30/81

IN THE PRIVY COUNCIL NO. 26 of 1981

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST IN PROCEEDINGS No. 3568 of 1978

BETWEEN :

KOORAGANG INVESTMENTS PTY. LIMITED Appellant

- and -

RICHARDSON & WRENCH LIMITED Respondent

CASE FOR THE APPELLANT

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NATURE OF THE PROCEEDINGS

1. Kooragang Investments Pty. Limited (Kooragang) appeals from a decision of Mr. Justice Rogers given in the Common Law Division (Commercial List) of the Supreme Court of New South Wales on 4th July, 1980.

2. Kooragang commenced proceedings against Richardson & Wrench Ltd. (R&W) a company which for many years had carried on, and at all material times carried on business and held itself out as real estate agents and valuers of real estate, in respect of two valuations (the Valuations) of real property in Glebe and McMahons Point, which are suburbs of Sydney, New South Wales as a result of which Kooragang advanced moneys to members of the Giles Bourke Group of companies. The Valuations were dated 26th March 1973 and 14th June 1973 and were made by Mr. Thomas George Rathborne (Rathborne) who was at all material times employed by R&W as a Senior Valuer. In the proceedings, Kooragang claimed damages from R&W for negligence in and about the issue of the Valuations and for fraud.

Ex. B and C Vol. III, 670 682.

St. of Cl.paras 8 and 20, 3 and 25, Vol I, 1.

3.1. The trial judge found that the Valuations were carried out by Rathborne and obtained from him by the Giles Bourke Group of companies (members of which owned the properties valued) outside the course or scope of his employment without actual authority, and "to the total exclusion of the defendant";

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Reasons, Vol.III 899, 902.

accordingly, R&W were not responsible for the Valuations. His Honour apparently accepted a proposition that, as Kooragang did not know of Rathborne, his activities in relation to the preparation of the Valuations, or his authority from R&W, any ostensible authority was irrelevant in determining whether the Valuations were made in the course or within the scope of Rathborne's employment.

Reasons, Vol.III 904.

3.2. The trial judge further found that even if the Valuations had been ones for which R&W was legally liable, there was no duty of care owed to Kooragang in the circumstances of the case, because the Valuations were obtained outside the boundaries of the "special relationship" delimited by the arrangements between the parties, and consequently no Hedley-Byrne duty of care arose.

Reasons, Vol.III 908.

3.3. The trial judge also found that the Valuations were made negligently, that Kooragang relied on them when entering into the relevant transactions, and when making the relevant advances.

Reasons, Vol.III 910.

3.4. R&W alleged that Kooragang was guilty of contributory negligence. His Honour found that this was not the case.

Reasons, Vol.III 912.

3.5. As to Kooragang's claim based on fraud, the trial judge found that the claim had not been made out.

Reasons, Vol.III 914.

3.6. On the issue of damages, his Honour found that the true measure of damage was the actual loss suffered by Kooragang as a result of its making the relevant advances, and not merely so much of the principal sums it would have advanced had the Valuations been properly made.

Reasons, Vol.III 915-7.

4. The findings and reasons of the trial judge specified in 3.1 (the scope of Rathborne's employment), 3.2 (the exclusion of the duty of care) and 3.4 (whether Kooragang was guilty of contributory negligence) and 3.6 (the correct measure of damages) are the subject of appeal and arise for determination upon the hearing of the appeal.

5. The findings and reasons of the trial judge specified in 3.5 (fraud) are not the subject of

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appeal. The findings and reasons of the trial judge specified in 3.3 (negligence and reliance) and 3.6 (the correct measure of damages), do not arise for determination upon the hearing of the appeal. Kooragang's Counsel have been informed by Senior Counsel for R&W that R&W will not argue these matters. Accordingly the Appellant's case does not deal with the matters specified in 3.3 and 3.5.

10 THE LIABILITY OF R&W FOR THE VALUATIONS

6. The Reasons of the Trial Judge

6.1. The findings of fact of the trial judge relevant to the issue of whether or not Rathborne made the Valuations in the course or within the scope of his employment as a Senior Valuer with R&W appear in his Honour's Reasons. These are referred to in paragraph 8.1 below. His Honour then proceeded:

Reasons, Vol.III 892-895, 898.

20 "The difficulty lies in the application of well settled principles to the facts. The test of whether a wrongful act is within the course of an employee's employment is dependent on whether the act is either authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer.
30 Rathborne had no authority to make valuations for persons who were not clients of the Defendant or to sign the corporate name in respect of such valuations."

6.2. In support of the foregoing statement his Honour cited Bugge v. Brown (1919) 26 C.L.R. 110 at 117; Lloyd v. Grace, Smith & Co. [1912] A.C. 716, and United Africa Co. Ltd. v. Saka Owoade [1955] A.C. 130 at 144, and continued:

Reasons, Vol.III 899-900.

40 "Here Rathborne's services were engaged by the Giles Bourke Group, not as a servant of the Defendant, but merely as the man who had the opportunity of getting the Defendant's stationery. Rathborne did not perform his services for Fidelity Acceptance Pty. Limited and Group United Holdings Pty. Limited (both members of the Giles Bourke Group) at

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the office of the Defendant, but at the offices of those who engaged him. The secretarial work involved was carried out by an employee of the Giles Bourke Group. Indeed bearing in mind that Rathborne had become a Director of Group Unity Syndications Pty. Limited (also a member of the Giles Bourke Group) in November, 1972 it could be said that all work was done by officers and employees of the Group. Whatever payment or reward was given for the work done by Rathborne, did not come to the hands of the Defendant. There was no connection or relationship of any kind between the work which Rathborne did, for whatever reward Rathborne received or anticipated from the Giles Bourke Group in respect of those valuations, and the work which Rathborne, the employee of the Defendant, engaged on his employer's work was entrusted. It is true that as a matter of coincidence only, Rathborne performed somewhat the same duties for Richardson & Wrench Limited when carrying out his normal work as he carried out in preparing the two valuations in issue. Nonetheless his employment with the Defendant merely provided the occasion for coming into contact with the Giles Bourke Group of companies and for obtaining the Defendant's stationery and no more. The fact that Rathborne was entitled to sign the Defendant's corporate name to valuations on which he was engaged on behalf of the Defendant does not make valuations so signed by him in the course of his separate private business, valuations of the Defendants."

The phrases in parenthesis have been inserted.

Reasons, Vol.III 901-2. 6.3. His Honour then referred to Polkinghorne v. Holland (1934) 51 C.L.R. 143 and stated his conclusion thus:

"Here I am of the view on the whole of the evidence that the Giles Bourke Group of companies were obtaining the valuations in question

from Rathborne to the total exclusion of the Defendant."

6.4. Finally, on this issue, his Honour said: Reasons Vol.III 904.

"I should add for the sake of completeness that Mr. Clarke conceded that there was no evidence to enable him to argue that Rathborne had ostensible authority to make the valuations in question. As far as the Plaintiff was concerned it knew nothing of Rathborne or his activities or of his authority whether actual or ostensible. It did not know of Rathborne's role in the preparation of the valuations. As far as it was concerned it had photostat copies of valuations which it believed were produced by the Defendant but knew nothing more".

6.5. It is submitted that his Honour's conclusion was incorrect for the following reasons:-

6.5.1. He should have held that Rathborne's acts were in the course or scope of his employment.

6.5.2. He should have held that Rathborne's acts were within the scope of Rathborne's actual authority.

6.5.3. He should have held that Rathborne's acts were within the scope of his ostensible authority. In this connection his Honour's reasoning proceeds upon the basis that the question of Rathborne's ostensible authority was irrelevant to the determination of the issue of the course of employment and, indeed, that this was a case where there was no evidence to support a case of ostensible authority. This view of his Honour proceeded on the assumption that, for ostensible authority to be relevant, there must have been knowledge on the part of Kooragang as specified in the quotation in paragraph 6.4 above. It is submitted that this view is wrong in law and not supported by and, indeed, inconsistent with the authorities.

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These submissions are developed in detail in paragraphs 7 and 8 below.

6.6. It is also submitted that, on the trial, Senior Counsel who then appeared for Kooragang did not, as his Honour stated, concede "that there was no evidence to enable him to argue that Rathborne had ostensible authority to make the Valuations". The submissions of Senior Counsel which are apparently referred to by his Honour are it is submitted to the effect that, although there was no evidence of a specific holding out of Rathborne by R&W to Kooragang, it was sufficient that R&W had placed Rathborne in the position of Senior Valuer which he abused, and in that sense the ostensible authority of Rathborne was relevant. These submissions are recorded in the transcript. It is submitted that the trial judge took the statement of Senior Counsel on page 466 line 43, out of context, and attributed to it a meaning it does not bear in the light of the paragraphs preceding and succeeding that statement.

Reasons, Vol.III 904.

Vol.II 466 l.1-468 l.42

6.7. Indeed, knowledge of Rathborne's position as a Valuer employed by R&W must come to the knowledge of Kooragang, as R&W held him out by name on its letterhead, which was used in each of the Valuations, as a qualified valuer in R&W's Valuation Division.

Ex.B, Vol.III 671.
Ex.C, Vol.III 683, 687.

7. The Law Relating to Rathborne's Course of Employment

7.1. The general test to be applied is, as his Honour said, "well settled" at least as to the general statement of the test: an act is done in the course of an employee's employment if it is either authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer. However, it is submitted that an examination of the decisions relating to the vicarious liability of a master for the fraud of his servant leads to the conclusion that the actual or ostensible authority of a servant is relevant and conclusive in determining whether or not an act is done by that servant in the course of his employment and that even in the absence

of actual or ostensible authority, the master is liable in tort for acts which are within the course or scope of the servant's employment (Navarro v. Moregrand Ltd. [1951] 2 T.L.R. 674 (C.A.) per Lord Denning at 680), and that once this is established, the act of the servant becomes the act of the master and the latter is then liable. (It will be further submitted that these decisions are equally applicable to the liability of a master for the negligent advice of his servant.)

7.1.1 There are to be found throughout the authorities statements showing the relevance of actual or ostensible authority in determining the "course of employment" or the "scope of employment" of a servant. In Lloyd v. Grace, Smith & Co. (supra) Lord Shaw at 240 speaks of a "relationship where apparent authority is equivalent to real authority"; in Reckitt v. Barnett, Pembroke & Slater Ltd. [1928] 2 K.B. 244, Scrutton L.J. at 257, after rejecting the view that a master is not liable where a servant acts for his own benefit in committing a fraud, in the light of Lloyd v. Grace, Smith & Co. (supra) proceeded as follows:

> "But when he (the master) has put the agent in a position to do a certain class of acts, and the agent has done an act of that class, apparently on behalf of his principal but really for his own benefit, the principal cannot say to a third party, who without notice of the agent's abuse of authority has accepted the act which the agent has been put there to do: I am not liable, for my agent, though purporting to act for me, acted for his own benefit. The apparent authority is the real authority."

7.1.2 So too, in Uxbridge Permanent Benefit Building Society v. Pickard (1939) 2 K.B. 248 the Master of the Rolls, in finding that a solicitor was liable for the fraudulent representations of a

managing clerk to persons who were not even clients of that solicitor's firm, said:

> "When a person is put in that position his actual authority and his ostensible authority are in one sense the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. But the ostensible authority may go a little further, and for this reason, that it is not within his actual authority to commit a fraud. Nevertheless, it is within his ostensible authority to perform acts of the class I have mentioned. So long as he is acting within the scope of that class of act, his employer is bound whether or not the clerk is acting for his own purposes or for his employer's purposes" (at 254).
>
> .....
>
> In the case of the servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority .... were of a kind which in the ordinary course of an everyday transaction, were going to lead third persons, on the faith of them, to change their position, just as a purchaser from an apparent client or a mortgagee lending money to a client is going to change his position by being brought into contact with that client. This is within the actual and ostensible authority of the clerk. It is totally different in the case of a servant driving a motor car or cases of that kind where there is no question of the

action of third parties being affected in the least degree by any apparent authority on the part of the servant. (at 254-5)."

The Master of the Rolls (at 256) rejected the submission that the fact that a servant forges a document takes it outside the course of his employment, and (at 257) the submission that the representee was bound to enquire as to whether or not the servant had satisfied the internal administrative and managerial requirements of his master's business.

7.1.3. Furthermore the authorities show that the test referred to at the beginning of paragraph 7.1 above is to be construed liberally (Lloyd v. Grace, Smith & Co. /supra/ at 736 per Lord MacNaghten); and that the master is responsible even for prohibited acts which fall within the scope or sphere of a servant's employment (Canadian Pacific Railway Company v. Lockhart /1942/ A.C. 591, Ilkiw v. Samuels /1963/ I W.L.R. 991 at 1004 per Diplock L.J.).

7.2. It is further submitted that there is no legal requirement that the representee third party have knowledge of any specific holding out of the particular servant by the master as a pre-condition of determining by reference to the actual or ostensible authority of the servant whether or not an act of a servant is in the course of his employment.

7.2.1. No such requirement is to be found in the authorities where the actual or ostensible authority of a servant has been relied upon to determine the course of his employment, Lloyd v. Grace, Smith & Co. (supra); Swift v. Winterbotham (P.O. & Goddard) (1873) L.R. 8 Q.B. 244; Mackay v. Commercial Bank of New Brunswick (1874) L.R. 5 P.C. 394; Swire v. Francis (1877) 3 App.Cas. 106 (P.C.): Uxbridge Permanent Benefit Building Society v. Pickard (supra). Indeed, in Mackay's case (supra), a decision of the Privy

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Council, there was no evidence of any holding out by the master of the servant, and it is clear from the facts (at 397-400) that the representee had no knowledge of the actual or ostensible authority of the fraudulent servant, other than what he received in the relevant communications. Similarly, in Lloyd v. Grace, Smith & Co. (supra) there is no finding that the Plaintiff relied on any holding out by the employer, or that the actual or ostensible authority of the servant was brought to the Plaintiff's attention other than by the mere fact of the servant himself appearing to act in that position.

7.2.2. Such a requirement is as a matter of logic unnecessary to determine the vicarious liability of a master for the act of his servant. The liability of the master arises from his placing the servant in the position which the servant occupies (Navarro v. Moregrand Ltd. (supra) per Somervell, L.J. at 679; Barwick v. English Joint Stock Bank (1867) L.R. 2 Ex. 259 at 265-6), a principle which is frequently stated in the relevant authorities (c.f. Uxbridge Permanent Benefit Building Society v. Pickard /supra/). By placing the servant in the position occupied the master may be considered to be "holding the servant out", but it is the servant's occupancy of his position, and not necessarily any communication of the holding out to the representee, which determines the master's liability (c.f. Hern v. Nichols /1701/ 1 Salk. 289; 91 E.R. 256). This is consistent with the use in the authorities dealing with the vicarious liability of a master arising out of the fraudulent representations of a servant, of the phrases "scope of employment" or "scope of authority" as equivalents of the phrase "course of employment". Bugge v. Brown (1919) (supra) 116 and 118; Swift v. Winterbotham (1873) (supra); Lloyd v. Grace, Smith & Co. (supra) at 738.

7.2.3. Where, in the relevant authorities, knowledge of a servant's actual or ostensible authority by a representee has been relied upon in determining the liability of the master, it has been relied upon to limit what would otherwise have been the full extent of the master's liability. But the fact that knowledge on the part of a representee that a servant has no authority to act may limit the master's liability does not mean that a representee must have specific knowledge of the particular servant's authority actual or ostensible, for the master to be held liable. Uxbridge Permanent Benefit Building Society v. Pickard (supra per Sir Wilfred Greene MR. at 257 and Mackinnon, L.J. at 258); (Navarro v. Moregrand Ltd. (supra per Somervell, L.J. at 679).

7.2.4. A most relevant illustration that the liability of the master for the negligent or fraudulent representations of his servant arises out of his placing the servant in a position of authority, or "arming" the servant with authority is to be found in Western Australian Insurance Co. Ltd. v. Dayton (1924) 35 C.L.R. 355. In that case, the issue was whether an insurance company was bound by a policy issued pursuant to a proposal which had been completed by the company's agent without reference to the proponent and which was false. The agent had represented to the proponent that he had only to sign the proposal form. The High Court held the company bound by the policy. The following passage from the judgment of Isaacs, ACJ (at 376-7) is, it is submitted, directly applicable in this case.

> "It cannot be ignored that insurance companies are avid competitors for business, and, in their eagerness to secure it, are not content to await spontaneous applications but send out gatherers in all directions.

> They arm these gatherers with some authority. The nature of that authority is to direct in some way the flow of premiums to the coffers of the society, and the extent of the authority varies. Who is to suffer when the emissary of the society misleads the insured and induces him, by conduct amounting to a representation regarding some state of facts, to pay a premium which the emissary accepts for the company and which the company receives from him and retains? In my opinion, to the extent to which the restrictions upon authority are not known or fairly and reasonably disclosed or discoverable, they do not in such a state of things exist for the insured. If a person is constituted or held out or adopted by an insurance company as its agent in respect of any insurance transaction, whether it consists in the making of a contract or the receipt of a premium or the preparation of a proposal or otherwise, then, except to the extent of any restriction upon his agency which is communicated to or known or reasonably to be inferred by the person with whom the transaction takes place, the transaction stands on the same footing as if it had been transacted in precisely the same circumstances at the head office. The agent's contract or his representations as to the matter entrusted to him are in that case as effectual to bind the company as if the directors themselves were acting."

7.3. It is submitted that the same principles should govern the liability of a master for the negligent misrepresentations of a servant as govern his liability for the fraudulent misrepresentations of a servant, for, inter alia, the following reasons:

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7.3.1. The question in each case is whether the making of the representation was within the scope or course of employment: whether the representation be fraudulent or merely negligent is irrelevant to this question.

7.3.2. If a fraudulent representation be within the course or scope of employment, then a fortiori as to the same representation if made negligently.

7.3.3. There would not appear to be any reason for adopting different principles in relation to a negligent misrepresentation. It was apparently assumed by the trial judge that the same principle applied in relation to the issue of fraud as to the issue of negligence before him in so far as it was necessary to determine R&W's liability for the Valuations carried out by Rathborne. Reasons, Vol.III 896-7.

7.4. It is further submitted that the reasoning of the trial judge is open to criticism in the following respects:

7.4.1. In the present case the two decisions principally relied upon by the trial judge, namely, Bugge v. Brown (supra) and United Africa Co. Ltd. v. Saka Owoade (supra) were not cases involving fraudulent representations, but were cases of tortious acts of servants causing physical injury. Indeed, apart from a passing reference to Lloyd v. Grace, Smith & Co., his Honour ignored the most relevant cases. This criticism of his Honour is supported by the following passage from Clerk & Lindsell on Torts (14th Ed.) (at paragraph 249):

> "It is submitted that the principal considerations relevant to cases of fraud have no relevance in cases involving other torts such as trespass and negligence. Of its very nature fraud involves the deception of the victim and by that deception his persuasion to

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part with his property or do some other act to his own detriment and to the benefit of the person practising the fraud, and for this reason the decision whether a servant committed fraud in the course of his employment can only be made after the authority, actual and ostensible, with which the servant is clothed has been ascertained."

(and see Ilkiw v. Samuels /supra/ Diplock L.J. at 1004).

7.4.2. Furthermore, his Honour did not make any or any adequate attempt to ascertain the extent of Rathborne's actual or ostensible authority, nor did he distinguish between the question of whether or not an act is performed in the course of employment, and the further question of whether or not, if an act is performed in the course of employment it nevertheless is an act for which a master should not be liable because the servant was "on a frolic of his own". The third case cited by his Honour, namely Polkinghorne v. Holland (supra) was relied on by him in a further respect, namely, that for a servant to be found to be "on a frolic of his own" his act must be to the "total exclusion" of his master's employment. Polkinghorne v. Holland was a case of agency arising out of a partnership, in which the question was whether, the acts of the relevant partner being within the course of business of the partnership and the scope of his ostensible authority, the "extreme inference" could be drawn that the Plaintiff dealt with the defaulting partner entirely on his own account and not as a member of the firm. The Full High Court was unprepared to draw that inference. This is, of course, a different and later question to the question which must primarily be determined, namely, whether the relevant acts were done by a servant in the course of his employment.

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7.4.3. Even if the findings of fact made by his Honour be correct (and it is submitted below that they are not), they establish no more than that Rathborne made the Valuations for his own benefit. His Honour failed to consider that the circumstances in which an inference that a servant was acting "on a frolic of his own" can be drawn are considerably limited in the case of a fraudulent representation by a servant, in that it has long been established that there is no requirement that the acts of the servant be performed for the benefit of the master: Lloyd v. Grace, Smith & Co. (supra), Uxbridge Permanent Benefit Building Society v. Pickard (supra) and United Africa Co. Ld. v. Saka Owoade (supra).

8. The Evidence and Findings of Fact relating to the Course of Rathborne's Employment

8.1. It is submitted that the following facts were clearly established on the evidence:

(1) That Rathborne was at all material times employed as a senior valuer by R&W and was held out by R&W as a Valuer in its "Valuation Division" on its letterhead which was used in the case of each of the Valuations. — Reasons, Vol.III 892-4. Ex.B., Vol.III 671. Ex.C, Vol. III 683, 687.

(2) That Rathborne was expressly authorised to accept instructions for valuations and to prepare make and sign valuations. — Reasons, Vol.III 892-4 Vol.II, 232-4, 267, 275-6, 289, 342-8, 369.

(3) That Rathborne was authorised to accept instructions "in the field". — Vol. II, 289

(4) That where Rathborne had accepted instructions for a valuation, it was the normal procedure for him, and he was so authorised, to continue to complete that valuation. — Vol. II, 275-6.

(5) That a business relationship arose sometimes between a valuer of R&W and a particular client which led to the same valuer attending to that client's valuations wherever a relevant property might be situated, and that Rathborne carried out all the — Reasons, Vol. III 893.

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valuations for the Giles Bourke Group of companies as the result of such a situation.

Vol.II, 331-2. (6) That of all the valuers of R&W Rathborne did most work in the Glebe area.

Vol.II, 267. (7) That Rathborne was expressly authorised to sign valuations.

(8) That Rathborne had complained about the lack of typing facilities for valuations in the R&W office about the time of the making of the Valuations. 10

Vol.II, 347-8.

(9) That Rathborne had never been instructed not to take any stationery out of the office.

Vol.II, 291.

Vol.III, 841. Reasons, Vol.III 897. (10) That Rathborne except for Ex. 7, which purported to "blacklist" certain of the Giles Bourke Group of Companies on account of outstanding fees, had not been instructed not to take work from the Giles Bourke Group of companies, even though they had been and apparently still were regular clients of R&W and as a result were at the relevant time debtors to R&W in respect of previous valuations. 20

Vol. II, 277-8, 331-2.

(11) That at the time the Valuations were provided, there was only an odd account unpaid by the Giles Bourke Group of Companies, and most had probably been paid. 30

Vol.II, 275-290.

Vol.II, 275-290. (12) That had Rathborne acted in contravention of Exhibit 7, this action would have come to the attention of the responsible officer of R&W (Mr. Hodgson), but he was never reprimanded for any such contravention.

Vol.II, 288 and 42. (13) That in respect of valuations done for the Giles Bourke Group of Companies after November 1972, they were done because there had been satisfactory arrangements made about payment. 40

Reasons, Vol.III 894. (14) That Rathborne dictated each of the Valuations, had them typed on the letterhead of R&W, and signed the

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corporate name of R&W to each of the Valuations.

(15) That each of the Valuations was of property in respect of which Rathborne was expressly authorised to prepare make and sign valuations for clients of R&W. — Reasons, Vol.III 892-5.

(16) That in dictating and arranging for the typing of the Valuations, Rathborne did not carry out the usual and adopted internal administrative procedure of R&W although he had never been told not to take away stationery of R&W. — Reasons, Vol.III 892-5. Vol.II, 291.

(17) That the first six months of 1973 was a very busy time for R&W. — Vol.II, 272 and 14.

(18) That Rathborne did complain on more than one occasion about secretarial facilities. — Vol.II, 300, 348.

8.2. It is submitted that those facts clearly establish that Rathborne, in carrying out and making the Valuations and in signing them with the corporate name of R&W, was acting within the scope of his actual or ostensible authority as a valuer of R&W or generally within the course or scope of his employment. No other conclusion is reasonably open.

8.3. It is submitted that, in finding Rathborne did not carry out the Valuations in the course of his employment, the trial judge fell into further error, in, inter alia, the following respects:

8.3.1. His Honour did not attempt to determine the ostensible authority of Rathborne. In the Judgment his Honour made the following statement:

> "except for the fact that the Defendant's stationery was used in respect of the valuations and the Defendant's corporate name signed to the valuation, there is nothing to connect the two valuations with any activity carried out by or on behalf of the Defendant." — Reasons, Vol.III 894.

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Ex.B, Vol.III 671.
Ex.C, Vol.III 683, 687.

The paragraph of which this extract is the last sentence shows that his Honour was only considering the matter which appeared on the face of the Valuations and was apparently ignoring the appearance of Rathborne's name and his designation of R&W's letterhead. On the other hand if the actual or ostensible authority of Rathborne is taken into account, it is submitted that there is a great deal to connect the subject valuations with the ordinary course of business of R&W. While rules of internal management may sometimes determine the actual authority of a servant, they do not determine his ostensible authority; See Uxbridge Permanent Benefit Building Society v. Pickard (supra); Rickitt v. Barnett, Pembroke & Slater (Ld.) (supra): Lloyd v. Grace Smith & Co. (supra). Accordingly, the fact that Rathborne did not comply with the internal office procedure of R&W in preparing the Valuations does not mean that in preparing them he was acting outside the course of his employment.

8.3.2. Furthermore, when in the Reasons for Judgment, his Honour states:

> "Rathborne had no authority to make valuations for persons who were not clients of the Defendant or to sign the corporate name in respect of such valuations",

Reasons, Vol.III 898.

that remark, although it is left up in the air, does not take account of the fact (which his Honour had already found established) that Rathborne could accept instructions directly and thus make persons clients of R&W; and the further evidence, which was not referred to by his Honour, that Rathborne could accept instructions in the field and that he could complete and would, in the normal course, complete a valuation in respect of which he had directly accepted instructions. If this remark was intended to

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refer to Mr. Hodgson's instructions (Exhibit 7) to place the Giles Bourke Group on the "black list", such instruction did not affect the sphere of Rathborne's employment, but merely his conduct within that sphere. Vol.III, 841.

8.3.3. His Honour proceeded to a positive finding that, in making the Valuations and in signing them, Rathborne was engaged in a "separate private business" to the total exclusion of R&W. The evidence upon which this finding was based appears to be the following: Reasons, Vol.III 900.

(1) That Rathborne was at all material times a Director of Group Unity Syndications Pty. Limited, a member of the Giles Bourke Group of Companies. Reasons, Vol.III 899. Vol.II, 447

(2) That the Valuations were dictated to and typed by an employee of one of the Giles Bourke Group of companies in the premises of one of those companies on genuine letterhead of R&W which was signed by Rathborne. Reasons, Vol.III 895. Vol.II, 245-6. Reasons, Vol.III 894.

(3) That the internal procedure of R&W was not followed in respect of those valuations and, in particular, no field notes of preparatory material, no copy valuation was filed in the records of R&W, no invoice was raised and no record of payment was made. Reasons, Vol.III 894.

It is submitted that, in view of the evidence referred to in 8.1 above, this finding was not open to his Honour. This is shown in the subsidiary findings made by his Honour to support this conclusion. It is submitted that in making these subsidiary findings, his Honour clearly resorted to "mere speculation and conjecture" in the absence of any evidence to support

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these findings, or to provide any proper basis for the inference of any of them, especially since any such inference must be "extreme". Polkinghorne v. Holland (supra); Kerr v. Ayr Steam Shipping Co. Ltd. /1915/ A.C. 217 at 233 per Lord Shaw; Caswell v. Powel Duffryn Ass. Collieries Ltd. /1940/ A.C. 152 at 169-70 per Lord Wright; Scott v. Perry (1955) 55 S.R. (N.S.W.) 374 at 377-8; 383-4; Gurnett v. Macquarie Stevedoring Co. Pty. Ltd. (1955) 55 S.R. (N.S.W.) 243 at 247-8; Holloway v. McFeeters (1956) 94 C.L.R. 470 and Jones v. Dunkel (1959) 101 C.L.R. 298. The subsidiary findings which it is submitted should not have been made are the following:

Reasons, Vol.III 899, ll.24-7

(a) "Here Rathborne's services were engaged by the Giles Bourke Group, not as a servant of the Defendant, but merely as a man who had the opportunity of getting the Defendant's stationery."

Reasons, Vol.III 899, l.31-900 l.3

(b) "Indeed, bearing in mind that Rathborne had become a Director of Group Unity Syndications Pty. Limited in November 1972 it could be said that all the work was done by officers or employees of the Group."

Reasons, Vol.III 900 ll.5-13.

(c) "There was no connection or relationship of any kind between the work which Rathborne did, for whatever reward Rathborne received or anticipated from the Giles Bourke Group in respect of these Valuations, and the work with which Rathborne the employee of the Defendant, engaged on his employer's work was entrusted."

Reasons, Vol.II 900 ll. 17-20.

(d) "Nonetheless (Rathborne's) employment with the Defendant merely provided the occasion for coming into contact with the Giles Bourke Group of companies

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and for obtaining the Defendant's stationery and no more."

(e) "The fact that Rathborne was entitled to sign the Defendant's corporate name to valuations on which he was engaged on behalf of the Defendant does not make valuations so signed by him in the course of his private business, valuations of the Defendant." — Reasons, Vol.III 900 ll. 20-24.

8.3.4. Finally his Honour stated that "merely because the employment of Rathborne by the Defendant gave the occasion, and in a sense, the opportunity for carrying on this activity on his own behalf, does not engender liability on the part of the Defendant". In support of this proposition he cited Morris v. C.W. Martin & Sons Ltd. (1966) 1 Q.B. 716. But the passages quoted from the judgments in Morris' case are taken out of context and the decision does not support the application of the "mere opportunity" doctrine to the facts of this case, as illustrated by contrasting Leesh River Tea Co. Limited v. British India SN Co. Limited (1967) 2 Q.B. 250 per Sellers L.J. (at 272) and per Salmon L.J. (at 276). — Reasons, Vol.III 903 ll. 9-12

9. Accordingly, for the reasons set out in 7 and 8 above, it is submitted that in finding that the Valuations were not made by Rathborne in the course of his employment with R&W but in the course of a private business venture, the trial judge fell into error both of law and fact, and his finding should be reversed upon appeal.

THE EXCLUSION OF THE DUTY OF CARE

10. The second principal question which arises in this Appeal relates to his Honour's finding that "even if the valuations had been ones for which the Defendant was legally liable there was no duty of care owed to the Plaintiff in the circumstances of this case". — Reasons, Vol.III 908 ll. 10-13

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11. It is necessary to refer to his Honour's Reasons in this regard in detail.

Reasons, Vol.III 905 ll. 10-14.

11.1. His Honour commences by noting the concession of Senior Counsel for R&W which recognised that:

> "the Defendant, carrying on the business of and holding itself out as a skilled valuer, owed a duty of care to a specific and limited class of persons of which the Plaintiff would have been one but for the facts mentioned by (Senior Counsel)".

11.2. His Honour then referred to "the rejection of the 'neighbour' principle derived from the speech of Lord Atkin in Donoghue v. Stevenson [1932] A.C. 562 as the touchstone of liability in this branch of the law", and to a passage from the judgment of the Chief Justice of the High Court of Australia in Mutual Life & Citizens Assurance Co. Limited v. Evatt (1968) 122 C.L.R. 556 at 569 as setting out the appropriate criteria. His Honour then proceeded in these terms:

> "Here the plaintiff and the defendant delimited the boundaries of their "special relationship" by the arrangements made in February 1972. The whole tenor of the letter of 21st February, 1972 is dictated by the underlying assumption that all loan applications will proceed on the basis there set out. Indeed, as I pointed out earlier in my Judgment, the letter specifically refers to "all" applications being dealt with in a certain way. The evidence of both the plaintiff and the defendant's witnesses was to the effect that neither party adverted to the possibility that an intending borrower might, prior to approaching the plaintiff, obtain an up-to-date valuation from the defendant.
>
> The parties to the discussion on behalf of the plaintiff and the defendant were experienced businessmen, although the plaintiff's officers were not experienced in this particular branch of business activity. I see no

justification for thinking that when such men did not give consideration to a possibility I should hold that the defendant "ought to have known" that the plaintiff would be relying on its valuation produced otherwise than in accordance with the arrangements made. I do not consider that such departures as there were from the arrangement invalidated the basic structure agreed upon.

In the result, I am of the view that even if the valuations had been ones for which the defendant was legally liable there was no duty of care owed to the plaintiff in the circumstances of this case."

11.3. His Honour had earlier in the Reasons referred to a letter dated 21st February 1972 from Australian Fertilisers Limited to Mr. Hodgson of R&W, which is not set out in full in the Reasons for Judgment. That letter, in so far as it is relevant, is as follows:

Reasons, Vol.III 882-3.
Ex.A (page 69) Vol.III, 601.

"We refer to your letter of the 9th February, 1972, and discussions on the basis of valuations for proposed loans on First Mortgage by our Subsidiary Company, Kooragang Investments Pty. Limited.

We thank you for your draft letters, which we have suitably amended for our purposes and for your advice on how loan applications should be handled.

We confirm that in all applications which appear suitable to us, we will ask you to carry out a preliminary inspection of the property submitted for First Mortgage, which will include a physical examination of the outside of the buildings and the location area generally and an enquiry into the zoning restrictions currently in force. From these impressions you expect you could

provide a general comment on the suitability of the property as a mortgage prospect. You indicated a fee of about $25.00 for this service.

We will advise you by letter when an applicant may seek a valuation on a property. It is expected that you will provide your normal valuation which will show land and buildings separately."

11.4. His Honour held that "the whole tenor of the letter of 21st February 1972 is dictated by the underlying assumption that all loan applications will proceed on the basis there set out". By "all loan applications", his Honour appears to mean all applications to Kooragang for the advancement of moneys by any person whatsoever.

11.5. It is submitted that the letter does not in its terms support the "underlying assumption" which his Honour found, but that it does suggest upon its proper construction that if an intending borrower were to approach Kooragang and that intending borrower did not have an acceptable valuation, then Kooragang would follow the procedure set out in the letter. The first paragraph of the letter refers to "discussions on the basis of valuations for proposed loans on First Mortgage by our Subsidiary Company, Kooragang".

Notwithstanding these discussions, and the minutes of the holding company of Kooragang which appointed R&W Kooragang's valuers, it is submitted that too great a strain would be placed upon the terms of the letter of 21st February 1972 to extract from it an implied term or statement to the effect that Kooragang would not consider applications from borrowers with existing valuations, from R&W or otherwise, unless it followed the procedure set out in the letter. Accordingly, it is submitted that the construction placed upon the letter by his Honour is wrong.

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11.6. In reaching his conclusion that a duty of care was excluded in the circumstances of the case, the trial judge relied heavily upon the evidence of both the Plaintiff and the defendant's witnesses to the effect that "neither party adverted to the possibility that an intending borrower might, prior to approaching the Plaintiff, obtain an up-to-date valuation from the defendant". If neither party adverted to such a possibility, then when the unforeseen event arose it would, ex hypothesi, fall outside whatever arrangements otherwise existed. His Honour concluded that because this was so, it should not be held that R&W should reasonably have foreseen that Kooragang would rely upon the Valuations and that, presumably, Kooragang would not be a member of that class of persons to whom R&W owed a duty of care in respect of the Valuations.

Reasons, Vol.III 907 ll. 22-25.

Further, the evidence shows that the guidelines laid down by the letter dated 21st February 1972 were not always followed, since on at least two occasions Kooragang relied on undisputed R&W valuations received direct from the intending mortgagor: and that in such circumstances R&W would not expect Kooragang to require another valuation.

Vol.II pp. 352-356, 370

11.7. It is submitted that his Honour was in error in so concluding for the following reasons:

11.7.1. His Honour appears to have acted on the misconception of what is meant by the "special relationship" in relation to the giving of negligent advice. In this context, the term "special relationship" is used to denote that relationship which, apart from any relationship of contract of fiduciary obligation, gives rise to a duty of care: Hedley Byrne & Co. Limited v. Heller & Partners Limited /1964/ A.C. 465 per Lord Reid at 486; per Lord Hodson at 511, and per Lord Devlin at 523 and 525, and per Lord Pearce at p. 539; c.f. Nocton v. Lord

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Reasons, Vol.III
906-7.

Ashburton [1914] A.C. 932. Indeed, the term "special relationship" referred to by Lord Reid in a passage relied on by his Honour occurred in a passage the purpose of which was to extend, rather than to confine, the circumstances in which liability for negligent advice would arise.

11.7.2. Upon the assumption that the circumstances in which a duty of care may arise in relation to the giving of negligent advice have been formulated in the decision of the Privy Council in Mutual Life & Citizens Assurance Co. Limited v. Evatt (supra) in the narrow formulation stated by Hutley J.A. in L.Shaddock & Associates Pty. Limited v. Parramatta City Council [1979] 1 N.S.W.L.R. 566 at 586-7, namely,

> "the duty, apart from contract, to give advice without negligence is not laid by the Common Law upon an adviser who, at the time the advice is sought, has not let it be known to the advisee that he claims to possess the standard of skill and competence of, and is prepared to exercise diligence which is generally shown by, persons who carry on the business of giving advice of any kind sought"

then in the present case, it is submitted that a duty of care clearly arises. That was made clear by the concession of Senior Counsel for R&W to which reference has been made above. Accordingly, had the Valuations been presented to any finance company other than Kooragang there would, on the reasoning of his Honour, have arisen a duty of care owed by R&W to that finance company in respect of the Valuations.

11.7.3. As a duty of care to finance companies generally (as within the class of persons to whom a duty was owed) on the part of R&W clearly arose in respect of the making and giving of the Valuations, it is difficult to see why this duty of care and the special relationship which would otherwise exist in respect of the Valuations should be excluded, so far as Kooragang is concerned, by whatever arrangements (even if they be called "special arrangements") existed between Kooragang and R&W in respect of other valuations. The whole point about a "special relationship" for the purpose of imposing liability for negligent advice is that that special relationship arises in an instant case. It is not part of a more general relationship such as solicitor and client or trustee and beneficiary, out of which other duties arise: Hedley Byrne & Co. Limited v. Heller & Partners Limited (supra) (passim). cf. Mutual Life & Citizens Assurance Co. Limited v. Evatt (supra) per Barwick, C.J. at 569 and 573-4; per Kitto, J. at 586; and per Taylor, J. at 602. (These passages would appear to be unaffected by the decision of the Privy Council in that case). The trial judge seems to have held that because there was a relationship or an arrangement of a general nature between Kooragang and R&W in respect of the obtaining of valuations in certain circumstances, a duty of care was thereby, and by reason of that matter alone, excluded in the case of valuations obtained from R&W in other circumstances. This simply does not follow.

11.7.4. It is apparent from the facts in Hedley Byrne & Co. Limited v. Heller & Partners Limited (supra) and, indeed, as a matter of common sense, that any reservation or exclusion of liability in respect of the giving of negligent advice must be made or imposed at the time that advice was given, and must, one would have thought, form part of that advice;

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cf. Mutual Life and Citizens Assurance Co. Limited v. Evatt (supra) per Barwick, C.J. at 570. In the present case, in relation to the Valuations, there was no such stated exclusion or limitation of liability, express or implied.

11.7.5. His Honour further appears to have overlooked the fact that, in the case of the first of the Valuations (the Glebe property) the valuation was specifically addressed to "an intending mortgagee". Consequently it is submitted that R&W knew or ought to have known that any prospective mortgagee (including potentially Kooragang) would be likely to rely upon it; and that as a result (irrespective of any arrangement made between the parties in February 1972) a Hedley-Byrne "special relationship" was constituted between R&W and Kooragang.

Ex.C, Vol.III 683, 687, 685 and 689

11.7.6. In the case of the second of the Valuations (the McMahons's Point property) the valuation was expressed to be "for and on behalf of Cobden Property Pty. Limited ... as Mortgagee (emphasis added). It is submitted that R&W knew or ought to have known that, in the event of Cobden Pty. Limited not granting a mortgage, it was likely in the ordinary course of events that this valuation would be made available to other prospective mortgagees (including potentially Kooragang), who would rely upon it, thus also constituting a Hedley-Byrne "special relationship". (Ministry of Housing and Local Government v. Sharp /1970/ 2 Q.B. 223 per Lord Denning M.R. (at 268-269) and Salmon L.J. (at 279-280). The Valuation contained the unqualified statement that "we recommend the property as an eligible security for the advancement of loan funds by way of first mortgage".

11.7.7. In this context Kooragang will also rely on the admissions made in evidence by Mr. Hodgson of R&W's understanding as to the use which an intending mortgagor might properly make of R&W Valuations.

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12. Accordingly, for the foregoing reasons, it is submitted that the trial judge fell into error both of fact and law in holding that there was no duty of care owed by R&W to Kooragang in respect of the Valuations.

CONTRIBUTORY NEGLIGENCE

13. The trial judge found that upon the evidence Kooragang was not guilty of contributory negligence. The subsidiary findings of his Honour in this respect are the subject of cross appeal by R&W. Kooragang submits that his Honour's findings should be upheld.

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Notice of Cross Appeal Grounds 2, 3 and 4

14. It is further submitted, however, that as a matter of law, a defence of contributory negligence was not open on the evidence in the present case. The allegations of contributory negligence pursued at the trial amount in essence to an allegation that Kooragang should have taken steps independently to verify the valuations of R&W, either by inquiry from R&W or by the obtaining of further valuations. In so far as this would have required Kooragang to verify that the Valuations had been made by a duly authorised employee or agent of R&W, the failure of Kooragang so to do cannot be negligence which contributed to the damage suffered, as the failure goes to ascertaining the scope of employment of Rathborne and his actual or ostensible authority, not to the further and different issue of whether or not the Valuations were made negligently.

Defence para 30

15. Moreover, in so far as the Respondent's submissions in support of allegations of contributory negligence would require Kooragang to have obtained a new valuation, whether from R&W or elsewhere, and whether because of the date of the Valuations or because of some other alleged defect in their contents, they cannot be accepted, for, inter alia, the following reasons:

15.1. The principle of Hedley, Byrne & Co. Limited v. Heller & Partners Limited (supra) enables a plaintiff to recover for damage suffered as the result of an innocent but negligent misrepresentation upon which he relied. A defendant may

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negative reliance, and then an essential part of the cause of action is not established. However, it is submitted, where the plaintiff establishes that he relied on the misrepresentation, as the Appellant has done in this case, a defendant cannot be heard to say that the plaintiff should not have relied upon it and is thereby guilty of contributory negligence because it is the defendant's wrongful action itself which has put the plaintiff off making further enquiry. The defendant has both caused the damage and has caused the plaintiff not take any steps to avoid the damage, and any failure of the plaintiff to do so is the fault of the defendant.

15.2. This conclusion arises inevitably from the nature of the cause of action established in Hedley-Byrne's Case (supra). To hold otherwise would be to contradict the rationale of the principle enabling recovery for innocent but negligent advice and to curtail the remedy.

15.3. Such a conclusion has been reached in cases where a defence of contributory negligence has been denied toclaims in fraud or for innocent misrepresentation founding an estoppel. Glanville Williams, Joint Torts and Contributory Negligence (1951) at 198-9; Spencer-Bower and Turner, Estoppel by Representation (3rd Ed) at 96, para 101; Bloomenthal v. Ford [1897] AC 156 at 168; Western Australian Insurance Co. Ltd. v. Dayton (1924) 35 CLR 355 at 374-6; In re Arnold; Arnold v. Arnold [1880] 14 Ch D 270 at 281; Nocton v. Ashburton [1914] AC 932 at 962; Central Railway Co. of Venezuela v. Kisch (1867) LR 2HL 99 at 120-1. There is no reason for any different conclusion in the present case. Indeed, any other conclusion would be to deny recovery to the Appellant in circumstances where the Respondent would otherwise be estopped from repudiating his misrepresentation.

THE MEASURE OF DAMAGES

Reasons, Vol.III 915-917.

16. It is submitted that the trial judge was correct in holding that the correct measure of damages is that laid down in the Court of

Appeal in Baxter v. F.W. Gapp & Co. Limited /1939/ 2 KB 271, namely the whole loss suffered by Kooragang as a result of making the advances, for, inter alia, the following reasons:

16.1. This standard is consistent with that adopted in Australia, England, Canada and New Zealand as the measure of damages in deceit. McGregor on Damages (14th Ed) at para 1459;
McConnel v. Wright /1903/ 1 Ch 546;
Twycross v. Grant /1877/ 2 CPD 469;
Doyle v. Olby Ironmongers /1969/ 2 QB 158;
Holmes v. Jones (1907) 4 CLR 1692;
Toteff v. Antonas (1952) 87 CLR 647;
Canavan v. Wright (1957) NZLR 790;
New Zealand Refrigerating Co. Ltd. v. Scott /1969/ NZLR 30;
Parna v. G & S Properties Ltd. /1969/ 5 DLR (3d) 315.

16.2. The cases relating to the measure of damage in deceit should be applied by analogy McGregor on Damages (supra) at paras 1479, 1480; Esso Petroleum Co. Ltd. v. Mardon /1976/ QB 801; W.B. Anderson and Sons Ltd. v. Rhodes (Liverpool) /1967/ 2 ALL ER 850; Ministry of Housing and Local Government v. Sharp /1970/ 2 QB 223.

16.3. As his Honour says, there is no evidence that Kooragang would have advanced, or that the mortgagor would have accepted, any lesser sums than those in fact advanced, had the Valuations been correct. So to conclude would be mere speculation (see the authorities cited at 8.3.4 above). There is thus no factual basis for departing from the ordinary measure of damages, unlike the decision relied upon by R&W, Laughton-Boyd v. Maloney (New South Wales Supreme Court, Yeldham, J, 8th June 1979, unreported).

17. The Appellant, Kooragang, consequently respectfully submits that the appeal herein should be allowed for the following, among other

R E A S O N S

(1) That the trial judge was in error in holding that R&W was not responsible for the Valuations.

(2) That the trial judge was in error in finding that on the evidence the Valuations were obtained from the valuer who made them to the total exclusion of R&W.

(3) That the trial judge was in error in finding that the valuer who made the Valuations was not authorised to make those valuations for persons who were not clients of R&W or to sign the corporate name of R&W in respect of such valuations.

(4) That the trial judge was in error in finding that the valuer who made the Valuations was not acting in the course of his employment in preparing those valuations.

(5) That the trial judge erred in holding that even if the Valuations had been ones for which R&W was legally liable, there was no duty of care owed by R&W to Kooragang in the circumstances of this case.

(6) That the trial judge erred in law in holding that the circumstances of the case relied upon by him to exclude a duty of care owed by R&W to Kooragang in respect of the Valuations did exclude or were sufficient to exclude that duty.

(7) That the trial judge should have held that in the circumstances of the case R&W owed a duty of care to Kooragang in respect of the making of the Valuations.

(8) That the trial judge should have held that the valuer who made the Valuations did so in the course of his employment with R&W.

(9) That the trial judge should have held that R&W was responsible for the making of the said Valuations by the valuer who made them.

DAVID C.H. HIRST

MICHAEL McHUGH

JOHN GARNSEY

Lodged: May, 1981

NO. 26 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALE
COMMON LAW DIVISION
COMMERCIAL LIST

B E T W E E N :

KOORAGANG INVESTMENTS PTY. LIMITED

Appellant

- and -

RICHARDSON & WRENCH LIMITED

Respondent

CASE FOR THE APPELLANT

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