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 v THE MINISTER

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(1981) 48 LGRA 126
 Related proceedings

[This case is 75 pages in LGRA]

[Judgment Date: 17 Dec]

[SUPREME COURT OF NEW SOUTH WALES (COMMON LAW DIVISION)]

SAN SEBASTIAN PTY LTD AND ANOTHER v. MINISTER ADMINISTERING THE
 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (NSW) AND ANOTHER*

Ash J

Dec 17, 1981

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Negligence -- Negligent misrepresentation -- Alleged negligent information and failure to inform --
 Redevelopment planning study -- Inadequate research and preparation -- Likely increases in workforce and
 transport needs -- Adoption of study as council's plan for the area -- Public exhibition -- Purchase of land on
 faith of plan -- Abandonment of plan -- Financial loss -- Contribution.

In 1968 and 1969 the State Planning Authority of New South Wales as consultant to the Sydney City Council prepared a redevelopment planning study for the Woolloomooloo area of the city. A steering committee comprising officers of both the authority and the council had full control of the preparation of the study. It was found that in substance the study was really the result of the joint efforts of both the authority and the council. The council adopted the study as its plan for the redevelopment of the Woolloomooloo area and placed it on public exhibition at the Town Hall in August 1969. The study envisaged site consolidations and street reorganizations to permit the creation of "super-blocks" and large scale redevelopment projects. The council proposed to deal with development applications in accordance with the plan.

The second plaintiff (B) and his wife owned the shares in the first plaintiff which was a land development company. B had experience in redeveloping land. He attended the public exhibition of the study and had discussions with council officers and an alderman concerning its implementation. He and the first plaintiff entered into contracts to purchase land at Woolloomooloo for the purpose of redeveloping it in accordance with the study. In particular he proposed to establish a mixed development comprising a hotel, offices and residential apartments.

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The preparation of the study was found by the court to have fallen well short of applicable town planning standards of investigation, research and calculation. In particular it had failed to recognize the likely increase in workforce and transport needs that would be generated by its implementation. From time to time in the years 1969 to 1971 both inclusive the council received criticisms of the study. The council's own strategic plan for the City of Sydney, which was published in July 1971, also contained criticism of it. The council adhered to the study as a matter of policy. In late 1972 the council abandoned the study. Some of the land which the first plaintiff had purchased was resumed by the Housing Commission in 1975: see *Housing Commission of New South Wales v San Sebastian Pty Ltd* (1978) 37 LGRA 214. The rest of the land which had been purchased by the plaintiffs was sold a few years later after it had been rezoned for low scale residential use.

The plaintiffs suffered financial loss as a result of their aborted intentions and claimed damages for negligence against both defendants. They claimed that the study had been negligently prepared and constituted a negligent misrepresentation. They further claimed that the defendants had failed to carry out a duty of disclosure to them as the infeasibility of implementing the study became, so the plaintiffs alleged, increasingly apparent to the defendants. The council cross-claimed against the authority for indemnity or contribution.

Held: (1) Both defendants were liable to the plaintiffs in negligence relating to the inadequate preparation of the planning study.

(2) In particular, the defendants were liable both under the "special relationship" principle embodied in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and also under the general "neighbour" principle embodied in *Donoghue v Stevenson* [1932] AC 562.

(3) For the purposes of the *Hedley Byrne* principle the relevant status of the plaintiffs was that of "developers".

Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad" (1976) 136 CLR 129, referred to.

(4) There was no relevant distinction in the present matter between the giving of information and the giving of advice.

L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 46 LGRA 65, referred to.

(5) The defendants had no duty to disclose to the plaintiffs inadequacies of the study prior to its abandonment in late 1972.

(6) The council's claim for indemnity failed because the preparation of the study had been joint as between the authority and the council.

(7) The authority should pay contribution to the council representing four-fifths of the plaintiffs' damages which proportion fairly represented the extent of the authority's own responsibility in the matter.

[EDITORS' NOTE: The Court of Appeal upheld an appeal against this decision. A further appeal, to the High Court of Australia, has been lodged.]

CLAIM.

on money damages
The facts of the negligence, as found herein, have never been questioned or appealed against.

This was a claim for damages for negligence relating to the preparation and exhibition of a planning study and failure to subsequently disclose its infeasibility. The facts are set out in the judgment.

Murray Wilcox Q.C. and J. S. Hilton, for the plaintiff.

T. Simos Q.C. and J. P. Bryson, for the first defendant.

M. H. Tobias Q.C. and A. Emmett, for the second defendant.

Judgment reserved

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Dec 17

ASH J. This is an action claiming damages for negligence. To state in very brief form the nature of the case – there being a summary of the structural facts in the next and ensuing paragraphs – the plaintiffs seek damages (by way of economic loss) based on claimed liability for the alleged negligent preparation in 1968-1969 of a study (headed "Woolloomooloo Redevelopment Study" in its main descriptive document – exhibit E) for very extensive redevelopment of that area over the years then ahead, and for the alleged negligent misrepresentation in its publication in the Sydney Town Hall in August 1969. The plaintiffs claim that as a result they – among other developers – invested a substantial amount of money in the area and later suffered loss on the basis of the failure of the implementation of the study because of that negligence and misrepresentation. There was also an additional claim in negligence based on alleged misrepresentations during 1970 and 1971 as to aspects of the development.

The first of the two plaintiffs is a family proprietary company owned by Mr H. W. Baker (the second plaintiff) and his wife; Mr Baker, a practising solicitor, had for several years been interested in land development and the investment involved. The originally-named first defendant was the State Planning Authority, which had been constituted as a body corporate under the *State Planning Authority Act 1963*. However, because of subsequent legislation (and it is unnecessary here to set out the relevant portions of it) the New South Wales Planning and Environment Commission in 1974 succeeded to any claimed liability against the authority; and later, pursuant to the *Environmental Planning and Assessment Act of 1979*, which legislation commenced to operate on 1st September, 1980, the first defendant (as now named, the name being an enacted corporate one) succeeded to that claimed liability. The reference however to the first defendant will, for convenience, be "SPA". As to the second defendant, in 1968 the Sydney City Council was under the administration of three commissioners, the then State Government having decided to revise the boundaries of the city, so that the commissioners controlled the council affairs as there were no elected aldermen, but that situation came to an end after

a council election in October 1969. During the hearing, then, there was no dispute that each of the present defendants is correctly named in respect of any liability which may be established by the plaintiffs against either or both of them pursuant to this action. The second defendant will be frequently referred to as "(the) council". Because it was the first plaintiff that originally purchased land in the Woolloomooloo area and Mr Baker acted as that company's guarantor, again for convenience "the plaintiffs" will also be repeatedly referred to by the substitution of "Mr Baker". There was no dispute that he was representing and acting for the first plaintiff and himself at all times in relevant actions taken and statements made by him throughout all the events relevant to the case and referred to in evidence.

The case has been a very complex one because of the mass of detail involved in presentation of its subjectmatter (town planning), and of the questions of law involved which are mainly, whether there was a legal duty upon either or both of the defendants; if so, what it was; whether it was of the *Hedley Byrne* type or of the *Donoghue v Stevenson* type or both; and several other allied matters. At the outset of the hearing two things were

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announced; first, that it is a test case in the sense of other plaintiffs being ready to proceed in other actions on the same matter; secondly, that whatever the result it would proceed by appeal to the High Court. Each of the defendants has filed a number of defences including one under the *Limitation Act 1969*, and another based on lack or inadequacy of service of notices under the relevant Acts. After some ten weeks of hearing, the case was adjourned for a period during which long and very detailed written submissions were prepared by counsel for the parties relating to all issues of fact and law, and final verbal submissions later continued for more than another two weeks. I now set out that summary of the structure of facts in this case.

It is of course impossible to record here, particularly as most of the relevant events occurred a decade or longer ago, the innumerable matters which occurred or did not occur in relation to the matters in dispute; but I shall now set out in summary form a chronology of facts and events upon which the plaintiffs' claims are mainly based, adding for assistance by way of information a number of matters referred to during the long hearing. The summary is certainly not exhaustive.

Facts and events preceding the publication of the study in 1969 :

One prefatory fact was that pursuant to the *County of Cumberland Planning Scheme*, prescribed on 23rd May, 1951, the subject land in Woolloomooloo consisting of some 91 acres was that part – in somewhat broad description – which extends from William Street through to Woolloomooloo Bay, is bounded on the east by Victoria Street and on the west by Sir John Young Crescent and Haig Avenue; and was zoned as county centre, a zoning which remained in force until 1975. All county centre uses require the consent of the responsible authority. A number of schemes and revisions followed. Another prefatory fact was the preparation and (in October 1967) the publication by the SPA of what was called a prelude to a plan (that plan being the Sydney Region Outline Plan – "SROP" – which was itself published by the SPA in March 1968). It identified the SROP as "a new strategic plan, setting out guidelines and principles, policies and broad urban form, for the further growth of Sydney over the next two or three decades."

It was on 1st February, 1968, – pursuant to an earlier oral request from the then Minister for Local Government, who had charge of planning matters, to the SPA to confer with the council regarding the preparation of a plan to guide the redevelopment of Woolloomooloo – that the chairman of the SPA, Mr Ashton, conferred with the chief commissioner of the city, Mr (later Sir Vernon) Treatt and the town clerk, Mr Luscombe. In the absence of oral evidence as to the content of that discussion, I shall refer to the interchange of letters written by Mr Ashton and Mr Treatt as the best evidence to indicate what was then decided to be done. The letter from Mr Ashton to Mr Treatt dated 8th February, 1968, was as follows:

"Dear Mr Treatt,

I refer to my discussion with yourself and the town clerk on Thursday, 1st February, 1968, in connexion with the proposal to prepare a detailed plan of development for the Woolloomooloo area.

This is to confirm that the conclusions reached as a result of our discussion were, as follows:

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(a) That at an early date a steering committee comprising representatives of the city council and the authority would be appointed.

(b) That this committee -- as well as initiating a redevelopment scheme for Woolloomooloo -- would look at interim development applications and make recommendations to the council.

(c) That the staff of the council would be made available to help in the task. That some suitable arrangement would be determined by the steering committee to allocate tasks, to set targets and priorities, and appoint a chief of staff.

(d) It was clearly acknowledged that co-operation was an essential ingredient and both yourself and the town clerk thought this could be assured.

(e) Without committing the council it seemed that a commissioner and the town clerk should be on the steering committee.

(f) Each organization would cover expenses of staff itself but any costs for consultants would be shared equally.

I shall be pleased to be informed at your earliest convenience of your nominees on the steering committee, if council agrees to the proposals.

Yours faithfully,

(signed)

(N. A. W. Ashton)

Chairman."

The reply of Mr Treatt to Mr Ashton dated 16th February, 1968, was as follows:

"Dear Mr Ashton,

With reference to your letter of the 8th February, 1968, regarding a proposal to prepare a detailed plan of development for the Woolloomooloo area, I now confirm that the conclusions reached at our recent discussion are as set out by you in your letter under reply in pars (a) to (f) inclusive.

The council's nominees on the steering committee will be deputy chief commissioner J. A. L. Shaw and the town clerk, Mr J. H. Luscombe.

Yours faithfully,

(signed)

Vernon Treatt,

Chief Commissioner."

Those two letters are exhibit AH.

Thereafter a committee called the Woolloomooloo Steering Committee was constituted. It had four members. The two from the SPA were Mr Ashton, who was its chairman throughout, and Mr Kacirek (deputy chief planner of the SPA) and the two from the council were Mr Shaw (deputy chief commissioner of the City of Sydney) and Mr Luscombe (town clerk of the Sydney City Council). Ten meetings were held, the first one on 11th April, 1968, and the final one on 5th June, 1969. A photostat of the minutes of those ten meetings is exhibit AJ, and the attendance at each of them appears at the outset of each of those minutes. Apart from those four members, the SPA was primarily represented by Mr Snodgrass, the principal planner (investigation and development) and Mr Pegus, specialist (investigation and development), though other senior officers of the

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authority attended from time to time as shown; and the council was represented by Mr Stevenson, the city engineer.

The following minute was written by the town clerk to the council finance committee on 22nd July, 1969, and I quote it as also being a statement by one of those present of what in fact had occurred.

"MINUTE BY THE TOWN CLERK

Town Clerk's No 568/68

Subject: Steering committee for the redevelopment plan for
Woolloomooloo

Question of remuneration to the State Planning Authority
of New South Wales.

Date: 22nd July, 1969.

Early in 1968 the chairman of the State Planning Authority called on the chief commissioner and the town clerk with a view to discussing a redevelopment plan for the area generally known as Woolloomooloo. Mr Ashton pointed out that this should be a joint venture of the Council of the City of Sydney and the State Planning Authority and considered that a committee consisting of representatives of both bodies should be formed.

The chief commissioner agreed and informed Mr Ashton that the deputy chief commissioner, Mr J. A. L. Shaw, the town clerk and the city engineer would represent the council.

The first meeting of the joint committee was held on 11th April, 1968, in the offices of the State Planning Authority when certain fundamentals were agreed to. Broadly these were as follow:

1. An officer of the State Planning Authority would direct the actual study in consultation with the city engineer.
2. Officers of the State Planning Authority would be working on the project, either full time or part time.
3. It was decided that outside consultants would not be called in to assist the committee as this may delay the compilation of a report.
4. The State Planning Authority officers were to obtain the necessary information for the preparation of a report and collate it.
5. The actual survey work such as age, condition of buildings, question of sites of buildings of interest from an historical point of view, contours, land owners and similar matters were to be carried out by the officers of the State Planning Authority.

The committee has met on numerous occasions and its deliberations are now nearing finality. A considerable amount of work has been carried out by the officers of the State Planning Authority as well as officers of the council and the question of whether some monetary consideration should be paid to the State Planning Authority as well as officers of the council and the question of whether some monetary consideration should be paid to the State Planning Authority of New South Wales for the work which it has carried out in conjunction with the council in the preparation of the redevelopment plan for Woolloomooloo is submitted for the consideration of the council.

(signed)

TOWN CLERK."

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(The reference to Mr Stevenson in the second paragraph of that minute could by itself be misunderstood. As stated, he was a representative, but not a member as were the other two also named as representatives.) Mr Kacirek in his evidence confirmed that Mr Stevenson did attend during committee meetings, his principal task being "to examine and advise on the local street systems and any proposals to modify it"; that was elaborated upon and Mr Kacirek indicated that Mr Stevenson made recommendations to the steering committee.

Mr Kacirek explained the function and the achievement of the steering committee. There was a "study group" also described as "working party" and as "planning team", consisting totally of officers of the SPA and it presented to the

committee various planning concepts, studies and principles upon which it had worked as being appropriate to the Woolloomooloo area. As to the role of the steering committee Mr Kacirek confirmed it as follows:

"That the various studies and alternatives and proposals and principles were devised by the planning team, illustrated by appropriate maps; and then at the meeting of the steering committee from time to time, these proposals and the study team's or the planning team's consideration of the proposals and recommendations were put to and discussed by the committee ... and either agreed to or sent back for further consideration ... sometimes the study team was asked to do some more work ... and on those occasions further work was done and further recommendations based on that further analysis and reasearch ... and again recommendations made to the committee for its assent."

The joint steering committee had full control of the matter and the final recommendations contained in the published plan were the product of decisions taken by it. (I shall note here that Mr Kacirek identified a "supplementary role". That was consultation with appropriate landowners who owned a significant part of the area; and also, when developers wished to try and press for a decision of the city council in advance of the completion of the study, the steering committee met those developers and gave advice to the city council as to whether it would be appropriate to defer a decision or not. Most of them were deferred. The main interviews were undertaken by the steering committee, and the particular land owners were requested to come and meet the committee which heard what they wished to say.)

The defendants also joined in the exhibition of the study to the public. The SPA chairman wrote a letter to the Chief Commissioner dated 29th July, 1969, of which the introductory portion was as follows:

"Dear Sir,

WOOLLOOMOOLOO REDEVELOPMENT STUDY

Following the recent visit to this office by the city commissioners to inspect the results of the above study, which has been completed on behalf of the Sydney City Council by the professional planning organization of this authority, acting as consultants to the council, a bound copy of the report is herewith.

... "

A reply letter dated 12th August, 1969, was sent to the chairman by the town clerk and the introductory portion was as follows:

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"Dear Sir,

WOOLLOOMOOLOO REDEVELOPMENT STUDY

Referring to your letter of 29th July, 1969, addressed to the chief commissioner, I have to inform you that the council at its meeting on the 11th August, 1969, accepted the plan forwarded with your letter as the council's plan for the redevelopment of the Woolloomooloo area.

... "

The exhibition took place in the lower Town Hall and was opened by the chief commissioner on 19th August, 1969. Originally set for two weeks, the time was extended to four weeks. It was held under the supervision of council officers but Mr Kacirek and Mr Pegus attended it. The publicity given to that exhibition was considerable. Exhibit BA indicates what was published the next morning (and I indicate that the documents were admitted only to establish the publicity of the exhibition and that no regard is paid to the contents of any articles or reports appearing); and exhibit A is another one. There was also publicity on radio and television, and a newspaper advertisement by council.

The character of the exhibition appears in the evidence, and the model and the maps were tendered as exhibits. The three important documents are exhibits C (a brochure), D, and E. Understandably there was much argument relating to them, and concentration on specific sentences, paragraphs and portions of those documents can produce arguments and counter-arguments. Exhibit C is a picturesque summary of the matter. At the outset the two defendants are identified and I quote only the final sentence appearing on what would be the front page when the document is folded:

"The city council sought the authority's assistance in undertaking the necessary study and plan; and, by arrangement, the professional planning organization of the authority has prepared the present proposals, acting

in the capacity of planning consultants to the city council."

Reference will be made in particular to one of the portions of that exhibit, but I conclude these remarks at this point by quoting the "final" section, written in considerably larger print than any of the other text:

"IMPLEMENTATION:

It has been assumed that private enterprise will bring about the degree of site consolidation necessary for the implementation of many of the principles envisaged because of the economic advantages to be obtained by doing so. Involvement by public authorities has been assumed to be minimal although in certain areas problems of implementation may arise depending on the circumstances at the time, and calling for limited action by the city council to facilitate site consolidation.

In general, a good deal of flexibility exists in the actual form of the total concept. Certain elements of the proposals, however, are fundamental and cannot be subject to substantial change. These elements are: The new pattern of streets providing the main local distribution of traffic throughout the area; the principle of the pedestrian movement network; the general disposition of major parking areas; proposals for the Kings Cross area, Woolloomooloo Bay area, and William Street; and density and environmental standards throughout the area."

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Facts and events after the publication of the study in 1969 up to 9th November, 1972:

Because the next subheading to follow this is "Summary of Mr Baker's activities" there would be considerable overlapping if all events after August 1969 were listed under this subheading. Therefore I shall here omit references to the plaintiffs during that period. The matters listed here are mainly for assistance by way of information only, whereas those under that next subheading mainly relate to the plaintiffs' case.

Further at this point I interpolate that there were seven approvals by the second defendant to development applications which were given between the time of the publication of the study and July 1971. Put in chronological order, they were for the following: extensions to the Sydney Eye Hospital; the Bank of New South Wales, 134-138 William Street at the corner of Bourke Street; the Olivetti Building, 140-148 William Street; the Westfield Building (including the Boulevard Hotel), 88-108 William Street, 131-133 Palmer Street, 71-85 and 112-114 Crown Street, and 1-11 Riley Street; the Scandia Building, 22-40 Sir John Young Crescent; and the other two were for applications for a non-office building and for the Blind Society site. After July 1971 approvals were granted for an office building in Forbes Street, one relating to the Blind Society site which was an amended form of the earlier approved proposal relating to extensions to the Sydney Eye Hospital, and one relating to the Londish (Gateway) application.

By letter dated 12th September, 1969, the town clerk sent the following letter to the Secretary of the SPA:

"Dear Sir,

Referring to previous correspondence with regard to the steering committee set up to formulate a redevelopment plan for the area generally known as Woolloomooloo, I have to inform you that the council at a recent meeting approved of the payment by the council to the authority of a fee in the sum of \$25,000 in respect of the professional resources made available by the authority for the preparation of the redevelopment plan on the council's behalf.

A cheque in the sum stated is enclosed.

Yours faithfully,

(signed)."

On 13th October, 1969, by which date the new city council had come into office, there was a meeting of the works committee of the council at which it was decided to request a comprehensive joint report on all aspects of the study.

In November 1969 the town clerk received a complaint from the Metropolitan Water Sewerage and Drainage Board referring to the council's failure to have consulted with the board concerning the effect upon its services of the proposals in the study.

On 5th December, 1969, the council was advised by its solicitor that it was not bound by its previous adoption of the study.

On 8th December, 1969, the new council adopted the study.

On 15th December, 1969, council decided to approve the preparation of a strategic master plan for the City of Sydney – that is, the total of the city, including Woolloomooloo – and decided to seek applications from planners

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for the preparation of the plan. The consultants finally appointed were led by Urban Systems Corporation Pty Ltd the principal of which was Mr W. G. Clarke, a townplanner (who was called as the chief witness in the plaintiffs' case); they consisted of a wide group of persons with varying expertise. *

Late in 1970, because of some concern at the fact that the then planning for the Eastern Suburbs Railway, of which the construction had then recommenced, did not provide for any station at Woolloomooloo, the Minister for Transport established an inter-departmental committee to consider and report upon the matter of need for such a station. The Ministry of Transport, the Department of Railways and the SPA were represented on the committee. That committee met in January, February and March of 1971, and its investigations had led to the realization that a likely workforce in Woolloomooloo was considerably more than had apparently been assumed by those who had prepared the study. In any event the committee felt that there should be a railway station at Woolloomooloo and its report to the Minister recommended that, the report and recommendations being issued in May 1971.

On 16th July, 1971, the *City of Sydney Planning Scheme* was prescribed under the *Local Government Act*, Woolloomooloo being simply zoned as county centre. The scheme superseded that part of the *County of Cumberland Planning Scheme* which covered the city. Clause 59 of the scheme required concurrence of the SPA in respect of development applications approved thereafter by the city council. On 20th July, 1971, the *City of Sydney Strategic Plan* was presented to the city council. The plan expressed the view that the "valley" of Woolloomooloo should "be re-established as much as possible in predominantly residential uses". Very soon after the receipt of their report, the general purpose committee of the council recommended that the plan be adopted and council did adopt it on 2nd August, 1971. *

On 20th October, 1971, an application was lodged by Gateway Developments Pty Ltd (called "Woolloomooloo Redevelopment Project", and the controller of that company was a Mr Londish to whom reference was made at times during the hearing) for a major commercial development in the Woolloomooloo area. Other "Londish companies" were also becoming involved in the area. Then the council approved in principle the adoption of a new street system as detailed in the city engineer's report dated 20th October, 1971.

On 6th December, 1971, council adopted a Development Control and Floor Space Ratio Code for the city which stated among its policies (cl. 8): *

"In the following precincts the responsible authority will determine permissible floor space ratios as and when necessary:

...

The Woolloomooloo precinct, within which council will administer development control in the light of the Woolloomooloo study prepared in 1969 by the professional staff of the State Planning Authority of New South Wales."

* See letters, notes, etc in the Clarke Archive for this period

That in effect was a reaffirmation of the study.

On 26th January, 1972, the Minister for Transport wrote to the Minister for Local Government expressing concern about conflicting proposals for

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the Woolloomooloo area, and suggested a high level conference on the major matters involved.

In March 1972 the council examined the application of Gateway Developments Pty Ltd, and envisaged that it would have major consequences in terms of what was to happen in Woolloomooloo. On 8th May, 1972, approval was granted, but that was rescinded on 22nd May, 1972.

On 24th April, 1972, council gave approval in principle to the adoption of the new street system for the Woolloomooloo area.

On 9th May, 1972, a meeting took place of the Minister for Local Government and the Minister for Transport together with the chairman of the Cumberland Transport Advisory Committee (CUMTAC), and Mr Ashton, regarding the Woolloomooloo redevelopment in the light of the Gateway proposals. It was decided to set up a high level steering committee, and it met in May and June of 1972.

On 1st June, 1972, the SPA informed the council that it did not give its concurrence to the Gateway application, inter alia, on the ground that the Gateway proposal involved too much floor space.

For a number of years the Commonwealth Government had owned a 5-acre parcel of land in Woolloomooloo, and while another use for it may earlier have been intended, in the late sixties the proposal was to erect a Commonwealth Centre (office-type) on the site. In June-July 1972 a Commonwealth Parliamentary Standing Committee on Public Works investigated that matter and ultimately, by a narrow majority, recommended against it on 29th August, 1972.

On 27th March, 1972, the council had approved the commencement of an action plan programme for various parts of the city, and in September 1972 the city planning officer submitted a brief for the preparation of an action plan for Woolloomooloo.

Summary of Mr Baker's activities:

In early 1969 Mr Baker heard of the prospective Woolloomooloo project and after making certain inquiries from clients and business associates in the development field, and of council and the SPA, was informed of the date of the exhibition of the study in the lower Town Hall. In evidence he described the exhibition including the maps on the walls and the model, and said that there were "crowds of people" and attendants present. Mr Baker, in addition to many others present, took away from a table the brochure similar to exhibit C and the pamphlet similar to exhibit D. Both those documents were available to persons there, as he saw again on the two or three other occasions on which he visited the exhibition. On one of those occasions he went to the building department of the council in the Town Hall and obtained a small copy of exhibit E.

The presentation of the study must be examined in the atmosphere of all its circumstances, and the two main documents (which were exhibit C and exhibit E, mentioned above) must be considered in the light of all the other documents there, including particularly the plans and the model; and that, in broad terms, was the view adopted throughout this long hearing. I shall not, having regard to the long content of those exhibits and to the inadequate presentation of exhibit C which a mere transcript would convey, set them

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out. However, in relation to my examination of the law to be applied in this case, I shall list a number of extracts from them later.

Mr Baker stated in evidence that he examined those three exhibits closely, noting the requirements of site consolidation and the reorganization of the streets to permit "super-blocks" of redevelopment. He said that it was apparent from the released plan and the plot ratios related to it that extensive commercial development could be made on the subject land and that the land appeared to him to be a "very good" purchase because of the low price for land compared with the central business district ("CBD") of which this development was intended to be an extension. He decided then to become a developer there and in December 1969 he entered a contract for the purchase of a property in Bland Street which he intended to use as a possible office and as a possible temporary residence for displaced owners or tenants who did not wish to leave the area but could occupy part of a development site.

In July 1970 Mr Baker, when he was contemplating purchase of properties in Nicholson Street, went to the building department of the city council, spoke to Mr Hill, (development control officer – later called chief development inspector – of the city building and survey department) and asked him what sort of development he could expect to be able to do in that part of Woolloomooloo, identifying the particular part on a map, that is, the block bounded by Nicholson, Bland, Forbes and Bourke Streets. Mr Baker said that Mr Hill's answer was that the council was applying the Woolloomooloo Redevelopment Plan and that the sort of development he would be able to do would be in accordance with that plan and would probably be "a commercial/residential" type of development; and that Mr Hill also said that the current policy of the council was to look for large block development and that it favoured blocks with a minimum of 30,000 square feet before considering a development application. Mr Baker said that following that conversation he believed he was safe in purchasing those properties and in proceeding towards development. He then entered into a contract to purchase 36-38 Nicholson Street and about a month later 32-34 Nicholson Street, they being adjacent, and said that his intention when entering the second contract was to consolidate the block to form a large block, if possible, for redevelopment of a commercial type.

In a further discussion in late October or early November 1970 with Mr Hill, Mr Baker said that he told Mr Hill of his recent Nicholson Street purchases and wished to ensure what would be the situation with development applications in the event of him proceeding. Mr Hill "reaffirmed", Mr Baker said, that the council was still applying the Woolloomooloo Redevelopment Plan and was looking at applications of 30,000 square feet for the sort of development in which he was interested. He said that he would need to enlarge the site to have that amount of area; and that assurance by Mr Hill gave him confidence to retain an architect (Mr A. T. Macdonald) to investigate the feasibilities of redevelopment there; Mr Macdonald later supplied him with a report. He retained other consultants, a quantity surveyor, a structural engineer, and a property consultant, from whom he received a report in March 1971.

Mr Baker wrote a letter to the council dated 28th January, 1971, (exhibit J) and he obtained a verbal reply from an alderman, Mr Lewis, who was chairman of the works committee. At a meeting in April 1971 with

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three aldermen at the Town Hall – Mr Lewis, Mr Griffin (later Sir David Griffin and Lord Mayor, then vice-chairman of the finance committee) and Mr Harris, the vice-chairman of the works committee – Mr Baker told the aldermen of his wish to undertake the development and that he would therefore need for that purpose to buy council streets or land so as to make it large enough to achieve the approval of the council; the block itself had an area of only 20,000 square feet. He said that he wished to buy as much land adjoining the site as the council could dispose of, namely, the area going down from the council depot to Bland Street, all of which was owned by the council. He offered \$30 per square foot, and he indicated that he was prepared to buy it over a period of three years on deposit and interest. He said that Mr Harris stated that the council was prepared to sell council lands for the purpose of site amalgamation. Mr Baker said that when he asked for an answer to his request, Mr Lewis said that he would contact him shortly and let him know the result of the meeting. The land which Mr Harris had indicated that the council was prepared to dispose of was the depot and the street in between Nicholson Street and Bland Street and probably Bourke Street also. Following that meeting Mr Baker (through another proprietary family company) bought a number of other properties in Bourke Street in July 1971, which were immediately adjacent to the Nicholson Street property, separated only by a 30 feet wide council street, the purpose being "to enlarge the overall site, to buy as much private land within that area as possible". Mr Baker said that at that stage he had in mind a mixed type of development comprising a hotel, commercial development (offices and shops) and some apartments; and that at the time of the purchase of the Bourke Street properties (July 1971) he believed that the plan was accepted by both the city council and the SPA as being the plan to be complied with. Later in 1971 he purchased another property a hundred yards or so away in Bourke Street for temporary residence of occupants, as mentioned in respect of that Bland Street purchase, above. (That other proprietary company was named Sebastian Properties Pty Ltd and was of the same family structure. Exhibit F sets out details of the eight purchased properties – four by the first plaintiff and four by that other company.)

Following that meeting with the three Aldermen Mr Baker said that he had another conversation with Mr Lewis who informed him that he thought it would be fairly soon that he would obtain an answer as to what council lands could be sold; and that he had other similar conversations, on a number of occasions, though no reason was given for the delay.

Mr Baker said that by mid-1972 he had received a copy of the council recommendations for a new road scheme for Woolloomooloo which was dated in late 1971. (The relevant minute dated 20th October, 1971, was tendered as exhibit M.) He said that that would have some effect on his property. Other correspondence was tendered; and he was invited to meet a subcommittee of the council on 16th June, 1972, at which some aldermen were present. He raised the matter of purchase of council lands and Alderman (later Sir Nicholas, Lord Mayor) Shehadie told him that to obtain the consideration of the council he would have to have additional property. Mr Baker replied that he would first like to know whether in fact he could have the council lands and an alderman told him at that meeting to prepare in a form what he had, what he wished to do, what he wished to acquire from the council, what other lands were available and what development he

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intended to carry out. He then commissioned his architect to prepare a brochure, which was admitted as an exhibit.

Before that brochure had been sent to the council Mr Baker had spoken to Mr Hebblewhite (principal engineer designer) and Mr Llewellyn-Smith (city planning officer and the project director for Woolloomooloo); and he also had discussions with persons in other Government departments. After the submission of the brochure he had discussions with Alderman Lewis and another meeting with council officers on 9th November, 1972, at which the architect and Mr Llewellyn-Smith and Mr Hebblewhite were present. He said that he and his architect were informed at that meeting that the council could not give consideration to the proposal at that stage because it was intended that the council would prepare a new plan for Woolloomooloo which would involve rearranging the streets pursuant to the probability that the Commonwealth Centre would not proceed, and that the land he held was insufficient to be separately considered as to what the road pattern would be that would affect him; and that he would have to wait until the new plan was completed which was probably at the end of 1973 or early 1974. He was told that the plan would be similar to the one in existence as affecting the sort of development he was interested in, but "as to its details that would have to be worked out". He had not previously heard of that plan. As it was expressed in the submissions on behalf of the second defendant, " ...

November 1972, by which time it" (i.e. the council) "had determined to review the study and Mr Baker was advised accordingly".

Mr Baker said in evidence that that information produced on his mind "dismay, disappointment, and the realization that I should try to retrieve the situation as best as I could" and that he in fact set about doing that. In the result he ultimately submitted a development application for a private hospital on the land he had acquired in Bourke Street and Nicholson Street. However a plan of the Department of Main Roads showed that that was to be affected by roads differently from the effect of the road pattern which the council had adopted. The plan was redrawn by Mr Macdonald and the application was put in in May. It was deferred and never substantially dealt with. The land was ultimately resumed by the Housing Commission on behalf of the State Government in August 1975.

(Mr Baker brought a claim for compensation in respect of that resumption which was eventually assessed in the Land and Valuation Court following an appeal to the High Court on certain matters. As to the other properties, they were eventually sold in about 1978 by which time the sites had been rezoned so as to restrict their use to low scale residential use.)

I note that Mr Baker had purchased two terraces in Cathedral Street in Woolloomooloo in June or July 1969 just before the publication of the study. He and other people were at that stage aware that some preparation was being carried out, but not of its content. After the publication of the study he purchased two more terraces on either side of those two already purchased in order to take it up to the corner of Forbes Street to make it a site, but when he learnt that "we couldn't go any further because Gateway had bought options over the adjoining properties" he sold the properties.

Events after 9th November, 1972:

It is appropriate here to record events which happened after 9th November, 1972. As is known, there was a change in the Commonwealth

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Government, and that abovementioned recommendation by the Parliamentary Standing Committee on Public Works was approved by the new Government. Industrial action was taken imposing a "Green Ban" on the development at Woolloomooloo. During 1973 council in any event deferred decisions on any of the applications under the study pending completion of the proposed action plan; and on 24th September, 1973, deferred any further consideration pending the outcome of a conference between the Commonwealth Government, the SPA, and the council in respect of the future of the Woolloomooloo area.

On 20th December, 1973, there was a meeting between the Commonwealth Minister for Urban and Regional Development, the New South Wales Minister for Planning and Environment, and the Lord Mayor, at which the Commonwealth Minister offered up to \$20,000 to the council to prepare proposals for the development of Woolloomooloo. During 1973 and 1974 work was carried out by the council on the development of the action plan for Woolloomooloo.

On 1st January, 1974, the Minister for Transport, and the Minister for Local Government and Minister for Highways, published the first volume of the Sydney Area Transportation Study ("SATS") which had been commenced in January 1971. The study related to "the transportation needs of the Sydney region to the year 2000" and its introductory remark was that "all detailed analysis has been completed and recommendations prepared for consideration by the Government".

On 2nd December, 1974, council adopted the City of Sydney Strategic Plan 1974-1977 in which the 1971 strategic plan recommendation that Woolloomooloo should be developed for predominantly residential area was accepted. *

On 27th June, 1975, an agreement was signed between the Commonwealth and New South Wales Governments in relation to the provision of financial assistance to the State for "Urban Expansion and Redevelopment (Woolloomooloo)". It was expressed to be deemed to have operation from 1st July, 1974.

An interim development order published on 8th August, 1975, replaced the development permitted in the Woolloomooloo area, making it mainly residential.

The issues, the nature of the case, and the witnesses called:

At this stage I shall summarize the issues between the parties. The original statement of claim was filed on 2nd September, 1976, and understandably in a case of this ambit and depth with additional facts and circumstances emerging, particularly from subpoenaed records, later amendments to the pleadings have been filed and some presented at the hearing. The main claim of the plaintiffs against both defendants is that of negligence in the

preparation of the study (that is, by non-adherence to normal and proper standards of town planning) and its publication/exhibition. In law it is based first upon the *Hedley Byrne* rule, the claim being (and I shall deal with it more fully later) that that exhibition contained misrepresentations – to be considered of course in the light of the other requirements of the *Hedley Byrne* rule – resulting from negligence. The second claim is made on the same alleged negligence but based on the *Donoghue v Stevenson* principle. Each defendant denied the existence of any such duty in the circumstances

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of the case, of any breach if a duty were held to exist, and of the other elements required to establish the elements of either negligence put forward.

There are very many particulars in the statement of claim under the heading of negligence, but the core of the allegation is deficiency in respect of what I shall here briefly call "transportation/workforce". In that exhibit C there was the reference to an "envisaged" workforce of 35,000 to be occasioned by the implementation of the study. The plaintiffs claim that apart from such a figure being even excessive for the then existing transportation and planned additions to it, the really important thing was that if the development as indicated in the study were in fact to occur the combination of the probable resultant workforce (said to be more than double that figure) and the transport facilities would result in such gross difficulty that the study would in effect be infeasible; and that upon the evidence the study, research, calculations and all the other relevant matters in respect of workforce and transportation were very inadequate and fell quite short of the standards and practice of reasonably well informed and competent town planners of the time. There was direct conflict on that subjectmatter between expert witnesses called by the plaintiff and the first defendant. (In general the second defendant adopted the defence and mode of contest carried out on behalf of the first defendant right through the case though other grounds of defence were also taken.) In short then the main factual issues were first, whether those normal and proper town planning standards were adopted and adhered to or not in the preparation of the study (and of course in a discipline with so many variables and intangibles any short-coming would have to be a clear one before negligence would be likely to be established); secondly, whether the proposed development of the study was feasible of implementation having regard mainly to that "transportation/workforce" matter.

The plaintiffs made an alternative claim of negligence based on those verbal statements made later by Mr Hill and Alderman Harris at the Sydney City Council. The plaintiffs also claimed that when (and the evidence on the matter will be referred to later) difficulty of feasibility of the study because of that transportation/workforce matter was indicated late in 1970 and became progressively more known to each of the defendants during 1971 they were under a duty to the plaintiffs to disclose to the plaintiffs that infeasibility of the study and/or its non-fulfilment, but did not do so.

Additional defences based on the *Limitation Act* and lack of notice under the relevant Acts were also taken by each defendant. There was a cross-claim by the second defendant against the first defendant; but when, following the joint request of all parties, I ordered the case to proceed in the first stage of liability only and to postpone the matter of damages, I also at the request of counsel for the second defendant and with assent postponed that matter of the cross-claim to be dealt with in the later part of the hearing which would commence after my findings had been made and declared in respect of the first portion.

The above summary of the issues is very over-simplified, but is included here merely for preface.

The plaintiffs' case here then rests in effect on an alleged deficiency in a major exercise undertaken by two of the responsible established bodies in our community. (I shall deal later with the question of "joint undertaking".) When that exercise is of a type such as this one, that is, of town planning,

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one must take great care in relation to hindsight. This study looked forward for the implementation of the redevelopment with which it was concerned for a period – to quote probably the lowest estimate referred to in evidence – of "ten to fifteen years"; and when one thinks of the innumerable assessments and decisions that are required to be made by those preparing a study of this range and magnitude – which is intended to be implemented in the heart of the biggest city in the nation, and indeed one of the larger cities in the whole world – and then couples with that the thought of the unknown future events, one can some twelve or more years later when seized of the events which have in fact occurred in the interim, perhaps criticize the preparers of that study on a number of bases; and that generally-expressed statement in one that must be well kept in mind when the study is being examined. Further it is a feature of a study of that type that almost certainly it will in any event be subject to some variations or modifications, the amount of degree in them necessarily varying; and then of course as regards those expected to participate in its implementation there is the element of "risk", and I shall refer to that later in more detail. But having made those comments, I feel that it is appropriate to say at this stage that the majority of the evidence given in relation to this study referred to the situation as at the time of or near the time of its undertaking and publication. That statement applies not only to those who can be described as the "main" witnesses for each party but also to the mass of detail appearing in exhibits. But apart from that evidence, and with some minor exceptions, most of the remaining evidence was in effect a 1981 assessment of

what had been done or ought to have been done over twelve years earlier, and much oral evidence of that nature was given on behalf of the defendants. However, the matter will be examined without dependence upon hindsight of the type to which I have referred – and which was certainly stressed in counsel submissions; but in any event because the plaintiffs' case is based on the preparation of the study, its publication, and events following in the next three years or so, it would therefore ignore any events which occurred less than some nine years ago, that is, after 9th November, 1972.

I shall identify the witnesses called in this case in addition to Mr Baker and Mr Macdonald, who have been mentioned. The two townplanning experts called on behalf of the plaintiffs were Mr W. G. Clarke (also earlier mentioned), and Professor J. Toon, the present head of the committee of town and country planning at the University of Sydney. I do not propose (with one partial exception to which I shall later refer) to set out the high qualifications and experience of those two expert witnesses, or of the other witnesses called for the plaintiffs or those for either defendant; in respect of each of them the qualifications and experience are set out in the transcript or in other exhibits. On behalf of the plaintiffs were also called Mr P. W. Casey, a practising traffic and transportation engineer, and Mr C. R. Weir, a valuer who gave evidence in relation to land values in the subject area. The principal witness called on behalf of the first defendant was Mr J. F. P. Kacirek, now chairman of the Macarthur Development Board but formerly deputy chief planner of the SPA, becoming chief planner later in 1969 (Mr Kacirek was a member of that steering committee and planning team of the SPA which was engaged in the study); and Mr R. J. Pegus, who, being the project manager of that team and a planner with the SPA, was therefore also a material witness for the first defendant. Other witnesses were

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* of Clarke Gizzard / Urban Systems

Professor H. L. Westerman, the present Professor and head of the School of Town and Country Planning at the University of New South Wales; two practising townplanners, Mr J. J. Bayly and Mr D. R. McInnes; Mr E. R. Jefferay, the urban investigations engineer of the Department of Main Roads ("DMR") at the subject time, whose prime duties were investigations into roads in Sydney, Newcastle and Wollongong; and Mr J. S. Carlisle and Mr A. Hayes, two practising transportation engineers. (Additionally, the former secretary to Mr Kacirek was interposed on a small matter and Mr K. W. Glover, the former principal cartographer of the SPA gave some short evidence on another matter.) Only one witness was called on behalf of the second defendant, Mr A. Briger, a practising architect, who was elected as an alderman of the City Council in 1969 after the retirement of the commissioners. Mr Briger remained on the council until 1980, having earlier been for a period the Deputy Lord Mayor and at the relevant time in this case was vice-chairman of the city development committee (in fact the chairman, the Lord Mayor holding the office ex officio) and a member of other committees.

The long evidence of those witnesses occupied in excess of 2,000 pages of transcript and some 200 exhibits were tendered, including many sealed reports, booklets, maps, departmental files and several other groups of documents. Lists of officers and their titles of each of the defendants at the material time were prepared and tendered (for the SPA, exhibit 14; for the council, exhibit C10).

The main factual issues:

Introductory comments:

I shall now embark on the examination of the main factual issues in this case. However it is appropriate in relation to two aspects first to make some comments which arise from the range and detail involved in it. The first relates to the evidence of both the witnesses and the exhibits. The second relates to the wide range of particulars in the statement of claim of the alleged negligence.

Evidence:

To attempt to set out particular answers of the witnesses or particular portions of the exhibits as the basis for each necessary finding would, apart from being an inordinate and almost impossible task, be also unwise and probably misleading. That is primarily because of the mass of material appearing in the transcript and in those exhibits. When a witness continues to give evidence for several days, and when records of statements made or authorized by him many years ago are closely examined one will inevitably find inconsistencies in expression and variations in the particular adjectives, nouns or verbs selected at the time. That aspect is only made more variable when the present subjectmatter is being considered. In a town planning exercise, particularly in one such as this the number of "factors" which have to be considered and the number of investigations, plans, calculations and other things which have to be undertaken not only in respect of each of those factors but also as to the balancing of them and their interfusion – to mention only some of the main items – short "yes/no" answers to questions, particularly to long ones, can be quite erroneous. Therefore although in the final submissions in this case, many passages in the evidence of witnesses were referred to or read, one has rather to take an overall view

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of the whole of the evidence whether given in the witnessbox or apparent from exhibits apart from the witness himself. A number of extracts will in fact be quoted, but to endeavour to set out an analysis of all of the evidence would, as I have stated, be unwise. That is only confirmed by the many long answers given to questions, all of which and not portion of which must be read; and it is only further confirmed by the strain undergone by some of the witnesses. Indeed one of those called on behalf of the plaintiff accepted an invitation to stand down because of mental tiredness, and another frequently paused after a long question and inaudibly with his eyes shut repeated it to himself so that he could understand it.

I shall therefore deal with the evidence given on the central matters only in summary form and indicate my conclusions. It is certainly not easy to have to choose between qualified and experienced experts in such a field as this, particularly when the conclusions formed by them on nearly every relevant matter require consideration of degree, balancing, and intangible factors. As a consequence of that, of course, there can be a considerable range of differences in opinions reached. I shall therefore set out reasons for accepting one view in preference to another or others and, as indicated, refer from time to time only briefly to specific evidence given or to extracts from exhibits. My conclusions to be expressed on that basis, were indeed draft-recorded in respect of each of the expert witnesses during and/or immediately after their actual evidence and an early re-reading of the chief portions of it.

▷ At this point I shall interpolate comments upon two matters which relate to all the witnesses, but each of which relates especially to Mr Clarke, the second one because it arose for decision during his evidence. The first is that in respect of criticism of witnesses at the hearing. On the matter of credibility in its sense of honesty there was, with one exception to which I shall refer later, no such suggestion relating to any of the witnesses throughout the case. But Mr Clarke was cross-examined by counsel for the second defendant on the suggestion that he had a "bias" against the SPA, which could produce a claim that his evidence against the standards of town planning adopted by the SPA in respect of the subject study would be affected. The cross-examination as such was justified, being prefatory to evidence which was ultimately given by Mr Briger that he held that view. As it is necessary to record a finding on that matter, I shall do so, but very clearly. I saw no sign whatever of any such bias during any part of the long evidence of Mr Clarke or in his demeanour. I formed the firm opinion that Mr Clarke's evidence from start to finish was frank and objective. It may well be that a number of his comments and at times his picturesque phrases appearing in his evidence could call for comment; and suggestions of some "arrogance" and of having a "powerful personality" were made. But those matters even if accepted are collateral to the court's attitude to evidence in this case. Mr Clarke was a professional man of high quality and experience, and that has only been confirmed by witnesses on the "other side" of this case.

It could be that Mr Clarke's firm criticism of the SPA in relation to the preparation of that study resulted from the opinions he had formed concerning the Woolloomooloo area while he was engaged in that other study of which he had been placed in charge, but he has also praised the SPA in respect of other work by them. I would require more evidence on

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this matter before accepting Mr Briger's view of a general "antipathy" to or "bias" against the SPA. But even if I were to accept it, that would be completely overridden in relation to Mr Clarke's evidence in this case. When a person has a responsibility to express an objective view it is serious if that view is influenced by a personal complex or bias towards another person or a corporation. Mr Clarke's presentation during his long evidence indicated clearly that he is quite above such a level. As I have already said he took a frank and objective view of the situation. Incidentally, that praise of Mr Clarke for the SPA was in respect of their preparation of a study almost exactly contemporary with the subject one; I shall refer to it later.

The second matter is an evidentiary one concerning the admissibility of the reports prepared by the specialist witnesses or of parts of them; and also to many of the expressions used in oral evidence. The matter is briefly but completely dealt with in a portion of an ex tempore judgment on evidentiary matters delivered on 7th July during the hearing. Following numerous objections taken as Mr Clarke's evidence proceeded, and the consequent "whiting-out" of portions of his report, the matter was discussed between counsel and there was agreement reached as to the adoption of the approach by the court as there set out. Even Professor Westerman in evidence referred to his own thorough report as "submissions", and one or two later reports notwithstanding that agreement had to be revised. But that approach was adopted in the interests of time and costs.

Range of allegations of negligence:

my use of the word "negligence" were whited out of my evidence.

The number of items of alleged negligence in respect of the preparation of this study, that is, in failure to adhere to normal and competent standards of townplanning, were considerable. As to some of them, the particular alleged deficiency alone would not have led to non-implementation of the study; to mention one instance, the non-consultation with the M.W.S. & D. Board before publication of the study. As to others of them, there was limited evidence; to mention an instance of that, the lack of research into seatransport which would involve the redevelopment of Woolloomooloo Bay. But to quote from my summary of the issues set out above, "the core of the allegation is in respect of what I shall here briefly call 'transportation/workforce' deficiency". That of course required examination of a number of collateral matters – to mention some, alternative selections, modal split of types of transport, land-use, density of

development and floor-space ratios. While there was of course throughout the case denial of any deficiency at all it was clear that that "core" did form the centre of the dispute. I shall not then specifically deal with a number of the particulars, but will examine the main ones that come under that "core" and some others related to it. A decision (that is, in this portion of the issues) on that basis is sufficient, and attention to all those omitted particulars would not alter it.

I conclude these introductory remarks with the comment that obviously the expressed views as to whose evidence is to be adopted will forecast my attitude to be taken in the dispute as to the claimed negligence. But having regard to the character of this case and of the type of evidence involved such an event is acceptable and understandable.

From this point therefore I shall proceed as follows. First, as to choice of the witnesses' evidence; secondly, as to examination of the basis of the

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alleged negligence, that is, failure to adopt and adhere to proper and normal standards of town planning in 1968 and 1969 in the preparation of the study; and thirdly, as to examination of those particulars of and relating to "transportation/workforce". There will inevitably be overlapping in the evidence and exhibits considered in relation to those two matters. There will be a large amount of evidence of the witnesses and in the exhibits which will not be mentioned, and there will be many of the separate references in those thoroughly prepared written and oral submissions which will not be mentioned. They have all been heard, read and considered.

The witnesses' evidence:

The chief townplanning expert called on behalf of the plaintiff was Mr Clarke. His qualifications and experience which appear in the first pages of his report (exhibit AS) – and I shall make a brief reference to some aspects of them – indicate quite clearly that he was conversant with and well able to express the professional standards of townplanning at the material time, particularly when applicable to innercity areas. After graduating in architecture at Sydney University in 1953 and being employed as town planning officer by the Cumberland County Council, he travelled overseas, obtained other qualifications, was employed as town planning officer by the London County Council and later by a council at Rhode Island and by a firm of consultants in New York city which specialised in research, planning and design for the redevelopment of inner-city districts. Between 1960 and 1967 he was a founder and principal of an independent group of urban research planning and design firms, carrying out major town planning studies and schemes for Federal, State and local government authorities and private sector investments throughout Australia, his main involvement being in Sydney where his practice was centred. It was in early 1970 that the Council of the City of Sydney, after advertising throughout and beyond Australia selected and appointed a research team of which he was made the leader for the preparation of the council's Sydney Strategic Plan, which was finally released on 21st July, 1971, and was formally adopted by council on 2nd August, 1971. In that task which he directed he was assisted by the work of a large team of urban economist planners, geographer planners, transportation planners and other planning specialists. The work included the study of the Woolloomooloo Redevelopment Plan and of the formal recognition and backing given to the plan by the SPA and the council. He remained the consultant director of the plan until as late as 1977.

I propose to act upon the evidence of Mr Clarke, who incidentally was in the witness-box for ten days, mainly under lengthy cross-examination. That is a major single decision but in addition to my acceptance of his evidence in preference to that of other witnesses where there is a difference, it was clear that there was a sound basis for doing so. It was the fact of his actual presence in Sydney at about the relevant time coupled with his inevitable knowledge on the main matters now under discussion because of that appointment to the leadership of the study for the Sydney Strategic Plan; and so, the nature of his professional task, bearing in mind the substance and importance of it, during the very years surrounding those in respect of which he was asked to express the standards. The reason why I have set out above – by way of exception, as stated earlier – a brief summary of some

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of the professional background of Mr Clarke is simply to provide a base for those few comments just made. The other witnesses, including the two professors, have themselves had experience in town planning in cities, but on the evidence given it does not equate in volume and quality with that of Mr Clarke as to Sydney at the relevant time.

I now set out further reasons for my acceptance of the evidence of Mr Clarke. He was a most impressive witness. The wide and deep thought which was evident from his answers only confirmed his high expertise. At times, during the long cross-examination, there were instances where his answers could have indeed been shorter, but that comment understandably in a case such as this applies also to others of the expert witnesses called. While Mr Clarke may have had the advantage of examining a number of relevant documents before they were available to the other witnesses, that would have but little bearing on the remark I now add, namely, the very thorough preparation of his report.

After setting out those qualifications and experience and defining his opinion on an important matter to which I shall

soon refer, Mr Clarke continued his report with the passage: "I now wish to tender in evidence some random samples of such planning studies and plans." The "exhibits", as he described them fell into four categories. Category A was described as "City Planning in the U.S.A. and U.K. 1958-66"; category B as "Work Published by Sydney-Based Professional Planners, 1962-68", before the defendants began work on their Woolloomooloo study and plan; category C consisted of five selected development plans, three from Sydney, one from south Melbourne, and one from Brisbane. Interposed at that stage of Mr Clarke's report was the portion headed "Critiques of the Defendants' Woolloomooloo Study and Plan", and then followed the "exhibits" in category D which related to items of detailed work done in the years 1970-1974, particularly to the *City of Sydney Strategic Plan Parking Policy and Control Code for New Development and Development Control and Floor Space Ratio Code*. Opinions arising from those "exhibits" were set out and a number of relevant calculations were made, the details being in appendices to the report.

Objection was taken by counsel for the defendants to the tender of any of those "exhibits", and thereupon counsel for the plaintiffs withdrew the tender and stated that he would place them on the Bar table so that his opponents could look at them and indeed with permission they then removed them from court for such examination. Later two or three of them were tendered without objection (two of them indeed by counsel for the first defendant) mainly because there was in evidence considerable reference to the contents. It was somewhat difficult to understand the basis of an objection such as this. Quite obviously each of the studies was dealing with a different situation, often a very different situation, as could be seen at once from the address alone just as a starting point. I would regard them not only as admissible but very helpful to a court and the parties as a part of evidence to explain an expertise to the court. While of course it is most helpful to give a long well-considered address, or long well-considered evidence, or indeed to write a book about a complex subject matter, it is also most helpful – when there is no suggestion of misrepresentation or incredibility – to see the subject matter in action. The structure is there although its application is very different; such difference involving of course from time to time the

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absence of one or more elements that are applicable in another example or the use of one or more elements that are inapplicable in another example. At a later stage however after the case of the first defendant had commenced it was noted on the transcript that the parties had agreed that:

- "(a) The various studies referred to in evidence by Mr Clarke shall be tendered in evidence.
- (b) All parties shall be free to put submissions regarding the comparability of such studies and the comments thereon made by Mr Clarke without being bound to call expert evidence in relation to that matter or being bound to deal with the question of comparability in cross-examination.
- (c) Failure to call evidence regarding comparability or to cross-examination thereon does not imply any acceptance of any evidence or view about comparability."

Because there had been other reports already prepared there appear on the transcript objections to evidence concerning those other reports.

The thorough indexation of Mr Clarke's report (exhibit AS, which incidentally in his own handwriting he identified as his "evidence in chief") only indicates the very careful preparation of it. The two central matters, and as to them it is again unnecessary for a copy to be made herein, are those headed "Definitions of what constituted professional competence in 1968 and 1969", (s 5, pp. 4, 5) and – as mentioned above – "Critiques of the Defendants' Woolloomooloo Study and Plan", (s 7, pp. 48-62) where the report then has a summary of his opinion as to the specific matters in respect of which the study fell short. Those matters of course were expanded in his long evidence. The large number of intervening pages between those two sections with the abovementioned headings indicates the purpose of all those "exhibits", that is, of those other studies. The principles as such are basic, but the application of them deals further with reality, and the inevitable existence of different facts and circumstances in each of all those studies only points out in more detail the value of the application of those principles. However I note additionally the direct relevance of one of those "exhibits" identified by Mr Clarke as "B7, Sydney Region Outline Plan 1967 & 68" (listed in court as exhibits AV and AW). Mr Clarke's report deals with them at pp. 18-26, and I shall refer to them later. As earlier stated, the last of those categories of "exhibits", (D), is placed after the second of those two principal matters because of the time of their publication, notwithstanding the almost contemporaneous study of the material for them. The report concludes with Mr Clarke's "tender in evidence" of his original 1970/71 calculations, "rearranged so as to be precisely comparable with sub-areas presented on an SPA map entitled 'Population and Workforce Capacities'". Those calculations are set out in the first of nine appendices to his report. Other calculations were made by him during the hearing. ** now in the Clarke Archive*

The "exhibits" in those first three categories – that is, those which were all prepared before August 1969 – clearly support the central deficiencies in professional standards alleged to exist in respect of the Woolloomooloo study and plan. Two important matters to an interested developer become obvious when they are examined: first, the range and detail of the matters set out in the report (and that includes all necessary aspects such as plans, maps, figures, other data et al); and secondly, the depth and analysis of each

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content, particularly those requiring special investigation having regard to the circumstances of the subject undertaking.

From start to finish in this hearing there was no dispute that this redevelopment project at Woolloomooloo was the largest of its kind ever undertaken in Australia, and while in other studies some subject matters would be specially important in contrast to their significance in the present study having regard to the particular circumstances, it would appear from those "exhibits" that none of the basic subject matters could be regarded as other than requiring full and adequate research and analysis in this case because of the location and complexity involved. I note that Mr Clarke's initial step when he commenced that section of his report under the heading "Critiques of the Defendants' Woolloomooloo Study and Plan" was to count the number of "words" and of "numbers" (allied with different items) in exhibit E; he added the words up and finished the summary with a large pen-made exclamation mark. That was certainly not irrelevant. It may be picturesque, and it may not alone establish lack of standards; but when viewed realistically and compared with the contents of all those "random exhibits" it fully corroborates in broad form the extent of the deficiency alleged to exist here and startlingly so because of the magnitude of this project.

Mr Clarke's report, apart from its dealing with those standards placed chief concentration upon that central matter of "transportation/workforce", but it is further simplified in its title by the word "movement" used by Mr Clarke and in other exhibits. I shall deal with that later and at this point I shall refer to Mr Clarke's comments on one or two of those "exhibits".

The first is that to which I have referred above, namely, the Sydney Region Outline Plan of 1967 and 1968. (Exhibit AV was a "Prelude" and was produced in October 1967 being a report by the SPA of some eighty pages with maps, graphs, tables and plans; and the plan itself (exhibit AW) was in the nature of a report — being a strategy for development over the next thirty years in Sydney — by the SPA containing 111 pages with photographs and diagrams, published in March 1968.) Mr Clarke's quotations in his report from those two publications would certainly tend to confirm my opinion — that even assuming a bias towards the SPA it would have no effect on his professional objective evidence — of Mr Clarke as above expressed. That plan of course was dealing with a much wider area in location and longer in time than the subject study, but the several passages underlined by Mr Clarke in his long quotations from each of those two publications cannot possibly be considered only in relation to the outline plan itself, particularly when it was published by the SPA "immediately" before the preparation of the subject study. The plan, under a subheading confined to "The Metropolitan City Centre", stated that:

"It is appropriate for the outline plan to indicate the role of the metropolitan city centre and the scale of activity, more especially the employment level, which it appears reasonable to adopt for future planning purposes."

It then stresses the inevitability "that the central business district will continue to involve a larger employment concentration than exists now", to "congestion problems which already exist", and to the likely increase of port traffic, the increase in office employment and the future rise of it. Then after

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introducing the central matter by the words "the fundamental problem however is one of movement" it examines that matter and sets out a number of important aspects of it which were among the central things stressed at this hearing in relation to the subject project. The last part of Mr Clarke's quotation was:

"Insofar as the planning problems of the existing city necessitate changes in the urban pattern, they involve redevelopment and urban renewal. These problems are not amenable to quick solutions. They call for complex and costly measures."

In those circumstances I think that the ensuing comments of Mr Clarke are very hard to question or criticise. That outline plan having been published just about the time the present study was about to commence, there is relevance in his initial remark that:

"What the SPA *did* in Woolloomooloo from 1968 onwards was *exactly the opposite* of what the SPA *said* in its authoritative 1967 and 1968 Sydney Region Outline Plan Reports."

Mr Clarke illustrated that comment by some quotations one of which was the SPA's opinion that one thing that was necessary was:

"... a *detailed and comprehensive study* of the problems of land use and movement in the city centre, *followed* by an imaginative plan to provide the guidance and context for developers."

On that basis then, his ensuing list of criticisms of what the SPA did and did not do in relation to Woolloomooloo are accurate.

Secondly, as to the "exhibits" in category C which were undertaken by three separate Sydney based professional organizations (including his own at that time) Mr Clarke certainly praised them by way of comparison. As to the Woolloomooloo study he said:

"The defendants' work was brief (only 8,750 words), unquantified (no numerical research or analysis), and narrow in scope (being a 'civic design' exercise for a site of 90 acres, and devoid of any economic or transportation analysis or proper recognition and study of influences or ramifications beyond the restricted area of Woolloomooloo)."

In contrast the Artarmon Redevelopment Plan involving some 105 acres, had two volumes: the first had seventynine pages, three appendices, ten tables, fourteen figures, four maps and six accompanying plans; the second had fortyseven pages, two appendices, eighteen accompanying plans and an architectural model including full plot ratio and development control codes. There were 40,000 words.

The second of those exhibits in category C was the Bondi Junction study which Mr Clarke described as "directly comparable to the Woolloomooloo study and plan and was prepared at the same time as the Woolloomooloo study and plan by the State Planning Authority of New South Wales". Several extracts are quoted, and one can note that appendices supplied include an analysis of existing traffic, an analysis of future traffic, an intersection analysis, person trips, and bus services. He concluded his comments, after referring to "the care, responsibility and competence of the State Planning Authority's 1969 Bondi Junction study", by stating that "the major reason for the quality of that study was in the fact that the State Planning Authority engaged persons to do the work who were properly

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qualified and experienced in that particular type of work". He continued (and there was no dispute on the fact stated): "I will also say that in the concurrent example of Woolloomooloo, the State Planning Authority and/or Sydney City Council (the defendants) failed to ensure that persons properly qualified and experienced were assigned or engaged to the Woolloomooloo work." As submitted, there was certainly a special aspect of the Bondi Junction study; but it is extremely difficult, because merely of that, to understand why the great "movement" aspect of the subject study was not examined in far greater depth and detail than it was in accordance with ordinary principles. However, it was not.

One of the submissions put forward on behalf of the defendants in relation to adherence to proper standards was that in Mr Clarke's evidence there were some words which indicated that his standards were higher than normal. I cannot accept that because it is clear from his surrounding evidence – apart from an overall examination of it – that that is not so. The comparative adjective is related to one or two specific matters. He did not found his evidence upon what he himself did, but upon what were the appropriate standards. I am far from persuaded that Mr Clarke would have produced those plans and studies unless he was simply satisfied as to their relevance in indicating and illustrating the basic structure in general terms of the methodology to be applied. His evidence as to the requisite standards and practices and the earlier years in which they were adopted was only confirmed by other witnesses. I shall refer later to that evidence which related to Sir Colin Buchanan; and then to the adoption by Professor Westerman of basic requisites set forward in the Buchanan Report before it was published. I find it unnecessary to elaborate on that submission: I cannot accept it on the evidence given.

Another submission made as to Mr Clarke's evidence was that he was in effect desiring to justify his earlier comments on the Woolloomooloo study as stated in the City of Sydney Strategic Plan (exhibit AT). Incidentally, his comments there were, as readily emerged in the evidence, far less critical of the study than his actual comments at the time. Mr Briger's evidence (to which I shall later refer) as well as his own, revealed that he "compromised" considerably on the matter with his then client (the city council) at Mr Briger's strong request to do so. I will not accept the submission. Above I have recorded my firm opinion of Mr Clarke's approach to his evidence; and my acceptance of it would only be supported by any connexion between his views in 1981 and those formed at the time: he was *there*; or to use his own analogy, he was at "a coal-face" – while a usable analogy perhaps as to nature, somewhat narrow in scope. I conclude these comments with a quotation from the evidence of the senior and experienced town planner who was the chief witness against Mr Clarke – that is, of course, only on a witness-opinion basis, for at least at the material time they were upon a Christian-name association – Mr Kacirek:

"Q. You knew Mr Clarke was a very experienced leading private town planning consultant? A. Yes.

Q. You knew he had been working at the request of the city council on Woolloomooloo? A. Yes."

It is to the evidence of Mr Kacirek that I now turn.

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Although of course there was much evidence from other witnesses, the case for the first defendant was largely based upon the evidence of Mr Kacirek, who was the chairman of the study group apart from being a member of the steering committee. His evidence therefore was directed to not only what he himself did or did not do and what opinions and assessments he himself made but also to what the other members of the group and committee did or did not do and – subject to some objections in evidence – to their views on particular matters. However, Mr Kacirek's evidence, whether considered individually or jointly with that of the other witnesses and the content of the exhibits, has not provided an adequate defence to the plaintiffs' claim of deficient preparation of this study. Though after full consideration I have no hesitation in reaching that view, it is an unwelcome one in the light of the background of Mr Kacirek and his presentation in this case. His qualifications and his wide experience at high level in the United Kingdom and involvement in international conferences and discussions are to be found in the transcript. Certainly his period in Australia prior to this study was short, but already he was the deputy chief planner, soon afterwards to become the chief planner of the SPA; and that "unwelcomeness" is therefore understandable. No personal comparison is involved between Mr Clarke and Mr Kacirek; the short question is whether the study was deficiently prepared because of lack of adherence to those standards and principles. My finding, upon which I shall later expand, will be that it was.

Mr Kacirek was certainly in a difficult position in the witness box. The claim of that major deficiency (in the "transportation/workforce" area, to be dealt with later) called for defence by Mr Kacirek as early as 1971; and on an overall assessment of his long evidence in this hearing I saw that evidence as "defensive" in character and inadequate as an answer to the evidence on behalf of the plaintiffs. Again, it is impossible to refer to all parts of it, but I indicate a few of the bases in which I do not accept his comments in the light of the whole of the evidence in the case. First, I do not accept his repeated claim that the study in its publication of August 1969 indicated a "concept"; undoubtedly other necessary steps had to follow, but as the questions and answers in cross-examination indicated, there was in my view far too much material to counter that claim of "concept"; and Mr Kacirek's repeated reference to the need for other matters before a "stage 2" could be reached did not change that view. Secondly, there were two particular matters upon which Mr Kacirek relied in support of his attitude of adequacy in the preparation of this study: first, "consultations" with the heads of departments, particularly the Commissioner for Main Roads and the (then) Commissioner for Railways; and secondly, the State Region Outline Plan which had been prepared by the SPA some months earlier. I shall examine those matters later, but as to that one of "consultations", I can well understand Mr Kacirek's comment that State and Public departments must rely on information and data exchanged between them when required; but that generalization does not cover the depth of research to be done, and the potential difficulties required to be overcome, by a town planner in such a complex undertaking as the present one; the supply of much written data and statistics, the subsequent study of it, and its relation to other matters was what was required rather than a short oral answer or a silence from which was to be inferred an opinion of full feasibility – not of an existing

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situation, but of a complex projected one involving future interfusion of the given information with such items as land-use and density.

Another approach adopted to some extent (and certainly adopted by another witness for the defendant) was a considered re-estimate of that workforce figure. Without doubt there is a large "grey" area between that "envisaged" 35,000 as stated in exhibit C and the figure of about 75,000 estimated by Mr Clarke; and it is obviously possible for experts to reach different figures, and this can flow from different assumptions and different assessments. But when one examines what in fact were the contents of that study – and to note one particular point, the encouragement of private enterprise in company with the site amalgamation – one tends to step very far ahead of that figure of 35,000. As to Mr Kacirek's comments on Mr Clarke's several "exhibits", I have already dealt with the claim that each study was different from the subject one. It was; and it must have been. But what Mr Clarke was examining was adherence to principles; and the existence of differences in "design", "subject", "degree", "main feature" et al (to quote some words from Mr Kacirek's evidence) does not remove that adherence – certainly not in relation to the central matter involved in this case.

Both Mr Kacirek and Mr Briger, the chief (only) witness on behalf of the other defendant, made several remarks throughout their long evidence on separate points favourable to the plaintiffs and certainly on a number of other points favourable to the defendants; but as I have said I have formed an overall opinion as to whether Mr Kacirek's evidence provides an answer to the claim of the plaintiffs, as to deficiency in preparation of the study in those respects. That opinion is that it does not.

The evidence of Mr Pegus was of course important because he was the member of the SPA who was in charge of that planning committee. It was in respect of him alone in this hearing (and now I refer back to that "one exception" as to credibility), that counsel in cross-examination directly put to him that his evidence in justifying the course taken by that committee under his direction was false. I will not expand upon that suggestion but undoubtedly his defensive answers and his lack of memory as to certain particulars as against others were definitely unsatisfactory. In particular, notwithstanding that only those documents of the whole of the file subpoenaed from the D.M.R. were found to be relevant to this matter, Mr Pegus was unable to recall much substance of other discussions with the officers of that

department which were claimed to have taken place. Again I repeat that criticism of lack of memory of events over a decade ago is difficult, but there was a sharp contrast between his specific recollections of other matters and his inability to recall the details of that matter. His inadequate recollection of one vital matter, how he came to reach the workforce figure of 35,000 was also unsatisfactory. His calculation during evidence of a workforce of the order of 35,000 or below was unimpressive; it was based on the selection of certain assessments and judgments which theoretically were certainly open, but in a practical sense were quite inadequate having regard to the contents of the study.

However, I felt that the whole of the weight of Mr Pegus' evidence could perhaps have been identified by one simple matter. As he indicated, he joined the SPA immediately after his return from England where he had engaged in and qualified in that town planning course. His knowledge was

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of a high order and the summary that he assembled at the outset of the preparation of this study (exhibit 8) recorded what in his opinion should be undertaken for the study; and in substance it accorded with what Professor Toon said that a good planner at that time should do. He was asked about it in chief: "Q. Were all the matters that you referred to in that document followed through? A. Basically, yes." The answering to cross-examination on this matter was certainly not impressive; and it appeared that several of the suggested steps had not been taken and others not fully pursued. Reasons were put forward but when considered in the light of the relevant central question of the standards to be adopted they had little weight in relation to this case. In my opinion that part of Mr Pegus' evidence – particularly as he was the fulltime head (subject to Mr Kacirek's supervision) of the planning team – weakened the whole of the defence in this action; but be that as it may, separately and apart from that opinion I had the clear view that Mr Pegus' answers were mainly characterized by a hazy and vague recollection. Mr Pegus left the SPA in 1971 and has since been engaged in private practice; and therefore one must take particular account of forgetfulness after ten years in those circumstances; however, for the reasons I have said, no adequate answer to this central portion of the plaintiffs' claim emerged from his evidence.

I will now refer to the other witnesses in the field on town planning. As a group they are separated from those three above-mentioned because they had been allotted the formidable task of pronouncing upon this study and the publication of it over twelve years ago. In contrast Mr Kacirek and Mr Pegus were engaged in it and Mr Clarke examined the same matter virtually at the same time and in a wider sense in its relation to the city as a whole. Nevertheless their evidence is to be fully examined, and it is certainly an advantage to the court to have the expressed views of these two Professors of our universities. Later I shall make some quotations from Professor Toon's initial approach in his report which set out the relevant standards in the 1960's and therefore at the material time; and I shall refer to the careful analysis by Professor Westerman as to different types of plans in the area of town planning. Mr Bayly and Mr McInnes were called on behalf of the first defendant, and were certainly fully qualified with much experience.

However, it will be evident because of my already stated acceptance of the evidence of Mr Clarke that those portions of the evidence of Professor Westerman, Mr Bayly, and Mr McInnes which are opposed to his evidence have not been accepted; and I think it appropriate therefore to give reasons for that. Though briefly expressed these reasons go to the basis of the greater part of their evidence.

The first of those reasons resulted from a matter which was strongly pressed on behalf of the defendants throughout the hearing in evidence and in final submissions. In short, it was stressed that this "plan" (and I shall refer to it by that word throughout these present comments) was not a development (or redevelopment) control plan, but a strategic plan; or if not wholly, then primarily. In submissions, identification of it was taken to the point where it was said that it was neither a planning scheme ordinance nor an interim development order, and I can dispose of that latter submission by agreeing with it as at August 1969. But it was the former of those distinctions which had a considerable effect on the evidence on behalf of the

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defendants. Although Professor Westerman expressly stated in an early part of his report (exhibit 61) that "the plan is not a development control plan but a combination of a strategic and a development type of plan", his evidence – and this was not really disputed – in criticism of the Woolloomooloo plan and support for its satisfactory preparation was to a considerable extent based upon his views that it was "strategic" in respect of so many matters. Mr McInnes, though not quite to the same extent, adopted a similar basis and also, as the Professor had done, identified the fundamental differences between those two types of plans: Mr Bayly also applied this view although he mainly described it as a "regulatory" plan and identified a number of the subheadings and phrases in exhibit E as being "strategic" or "policy" ones. There was of course acknowledgement, as indicated in that quotation from the Professor's report, that situations could exist which involved both of those basic features. But while that separation of identity may be important in other areas, the court is not concerned with the determination of points such as that. The court's task is not to determine whether by an overwhelming or marginal vote the study falls into one category or the other. The preferable task is, or was, for a reasonable town planner to go downstairs into the Town Hall in August 1969, note those main documents,

and the model, the maps and the general atmosphere, and then absorb the relevant information and events; and afterwards (which has been the subject of evidence) take reasonable action. Whatever classification, then, could be had or shared by this plan, the more important matter is what in fact happened; and I and, simply by way of comment, that the evidence of Professor Westerman and those two experienced town planners, insofar as it was based on that definitive approach is not consistent with the views expressed in a minute tendered on behalf of the first defendant (exhibit 37). While that minute was primarily concerned with the proposed Commonwealth Centre in that Woolloomooloo area, the following first and later paragraphs from a submission made by the SPA to the Parliamentary Standing Committee on Public Work three years later (20th July, 1972) were, under the heading "The Woolloomooloo Redevelopment Plan":

"1. In 1968/69, the professional staff of the State Planning Authority were commissioned, as consultants by the Council of the City of Sydney, to prepare a redevelopment plan for Woolloomooloo in order to promote urban renewal and to ensure that this key area in the heart of Sydney would, in the future, play an effective role in the general layout and functions of the metropolitan centre. *

Meaning ascribed by G.C.: "Mr Askin & Mr Norston instructed their SPA & City Commissioners to redevelop the 'Loo to get rid of the Labor voters"

3. The terms of reference to the consultants, in preparing the plan, were to produce proposals which would not only promote urban renewal but would encourage private enterprise to undertake the primary task of land assembly and implementation of the proposals in the plan."

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A second of those reasons is based upon a phrase (or phrases very similar to it) used in so many answers particularly in cross-examination, by those witnesses on behalf of the defendant, particularly by Professor Westerman and Mr Bayly in relation to this matter. I have already referred to the wide range of intangible matters in this area of town planning, known of course at top level to the witnesses in this case, but I formed the view that this frequent reference to "other factors" and to the element of "judgment" in

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** see the Clarke Archive as interpreted above by GC.*

reaching opinions was overpressed. While in this wide "grey" area one must allow for a range of differing views from experts, even that must be controlled. Professor Westerman, very thoroughly if one may say so, made calculations directed to establish the estimated workforce of Woolloomooloo in 1968 and 1969 (as did other witnesses during the hearing) which were arrived at by judgments of the relevant facts and circumstances. As a generalization, that is impeccable; but under cross-examination by counsel for the plaintiffs it did appear that the factors that were to be principally taken into any judgment on the matter of workforce calculation in *this* case were such as to raise the total figure a long way above that 35,000 and so to head towards agreement with the estimates of Mr Clarke. By way of example of that I note that one very important matter in this particular case which I felt that Professor Westerman under-assessed was that of site amalgamation (although more than one approach on that basis was made); and I feel that a submission of counsel for the plaintiff included both respect for the Professor and criticism of his calculation: "Once you accept the likelihood of amalgamation, Professor Westerman's figures can be seen for what they are, an exercise in retrospective rationalization leaving out of account the realities of the market-place." It was in the answers of Mr Bayly, particularly in cross-examination on a number of matters, that there was too much reference in my opinion to "other factors". But in this as in nearly all other cases of this general type there are usually one or a few particular matters for special consideration. There certainly were in this case and when a direct question is asked as to what step should or should not be taken on a particular matter, or whether or not that matter is relevant, the mere answer that "there are also several other matters to be considered" is not helpful.

The third of those reasons was the reference to the matter of "risk". That was stressed more than once by Mr Bayly, and indeed by other witnesses appearing for the first defendant. That factor is certainly not disassociated from the other two matters with which I have just dealt. The assessment of that factor – or of the "profit/risk" factor so frequently examined in the field of valuation of land which is contemplated for development – is very well-known, particularly to developers interested in land purchase. But it is always there and any reasonable developer knows that. In my view Mr Bayly particularly overemphasized the element of risk as affecting interest and action by developers following the publication of this study, and reference to it by all the town planners who gave evidence on the matter was in my opinion quite inadequate in answer to several of the directly relevant questions which were asked on it. I shall not examine it further except to comment that on the evidence of land values there it would probably on this occasion fight only a small battle with the element of profit "on the other side of the coin"; and there would surely be one element which could soon afterwards possibly reduce that "risk", that is, when the council commenced approving development applications pursuant to this plan before the end of 1969.

As to the three transportation engineers who gave evidence, Mr Casey and Mr Carlisle were informative to the court by their reports on evidence, but I have to note that Mr Hayes did not assist in the resolution of the problems of this case; I formed the opinion, while listening to his evidence that notwithstanding his full qualifications and his experience his remarks were largely based on what I considered to be apparently inadequate and

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erroneous assumptions. Mr Casey's report was particularly helpful in setting out the standards and practice that were normal and proper to be applied in principle in the carrying out of such a study as this in relation to the transportation matter (exhibit BG, pp. 6-20, which includes a number of analyses). There was undoubtedly a difficulty facing any transportation witness in this case because the situation of congestion, especially in two places, was by 1969 becoming evident; at the Cahill Expressway and the platforms at Town Hall and Wynyard, particularly the former. I prefer the evidence of Mr Casey to that of Mr Carlisle where there were differences between them; in particular I felt that Mr Casey's modal split on the traffic was preferable to that of Mr Carlisle, and in his calculations I felt that his assumptions were more realistic.

The remaining witness called on behalf of the plaintiffs was Mr Weir, the valuer, whose information as to Woolloomooloo at and surrounding the relevant time was of considerable assistance. The only other witness called on behalf of the first defendant was Mr Jefferay, a highly qualified engineer who was employed by the Department of Main Roads for twentyeight years, and he retired in 1975, his office being that of urban investigations engineer, of which the prime duties were to carry out investigations into roads in urban areas of Sydney, Newcastle and Wollongong. As to Mr Jefferay's evidence, no criticism at all is involved in the comment that his evidence did not assist the defence to the plaintiff's claims. Notwithstanding the occurrence of some consultations and meetings, the evidence of Mr Jefferay did not indicate anything of particular importance which had been added to the preparation by the defendants of this study. He was, apart from the Commissioner who was a member of the SPA and from Mr Shaw who had been a former commissioner, the member of the department who had contact with the SPA over this undertaking. I quote just two matters: first, although Mr Jefferay could recollect some conversations he had with the SPA officers he agreed that there was nowhere in existing records or in his recollection record of a figure of 35,000 for the workforce being given to him; and secondly, after his own examination of the exhibition of the study, he did not raise any objections with the Commissioner.

The evidence of Mr Briger was necessarily in a separate area to that of the other evidence. Having been elected to the council in October 1969 he had of course played no part in the preparation of the study, and he was not either a town planner or a transportation engineer. Apart from his own professional qualifications and standing, he obviously had a constructive interest in Sydney's development and had also acquired political expertise. I shall evaluate his evidence, a main content of which, I felt, was his explanation by way of justification of the attitude of the council to the continuation of implementing the Woolloomooloo study after he – because of his office – and therefore presumably several others had later become aware of this major transportation/workforce problem in respect of the study. That evidence when considered with other relevant evidence persuaded me that the council's decision to continue at that stage was one of policy, and I shall deal with that later. And I also concluded after considering other of his evidence in that same background that the council's decision in December 1969 to adopt the study then was not one of policy but was purely "operational" (a word more identified when I come to consider the law). Another significant reason for his evidence was his close

Because Askin & Merton (Premier & Minfa L.G.) favoured the Civic Reform

(= politics): Group, the CPA (1981) 48 LGRA 126 at 158 (the right wing of it) supported Askin & Merton in the 'hoo

and long contact with Mr Clarke because of that appointment of Mr Clarke as head of the group for the Sydney Strategic Plan. He made his attitude to Mr Clarke clear, but he made equally clear his regard for Mr Clarke's expertise. The conversations between them concerning the Woolloomooloo plan in late 1970 and early 1971 were the subject of some questioning. Mr Briger certainly denied some of Mr Clarke's particular expressions in those conversations but not, in relation to any important matter, their substance. His "aftermath" opinion of the Woolloomooloo study, especially of the particular matters here in issue, expressed in an address at the annual meeting of the Sydney Division of the Master Builders' Association on 3rd September, 1974, (recorded in exhibit FH) is firm; but in the light of the limitations under which (as expressed in the transcript) that document was admitted into evidence, I record that I have reached my relevant findings of fact throughout this case without reliance on it.

Here I repeat that there was a large range of answers on particular points in evidence and portions of reports referred to in submissions together with those answers given by each of those four witnesses; some of it assisted the party for whom they were called, and some the other party. But the three reasons as set out above, particularly the first two of them, were the basis for my reaching the conclusion that the opposition to Mr Clarke's evidence and the support for the preparation of the study and other matters in the case of the defendants fell far short of answering the evidence on behalf of the plaintiffs which I have accepted. Although the remarks in respect of all the above witnesses have included my views on a number of matters to be decided, I shall now examine the matter itself of the professional standards to be applied and the evidence in respect of it, and following that the matter of "transportation/workforce".

The preparation of the study:

I shall now examine the allegation of negligence in the preparation of the study and refer to the two main particulars on the matter set out in the statement of claim:

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"(t) Failure to prepare and document the Woolloomooloo redevelopment study in accordance with the standards of preparation and documentation commonly accepted by professional planners in Australia in 1968 and 1969.

(ee) Failure sufficiently to document in the published Woolloomooloo redevelopment study the studies undertaken, the information obtained, the assumptions and calculations underlying the recommendations and the reasons for the recommendations made in the Woolloomooloo redevelopment study."

Because in this case the central matter for examination is that of "transportation/workforce", more correctly described as the relationship between land-use, the intensity of land-use, and transportation, I shall commence examination of the allegations in those two particulars by considering the application of that preparation and documentation in respect of that central matter; and I commence by quoting the particular which is specifically related to it:

"(bb) Failure adequately to appreciate or consider the relationship, as regards the redevelopment of Woolloomooloo between:

(i) land-use;

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(ii) the intensity of any given land-use (development); and

(iii) transportation."

And I also refer to the following particular (h):

"(h) A failure properly to carry out a transportation and traffic study in respect of the Woolloomooloo area prior to the said documents being completed."

It was Professor Toon who set out in his report (exhibit AO) the stature of town planning in the years leading up to the time of the preparation of the study. He commenced his report:

"The approach adopted in the report is as follows: Section one comprises a review of the significant conceptual, methodological and technical advances in the field of town planning that occurred in the late 1950's and 1960's."

Having identified the two other sections he proceeded under the heading of section one, "Review of Planning Literature of late 1950's and 1960's". He then, among several other matters, described his use of the words "frame" and "core", proceeded to consider "the third area of research focused on the public economics of planning", and later continued:

"Regarding the development of more sophisticated planning tools there was a considerable array of literature devoted to all aspects of planning. The major impetus came from the multitude of transportation studies that were embarked upon as a consequence of both rapid urbanization and increasing car ownership rates."

He then referred to the Horwood and Boyce study and said that it along with others:

"... was focused on the interaction between land use and transportation which is frequently, and correctly, referred to as a chicken-egg relationship. This had become a major issue as urban congestion increased. Indeed the 1960's could well be described as a decade when urban transportation issues were the dominant concern of all governments concerned with the management of large urban areas."

He then identified the Buchanan report (incidentally, in about 1952 Mr Kacirek had succeeded Sir Colin (Professor) Buchanan as principal planner in charge of planning for the Greater London Region on behalf of the Minister responsible for planning; and Mr. Pegus had attended lectures by Professor Buchanan when he had earlier been in London) and stated that:

"The report investigated in some detail a series of case studies to demonstrate the relationship between various intensities of urban development, the level of environmental amenity and accessibility."

Finally he concluded his "review of section one" by saying:

"The foregoing section is intended to demonstrate that significant advances in the theory and practice of planning were taking place in the late 1950's and 1960's. It provides the essential context for the following section."

He then proceeded with section two, which he said "establishes the planning context of the redevelopment study in terms of the statutory, local and metropolitan and regional planning framework and the prevailing

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perception of the theory and practice of town planning"; and later section three, which "considers the characteristics of the redevelopment study" and concluded his introductory remarks by saying that "the report concludes with an evaluation of the study in terms of the criteria established in sections one and two". (That evaluation is later entitled section four.) The status of the Buchanan report was acknowledged by Mr Bayly, and also by Mr McInnes. The passages identified in the submissions on behalf of the plaintiffs establish the comment there that "it was accepted that a direct and causal mathematical relationship existed between particular forms of land use, intensity of land uses and transportation and it was normal planning practice, both overseas and in Australia, to study that relationship"; and confirmation of that occurred in a later statement in section four of the Professor's report headed "Evaluation of the Redevelopment Study":

"The theoretical aspects of land use/transport interactions were well-known at this time and the practical application of the concept to metropolitan planning, to central area planning, to district plans and to projects such as shopping centres and even individual office complexes were commonplace ... the general concepts were adverted to in 'The Future Canberra' (1965) and more specifically in 'Tomorrow's Canberra' (1970) referring to land use/transportation studies carried out in the mid 1960's."

Mr Clarke confirmed in his report and evidence that by 1968 research and planning for the future of metropolitan sub-areas had become common practice among planners; and, as already stated, that techniques and standards had been developed for those purposes initially in the United Kingdom and the United States, but by the 1960's were being applied in Australia. He indicated that it was by 1968 established practice among planners to investigate and analyse quantitatively those relationships, using mathematical, statistical and engineering techniques developed for that purpose. The Buchanan report of 1963 contained a detailed demonstration of the relevant methodology. Professor Westerman indeed in evidence indicated how those techniques in examining that relationship between land-use and movement had been adopted in a study in Adelaide prior to that report. The other witness called on behalf of the defendant who confirmed that type of evidence was Mr McInnes, and I quote one question and answer:

"Q. It would be fair to say that since the publication of the Buchanan report in 1964 it has been an axiom of town planning, well recognized in Australia, that there is a direct link between land use and transportation questions? A. I think that is fair comment, yes."

And later while he was being questioned in relation to the inquiries made to the two Departments of Railways and Roads (to which I shall refer shortly) Mr McInnes agreed that "the planner must be satisfied that the magnitude of the development he is proposing can be accommodated within the transportation system which would be available", from whatever source he might choose to be satisfied. Professor Westerman acknowledged during cross-examination:

"... any planner worth his salt in 1968/69 when asked to plan the development or redevelopment of a significant urban area should have

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had in the forefront of his mind the necessity of carefully relating his ultimate proposals to the transportation system which was going to be available to serve that area";

and Professor Toon stated that:

"... accessibility and land use (and intensity) were closely inter-related and consideration of that relationship should have been a major determination of the plan."

Therefore, as Mr Clarke and Professor Toon stated, it was accepted practice by 1968 in Australia to investigate transportation factors by quantifying for themselves traffic and rail, bus and motor vehicle movements and allied matters; and it was also normal practice to collect, analyse and tabulate the relevant statistical data. The Adelaide study (referred to just above, exhibit FB) and the Bondi Junction study (exhibit AX) are two examples of this. Though the latter of those two was prepared at the same time as the Woolloomooloo study, there were several submissions and remarks given in evidence as to that study being different from the subject one. Of course it was, and I refer to my

earlier comments; the examination here is of methodology and adherence to standards, particularly when required in relation to a major plan of this magnitude. Here there was no transportation research or analysis conducted by the planning team itself, notwithstanding the warning of transportation problems by Mr Caldwell and the references in that preliminary work programme of Mr Pegus (exhibit 8) to traffic and transport matters. Further, notwithstanding those earlier-mentioned consultations no data or figures were obtained which could be published. None of those things were done. Professor Westerman, after being assisted by time to consider and peruse some documents, stated in evidence that there was only one example known to him "of a plan prepared by a planner ... in which there has not been demonstrated in some detail the relationship between land-use and transportation". He referred to the Rocks study, but indicated that some detail on that matter was provided in it. However, he knew of no other example. I shall return later to this transportation/workforce matter but shall now continue by examination of those first two particulars in relation to some other aspects of this study.

In his evidence and by reference to some of the "random" examples which he brought to the court and which have been earlier mentioned, Mr Clarke stated and established that it was normal practice to embark on a detailed investigation of a range of matters of the kind indicated in the contents of the Artarmon study, the Bondi Junction study and the South Melbourne study. In vol. 1 of the Artarmon redevelopment plan (exhibit BY) it was clear that the planning team had embarked upon such investigation of the area including existing utility services, property values and property value ratios; and socio-economic characteristics of the population and the shopping centre – the latter two involving surveys and therefore charts, tables and graphs containing statistical information. As I have indicated, a remarkable feature of the preparation of this subject study was the lack of attention given to the content of that exhibit 8. On that matter of land values, 1962 values were used by the planning team and no adequate explanation of that was given; the reply submission made on behalf of the first defendant was that Mr Kacirek had had basic training as a valuer, but the fact that he had not practised in Australia and that he himself in evidence did not put that

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forward as a reason for relying on those values made that reply unconvincing. The Valuer-General was not consulted on that matter. As has already been mentioned the Metropolitan Water Sewerage and Drainage Board was not contacted at all and Mr Kacirek acknowledged in evidence that he had expected that there would have been a contact before publication of the plan notwithstanding the substantial additional expenditures that would be involved. Although some information was obtained concerning the population in the Woolloomooloo area at the time of the study including its age and indicating a total of about 5,000 residents, there was clearly no adequate research concerning the matters in particulars (d), (e) and (dd) in the statement of claim. They are as follows:

"(d) A failure to specify adequately or at all in the said documents any controls or limits on the quantity of commercial development to be permitted in the Woolloomooloo area if it were developed in accordance with the said plan.

(e) A failure to include in the said documents any planning bonuses or other incentives for residential development in the Woolloomooloo area.

(dd) Failure to undertake any, or any sufficient, research as to the underlying demand (capable of being satisfied in Woolloomooloo) for:

- (i) office development;
- (ii) retail space;
- (iii) port facilities;
- (iv) tourist accommodation and facilities;
- (v) entertainment and convention facilities; or
- (vi) high rise residential accommodation."

When there are a number of land-uses contemplated, the market demand for them and the planning controls are important. I mention those three particulars because they are obviously interwoven with the transportation/workforce matter and the evidence indicated that normal practice by planners at the time included survey techniques which were not done in this case. I do not intend to list all the other shortcomings on this matter. The practice which had been so clearly stated and not denied in evidence which I have summarized in relation to those matters was simply not followed.

The transportation/workforce matter.

I return now specifically to the matter of transportation/workforce. The planning team chose just to have consultation with the Department of Main Roads ("DMR") and the Department of Railways. The evidence of Mr Kacirek as to the Sydney Region Outline Plan in relation to that was inconclusive. In evidence-in-chief he said:

"Now in the case of the Woolloomooloo study, having regard to the fact that the wider studies of traffic and transport had been part of the Sydney Region Outline Plan exercise just completed, in which there had been a good deal of examination of available material, that was the context in which Woolloomooloo in particular was then looked at";

and he said that "so far as the steering committee and the planning team were concerned we looked to" those two departments; and earlier he had

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said that "it was felt that we should look to" them. But the SROP – for the preparation of which Mr Clarke praised the SPA as I have already indicated – had set out what should be done, not anything that had specifically been done. To turn first to the prelude to the plan (exhibit AV), at p. 44 under the first heading "Transport" and the first subheading "Transport in the Region" the first paragraph reads as follows:

"The importance of transport cannot be over-emphasized. The immense amount of capital involved in the provision of transport facilities, their permanent nature, and their impact on other land uses, dictate that careful thought be given to the planning of transport systems."

Later it stated that: "Data on land use and on traffic generation and movement is inadequate to assess the problems and plan for their solution"; and the final sentence under the chapter headed "The City Centre" and the last subheading "Implications for Planning" was:

"A detailed and comprehensive study of the problems of land use and movement in the city centre, followed by an imaginative plan to provide the guidance and context for private developers, is urgently needed."

As stated before the plan itself was published by the SPA in March 1968, and earlier in the identification of its "nature, role and content" says that: "In essence, the Outline Plan comprises principles, policies and broad strategy." The submissions for the plaintiff drew attention to three passages in the plan. The first is a quote from the first paragraph under the chapter headed "Transport":

"The formulation of comprehensive proposals for the building up of a regional transportation network is a difficult task, requiring extensive surveys of the movement of people and goods together with a measurement of the capacity of the different transport modes available to deal with the total traffic demands. Detailed investigations of this nature have not yet been completed but will form part of the succeeding stages of the outline plan."

Under subheading "Highways" it is stated:

"For the planning of future highway and rail networks, basic information of work trips and goods movement will be necessary. Whilst it is recognized that the congestion on the main road system is currently causing significant unnecessary costs in the movement of goods throughout the region, no information has yet been obtained on the nature and extent of the problem";

and under the subheading "Transport Planning Policy", appears the following:

"The survey and analysis of data necessary to define specific proposals for an adequate system to serve a greatly expanded metropolitan area is still far from complete."

Those publications then did not produce any data on this central matter in relation to the city centre or to Woolloomooloo, and did not purport to contain that detailed study. Rather did they indicate the problems and what was necessary to be met. But even if my understanding of what Mr Kacirek said in evidence was mistaken, the short point is that the requisite work – a

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deep quantitative analysis of this basic matter or of the retaining of consultants to do it – was not performed.

The consultations with the departments were inadequate. As to the Department of Main Roads, there were several meetings between August 1968 and January 1969 of officers of the SPA and of the DMR but those related almost entirely to the Kings Cross area. There was not placed in evidence any record of any meeting with the DMR after that period, and it would appear therefore that the planning team never sought the advice of the DMR as to transportation aspects consequent upon the later adoption by the steering committee of the floor-space ratios set out in the published documents, exhibits D and E. There is no record of a workforce figure of 35,000 in the minutes of the SPA as to meetings with the DMR; and in the light of the evidence of Mr Jefferay on the matter under cross-examination and of the evidence of Mr Pegus, I am unable to conclude from Mr Kacirek's evidence that the DMR was specifically informed of that figure. There was never apparently a meeting at which the final proposals of the study were put before the DMR – particularly Mr Jefferay personally – for approval; and the planning team never received any advice in writing from the DMR indicating that the proposals were satisfactory. Neither the results of the development upon the road system nor the existing congestion on the Harbour Bridge and Cahill Expressway were put to the DMR by the planning team, although Mr Caldwell, that transport specialist employed by the SPA, had clearly drawn attention to that latter problem.

The consultations with the Department of Railways were mainly concerned with the redesign of the Kings Cross Station. There was a meeting on 26th February, 1969, with the (then) Commissioner of Railways (Mr McCusker) and the Secretary of the Department (Mr King). Again, that was to discuss the Kings Cross Station development and only the "possibility" of a Woolloomooloo station was "mentioned". Although Mr Kacirek's recollection was that the work for that first "isochrone" was done in anticipation of that meeting and that there were "discussions with each of the two departments", there is no evidence that Mr McCusker or the department was then asked specifically to consider the feasibility of a workforce of 35,000; the planning team never received advice in writing from the department clearing its proposals. Further, the same deficiency occurred as in relation to the DMR, as stated above: the important meeting with the Commissioner for Railways was also before the meetings of the steering committee at which the proposed floor-space ratios were discussed, and the planning team did not return to the Commissioner or to the department to seek advice as to transportation consequences of those ratios.

I now examine the submissions put forward on behalf of the first defendant that it was reasonable for the authority to rely on the two departments in relation to these transport matters. The evidence put forward to establish that is a little separated in respect of each of the departments, and I have re-read the evidence of Mr Kacirek and Mr Pegus in relation to each of them, of Mr Jefferay and Mr. Carlisle as to the DMR and as to Professor Westerman and Mr Bayly and Mr McInnes as to the Department of Railways. In my opinion all that evidence provides a totally inadequate answer to this claim made on behalf of the plaintiffs. I have referred earlier to Mr Kacirek's evidence on this practise of reliance on other departments as a general practice, and my opinion that it does not cover the requirement in

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a case such as this. That opinion there expressed is based upon the direct evidence of Mr Clarke and Mr Casey. It was clear from that evidence that there was a strong need for a detailed study of the transportation and traffic matters in the light of the density of development and the workforce, and Mr Casey indicated the nature of such a study by setting out in his report a summary – needless to say in a case of this type not a short summary – of what was required. The fact of the high experience and competence of the two Commissioners and of the relevant officers of each of their staffs does not preclude that requirement. It was a task, and a heavy task for town planners, and I would agree with a comment in the submissions on behalf of the plaintiff that if the planning team did not itself possess the necessary expertise or for some reason did not wish to undertake it, advice from consultants appropriate for the purpose could have been obtained; and that was precisely what the SPA had done in the contemporaneous Bondi Junction study and what Sir John Overall had done in the case of the Rocks study.

That inadequate response by the planning team and the steering committee to the comments of Mr Caldwell is also relevant here. Mr Caldwell was employed by the SPA as a transportation specialist and in two documents in one of the SPA files, to which reference has been made (exhibit AL) Mr Caldwell had set out his warning of accessibility and transport problems in the area (referred to above). Mr Pegus, when shown one of those documents in his evidence-in-chief, said that Mr Caldwell had had discussions with him about Woolloomooloo, "and as a result of" those discussions "he was obviously going to write this minute". Mr Kacirek stated in evidence that Mr Caldwell's view that the station was "essential" was not put to the Commissioner for Railways, only that it was "desirable".

If then it was desired to place reliance on those two public departments, the planners should have been satisfied that the departments fully understood the nature of the proposals, addressed themselves to the implications and feasibility of them and that the right questions were asked of them. Specifically on the matter of that Woolloomooloo station the planning team should have made a full investigation of the matter, that is, if further questioning of the department did not provide the same result, undertaken an investigation of the matters raised by Mr Caldwell, obtained a clear indication from the department, and if the results of all that research justified it, there should have been a considerable modification of the study by reduction of floor space ratios and therefore the workforce which would be attracted to the area. As set out in those submissions, the statement in exhibit E concerning the doubt of that new railway station was a "vague, inconclusive" one. The above conclusions have been reached quite separately from the content of exhibit BV, the report of that inter-departmental committee on the Woolloomooloo station, which stated that a workforce of even 30,000 would pose serious transport and traffic problems, that a station would have to be provided there to avoid them,

although a substantial capital loss on ongoing revenue would result – a matter which was included in the submission on behalf of the plaintiffs, and to which I shall now refer.

Particular (r) states:

"The planning proposals contained in the said documents were

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incapable of being implemented without a very substantial capital expenditure which was not envisaged by the said proposals."

The truth of that statement can be readily inferred from the evidence. While the extent of cost of any undertaking cannot itself characterize the quality of that undertaking in its preparation, nevertheless the planning committee prepared this study without – according to the evidence – satisfying themselves on these matters. I have already referred to the Woolloomooloo Railway Station and Mr Caldwell's view, "essential". The steering committee sought no advice from the Department of Railways as to the costs, although the department had financial objections, as well as others, to its provision. When in 1971 it was investigated the heavy cost and an operation loss were revealed. Similarly there was no investigation as to the cost of upgrading Town Hall station, or of the likely requirement of extra roads or lanes in the Woolloomooloo area with a workforce of 35,000. In relation to the non-consultation with the Metropolitan Water Sewerage and Drainage Board, as to necessary development, by agreement during this hearing the 1970 cost involved for that would have been \$2,750,000. There was no evidence as to why none of those inquiries were made, the cost involved would of course be of prime importance to these public authorities, especially the Department of Railways.

On the matter of workforce estimate and/or calculation, the first particular listed in the statement of claim was:

"(a) A gross underestimate was made of the workforce which would be attracted to the Woolloomooloo area, if it were developed in accordance with the said plan";

and lengthy submissions were put forward on behalf of the plaintiffs on this matter. There was only that one reference to an estimate workforce which was in the brochure (exhibit C) beside the heading "People":

"A workforce of 35,000 and a resident population of 9,000 to 10,000 is envisaged when the area is fully redeveloped";

and no such statement was included in either of those other two documents, exhibits D and E. With one exception (the isochrone (exhibit 9) which contained workforce figures adding up to 35,000), none (as earlier indicated) of the documents contemporaneous with the preparation of the study – in particular the minutes of the steering committee (exhibit AJ) contained any reference to a workforce estimate. That isochrone included no content for any workforce north of Plunkett Street, and on the evidence given the figure of 13,000 in sector 2 would appear to be a considerable under estimate. It was prepared in January 1969 some months before those final two meetings of the steering committee at which the floor-space ratios ultimately proposed in exhibits D and E were discussed and adopted. The floor-space ratios used as a basis for the isochrone were in fact substantially below the maximum floor-space ratio recommended in the final proposals. The evidence as to what calculation was done to obtain that figure is certainly inadequate. It is surprising that a document of that importance, if prepared, would not have been retained. Mr Kacirek stated that he did only rough mental calculations to check the isochrone figures but no others, and that he never saw workforce calculations placed upon a piece of paper. Mr Pegus stated that he did make calculations on more than one occasion, but while necessarily

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allowing for memory lapse over a period of twelve years, I consider that his evidence falls short of establishing a basis upon which this figure was reached.

As foreshadowed in my earlier comments, I will turn to the evidence of Mr Clarke on this matter. He stated in his report for this case the figures that he and his planning team had calculated in 1970-1971 when preparing the City of Sydney Strategic Plan. The calculations were based on that relationship between site area, density of development land-use, and resultant workforce. Though I would tend to prefer those estimates to those made some eleven years later because of that time factor, Mr Clarke for the purpose of this hearing rearranged the calculations he had then made with the object of making his projections of workforce directly comparable with the estimates of workforce apparently projected by the SPA in each of the sub-areas shown in exhibit AZ. Even after making allowances for some residential development and for a considerable amount of non-office commercial floor-space in addition to office uses he reached a figure just short of 76,700 or, as he said, on a range basis, between 60,000 and 90,000.

My reference to the other witnesses will be brief. Mr Casey, who carries on the profession of a traffic and transport engineer, made some measurements of the model and the buildings displayed on it. They themselves indicated a potential workforce of 40,455 to 46,255; but if the floor space ratios permitted by the layout of the sites on the model were applied the figures would lie between about 60,000 and 66,000. This revealed a discrepancy between the model and the proposals. Mr Bayly, the Chairman of the Planning Consultative Council of Victoria, was questioned on this matter and when asked whether:

"... it is quite clear to your eye, is it, that development in accordance with the maximum floor-space ratios which were being envisaged in the development control proposals would yield a workforce well in excess of 35,000?", his answer was, "if the whole of the area were developed to the maximum available plot ratios, yes."

I have read the calculations and submissions relating to comparison of the estimates of Professor Westerman and Mr Clarke, but I prefer the evidence of Mr Clarke and a strong initial reason is that Mr Clarke's assessments were, as I have said, first made in 1970-1971 for the purposes of the preparation of that strategic plan and were checked in 1981 by remeasuring some of the SPA maps; whereas Professor Westerman relied upon Mr Pegus' measurements of areas in some exhibits first carried out in 1981 for the purpose of this case. There was certainly a difference between the bases of Mr Pegus' calculation and Mr Clarke's, but even using Mr Pegus' measurements of the site areas Mr Clarke's conclusion was that any projection of a workforce of 35,000 was a substantial under estimate. It was clear from the Professor's evidence that the likely extent of site amalgamation was not fully estimated.

On the matter of density per worker the figures varied within a number of sources of evidence, but Professor Westerman's assumption of 200 square feet per person as at 1969, which produced thereby the estimated number of office workers, appeared to be out-of-line with the bulk of the other evidence. In 1969 the SPA was using figures in the range of 130-175 square feet. Mr Garcia who had been a member of the planning team calculated

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that 130 square feet per worker would result from the commercial redevelopment of the Londish site; Mr Kacirek who was in charge of the planning team wrote a handwritten annotation referring to a range of 150-175 square feet and in a document dated 11th February, 1969, under a heading of "Block Redevelopment" he used, in relation to office employment a figure of 150 square feet; the Sydney Region Outline Plan published in late 1968 used figures in the range of 133-160 square feet. Mr Clarke adopted 175 square feet; Mr Pegus in evidence stated that he had no recollection of the figure that was used by the planning team at the time. That excess for office workers, who were said to occupy less space per person than other workers in commercial premises, would tend to increase a calculated figure for the workforce. The Professor allowed for as much as 37 per cent of non-office commercial space, a figure which was considered to be unmarketable by Mr Clarke and unlikely by Mr Weir. Professor Westerman also allowed for too many international hotels in this area, according to the evidence of Mr Weir. His allowance for the number of the workforce in the area north of Plunkett Street appeared to be out-of-line with what the study and indeed the model appeared to contemplate. However, the nature of the material available to the Professor fell short of the work and assistance of which Mr Clarke had had the benefit over ten years earlier as a source for his opinion.

On that matter of later realization, apart from Mr Clarke, others in those two subsequent years of 1970 and 1971 expressed views quite inconsistent with the figure of 35,000. At a meeting on 11th February, 1971, Mr Wickham, the deputy-chairman of the SPA, stated the estimate likely to result from the Woolloomooloo development as being between 50,000 and 90,000. About a fortnight before that at another meeting which was concerned with the preparation of the City of Sydney Strategic Plan Mr Crockett who represented the SPA had stated that the SPA's figures for the Woolloomooloo workforce were in excess of 90,000. Both of those statements were confirmed in the later evidence of Mr Briger who was present at each of the meetings. Mr Kacirek when asked in cross-examination the following question:

"It follows, does it not, that, whatever the precise figure, it was abundantly clear to everybody including yourself in 1971 that the target figure of 35,000 had been grossly exceeded by development in accordance with the spirit of the Woolloomooloo plan?", answered, "Could be, yes."

In a later answer he said the 35,000 was an "underestimate to the extent that in subsequent events it appeared that it was likely to be significantly above that level". Indeed in 1972 Mr Kacirek predicted a potential workforce in Woolloomooloo on the basis of adherence to this "spirit" of the Woolloomooloo plan of 44,000 to 50,000, which figures might even understate the office workforce (exhibit AN, document 4, p. 6). (I note here that there was a strong objection taken on behalf of the first defendant to the admissibility of the evidence of Mr Wickham and Mr Kacirek as to these figures. In a separate judgment I indicated my admission of the evidence for reasons stated, but for completeness I make the observation that if that evidence had been inadmissible I would still clearly find that figure of 35,000 inadequate on the basis of Mr Clarke's evidence alone.)

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The second defendant was also aware by early 1971 of the inadequacy of that workforce projection. The then (i.e. in March 1971) Lord Mayor (Sir Emmet McDermott) in a letter to the Under-Secretary of the Ministry of Transport said that "it is believed that" a workforce "may well be in the nature of 60,000 to 90,000 people" (exhibit AQ, document 21). At the Commonwealth Public Works Committee on 24th July, 1972, both Mr Briger and Mr Doran predicted a doubling of the 35,000 workforce estimate. It was also in early 1971 that Mr Clarke, then preparing his City of Sydney Strategic Plan, had expressed a similar view to Mr Kacirek in the course of a meeting that took place between them on 8th February, 1971.

I have read the extensive written submissions on the matter of workforce calculations put forward on behalf of the first defendant and similarly answered on behalf of the plaintiffs. I shall not analyse them here. My finding thereof is that that "envisaged" workforce figure was very wrong and resulted from very inadequate work including the items of research, investigation and calculation in the preparation of the study.

As to the earlier proposed Commonwealth office centre there has certainly been some inconsistency in the evidence given, and it would appear that a mistake was made in that earlier estimate of 9,000-10,000 workforce said to be proposed by the Commonwealth Department of Interior. I accept the statement by Mr J. R. Clark at that meeting on 30th June, 1972, with the SPA that the Commonwealth had never been aware of 8,000-10,000 for its site (exhibit BO, document 12). It was established that at the time of the commencement of the study the Commonwealth intended to develop the area as a naval store but that following those consultations with the steering committee it decided to proceed with the development of an office block. Mr Kacirek added in his evidence that as at the time of the eighth meeting of the steering committee on 23rd April, 1969, "the Commonwealth officials and the State Planning Authority were in accord that a Commonwealth office centre was an advantage, and the right role for their lands in Woolloomooloo, because it would provide the catalyst to change course, and important opportunities for encouraging private enterprise to come into Woolloomooloo also". Confirmation of that mistake to which I have referred appears in two of the documents in exhibit BO of meetings of the Commonwealth Department of the Interior on 19th April, 1972. In one it is stated that the SPA envisaged a 15,000 workforce for the Commonwealth centre and in the other it states specifically that "Mr Kacirek agreed and said the SPA study had envisaged 35,000 commuters in the area of which about 15,000 would be in the Commonwealth centre". Incidentally (a matter referred to above), that isochrone set out a workforce estimate of 13,000 in sector 2 on the basis that the Commonwealth office complex was to be located in one block of that sector and that the steering committee envisaged the development of offices in the adjoining block. That appears to be a clear under-estimate.

Now I shall refer to a few of the other particulars relating to this matter of transportation/workforce. Particular (i) stated:

"The estimated workforce of 35,000 exceeded the capacity of existing and then envisaged transportation facilities servicing the Woolloomooloo area."

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From the evidence it is quite clear that the capacity of the rail systems and road systems serving Woolloomooloo had been inadequately investigated in relation to a workforce of 35,000. Because of the balance of evidence the density of the development would involve a workforce well in excess of 35,000 this inquiry is somewhat redundant but the inadequacy of the preparation is established. One main feature was that there was inadequate inquiry into congestion of the railway platforms particularly at Town Hall station. Mr Carlisle, a practising transportation engineer called by the first defendant, envisaged that, particularly upon the platforms at Town Hall of the Eastern Suburbs Railway, and he gave more particulars in relation to the station and to the number of trains required; Mr Carlisle apparently accepted a level of service which was very low in order to "accommodate the workforce". Other matters were the density of traffic on the Harbour Bridge and Cahill Expressway and traffic problems and congestion at intersections and in respect of access to the (then proposed) Eastern Distributor particularly at the evening peakhour. Mr Casey expressed the opinion that a workforce of 35,000 would involve a volume of traffic excessive for the road system. The study did not refer to the need to proceed urgently with the building and adjustment of these roads or a railway station at Woolloomooloo.

In these circumstances I agree with the submission on behalf of the plaintiffs that the study had done far too little preparation to refer in exhibit E to "the creation of the environment in which the quality of life can be of the highest standard".

Particular (ff)(iii) stated:

"Failure sufficiently to investigate the Woolloomooloo area in relation to the mathematical, economic, and transportation analysis of the selection of alternative plot ratio codes."

From Mr Clarke's evidence on this matter, which was supported in effect by that of Professor Westerman, it had been shown during the 1960's that alternative plot ratio codes were open to that type of analysis and capable of specific definition. In the absence of any document in the defendants' files relating to satisfactory analysis of the plot ratios is exhibits D and E and Mr Kacirek's reference to "feelings" of the steering committee as to the choice of plot ratios,

Professor Toon's comment that they appeared to have been arrived at "intuitively" would gain support. It would certainly appear that that work was not adequately performed. On the matter of the basic floor-space ratio of 5:1 which was recommended (and referred to in particular (b) in the statement of claim), while the reference in the submissions on behalf of the plaintiffs to Mr Clarke's comment that the proposed ratios were greater than had ever previously been proposed in "the entire world" with the exception of some of the major world cities in the American continent and possible exceptions in western Europe and the comment of Mr Casey that that ratio was "greater than the average prevailing over the Sydney C.B.D. at that time", do not determine the submission that that ratio was excessive, a more close analysis of the evidence particularly that of Mr Clarke does establish that, and therefore illustrates lack of preparation of the study on this matter. Also there is proved accuracy in the proposition put forward by the plaintiffs as to the importance of comparative land values in the matter of encouraging

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developers to seek redevelopment in Woolloomooloo instead of the C.B.D. Mr Kacirek acknowledged that in his evidence, and agreed that it was a relevant factor to have up to date information on those values. The SPA relied, as already stated, on 1962 values. When Mr Clarke was re-examined on a question raised in his cross-examination as to what was "sufficient" to attract developers to Woolloomooloo, and therefore explained the character of that adjective, he not only confirmed the need for comparative land values but expanded on the matter with mention of many other factors, none of which would appear to have been investigated by the planning team. Further references were made in the submissions to evidence supporting differentiation as against the adoption of a uniform plot ratio in the part of the subject area which was zoned county centre; it being put forward as a necessary incentive to developers in the light of the different attributes of sites in the area.

Particular (c) in the statement of claim is as follows:

"A gross miscalculation was made of the extent to which site amalgamation would occur in the Woolloomooloo area as a result of the basic floor space ratio and bonuses for site amalgamation that were specified in the said documents."

It is apparent from a consideration of the evidence that there was a very substantial underestimate of the amount of site amalgamation which would take place following the publication of the study. The factors put forward on behalf of the plaintiffs had their base in the evidence of Mr Clarke and were as follows: the very low land values prevailing in the area; the high density C.B.D. type development for the area proposed in the study; the substantial density bonuses for site amalgamation including the prospect of purchase of public land (especially roads) which land would also qualify for bonuses, offered in the study; the imprimatur of the highest planning authority in the State which the study carried; and the fact that the study appeared to free the area from uncertainty that had prevailed previously. (I interpolate here a comment on this matter. While on the evidence it should have been investigated fully, it does carry with it a heavier element of future assessment than the other alleged deficiencies set out above.) Nevertheless, there was little or no research into the necessary aspects of the matters set out in particular (dd) of the statement of claim, abovementioned. In addition of course to other factors site amalgamation was a major matter for deep consideration in the light of the layout of the Woolloomooloo area. Further, there was no proper survey of the attitudes of the local owners and occupiers to this matter of site amalgamation.

There is no doubt that after the publication of the study site amalgamation did in fact occur, as Mr Briger indicated in his evidence. Even if it was not fully anticipated, the fact that it did occur substantially is not to me a mere application of hindsight comment or criticism; the relevant factor is that proper and adequate research on those matters would, upon the evidence, in probability have advised the planners of the prospect of its occurrence and therefore of the necessity for variation or qualification of the study, particularly in relation to floor-space ratios and bonuses.

The submissions on behalf of the plaintiffs continue with other matters set out in the particulars in the statement of claim, but while there is evidence to support each of them and none of them are insignificant, I shall not at

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this stage investigate all of them because they are only indirectly related to this "transportation/workforce" matter.

To conclude this section then I refer back to those two particulars first mentioned under the heading "Preparation of the study".

The lack of obtaining existing data or up-to-date data when necessary and lack of analysis of data mathematically, using established quantitative techniques was in relation to preparation as such a departure from normal standards of planning practice; detailed confirmation of that broad statement appears in Mr Clarke's report and in his evidence. However on the matter of documentation as such, there are in addition several references in the evidence to the normal practice of planners to disclose in the published documents what studies have been undertaken, and what data and information have been collected, what assumptions have been made and the reasons for recommendations so that

those relying on the study could follow what reasoning led to recommendations and if necessary find any flaws in that reasoning. There is no revelation in exhibit E, or in exhibits C or D, of any investigation or analysis of that mathematical relationship, and none of the documents or minutes in the files of the defendants relating to the preparation of the study contain any adequate analysis of that relationship which accords with accepted professional standards of planners in 1968 and 1969.

On the "failures" described in those two introductory particulars at the outset of this section, the evidence could be described as being in effect "all one way"; they relate to the standards put forward by Mr Clarke, with an indication of their origin, their use over the 1960's, and their adoption in those examples selected "at random". Mr Clarke's overall evidence on this aspect could "bluntly" be described as indicating that all the "studies" in those years to which he referred, particularly the ones in which the SPA was involved, were properly carried out except the Woolloomooloo study. My finding is that each of those two particulars – (t) and (ee) – has been strongly established; and so have each of the two particulars next set out – (bb) and (h); and although the reference to the relevant evidence in respect of each of the other particulars quoted above under this heading has been more brief than that in relation to those other three, I find that each of them has also been established.

The publication of the study:

The next important matter is that of the impact upon and the reliance by developers (particularly Mr Baker) of the study when published on 19th August, 1969. Before examining the evidence I shall refer to one or two of the submissions made on behalf of the first defendant and endorsed on behalf of the second defendant as to the "construction" of the study. (Counsel in making submissions indicated that his use of the word "documents" – which primarily of course related to exhibits C and E – did include the exhibited plans, exhibit D and exhibit B, the model; and therefore when considering those submissions I shall treat the reference to "study", "plan" and "documents" as having that same wider meaning.) A main question, it was submitted, was as to what "sort" of document this was because it was not a contract and not a legislative instrument or one of other types mentioned; it was submitted that it was entirely a matter of law, the court having to construe the document. I am unable to base my examination

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of this matter upon a question such as that. The circumstances of that publication cannot be disregarded; nor can the status of those responsible for its preparation, nor several other factors. Then there were submissions based upon that distinction between a "strategic plan" and a "development control plan". Earlier I have referred to the evidence of Professor Westerman on this matter and to that evidence of other witnesses; Mr Clarke had stated in evidence what he considered to be three aspects of the matter. But the short point is that it was what it was. Other submissions were based on the proposition that it would be unreasonable to act upon certain contents of the document which related to development matters and "ignore" everything else. Then there were submissions in relation to the city council's approval of applications; one document of the council had said that it would deal with applications "in the light of the Woolloomooloo study", and so, it was submitted, if the council regarded the study as equivalent to a development plan or interim development order, it would be in error. Although I feel that these submissions do not assist the questions which I have to determine in respect of this matter, it is not irrelevant to note that the second defendant's only witness, Mr Briger said that he regarded the study as being appropriately described as a development control plan, and that that was the way in which it had been regarded also by his "colleagues" since he had come to office; and when asked whether either Mr Stevenson or Mr Luscombe at any stage had informed him or any of his "colleagues" that it was wrong to treat the study as being a development control plan his answer was "Never"; and to a similar question as to whether the SPA had ever made that suggestion his answer was "Not to my knowledge, no".

I shall turn now to the effect of this publication upon Mr Baker and his reliance upon it. There was no dispute as to the experience of Mr Baker in the area of land development (that word "development" – and therefore the word "developer", with the necessary modification – is used here continually, as it was with mutual consent and understanding many times during the hearing, with a wider content than its initial meaning; and it includes investment in land whether by way of purchase, mortgage or guarantee and also costs associated with the holding and financing of land). As earlier stated, Mr Baker engaged not only Mr Macdonald but also three other professional men of differing expertise in respect of the purchases in this case. He also had some years of practice as a solicitor and years of investment in development; and indeed counsel for the first defendant in his final submissions conceded that Mr Baker had had "very considerable and substantial experience in developing properties". I shall therefore treat Mr Baker as a "reasonable" developer. (At this point I make another interpolation that when I have been and will be referring – as indeed as frequently done by counsel throughout the hearing – to a "developer", when legal assessment is being made the word means "reasonable developer", and "town planner" in such assessment means one correctly described in legal requirement, such as "reasonably well informed and competent", a phrase used indeed earlier.)

Further submissions (and I shall not mention others which I will not accept) in relation to certain of Mr Baker's answers in evidence were put forward as indicating that he had not acted "reasonably" in his examination of the study; that he had read the study "erroneously" and that he had "ignored" a particular part at the same time by assuming that he was "prima

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facie entitled to maximum floor-space ratios". I prefer to examine what effect this study had upon this reasonable developer and what he reasonably did after his examination of it; and I shall do so shortly. Those submissions also stressed the "risk" element to which I have referred earlier. But someone with Mr Baker's experience would automatically know of the element of "risk" in this type of investment – though owing to the very low land prices at the time he might have felt that it was a small one in respect of money loss – and he also would have known of the area of discretion in dealing with development applications by a council and other relevant matters. Further, while theoretically a person could say that instead of purchasing he should obtain an option until there was more "certainty", one can pause to wonder how many sellers of property in that area would have been interested in committing themselves to such a proposition at the time.

As a further preface to my comments on Mr Baker's reaction to this publication I shall refer to evidence of other witnesses. Mr Clarke gave evidence of the effect of some of those representations and of the study generally as indicating to a reasonable examiner of the study first, that the planning proposals embodied the results of careful research and study by experts, and that that included consultation with and acceptance by relevant public authorities; and secondly, that they were prepared in proper manner so as to be feasible of implementation in terms of planning. The chief witness of each of the defendants (Mr Kacirek and Mr Briger) gave direct evidence on that second matter; Mr Kacirek indeed agreed with the inclusion of transportation matters in that use of the word "planning". I quote further from the evidence of each of them: Mr Kacirek when he was asked as the last sentence in a long question which up to that point recited contents from Exhibit E, said:

"Q. So that people who read that were being told fairly clearly that the underlying assumption in the study was that private enterprise would go in there and buy up land, consolidated so as to obtain worthwhile development sites? A. Yes."

A later question was:

"Q. ... You do agree that you expected that the mere exhibition of the plan would be likely to stimulate interest in Woolloomooloo by prospective land purchasers and developers? A. Yes."

Also at this point it is not irrelevant to refer back to that matter of the council having with the SPA joint responsibility in relation to this study:

"Q. There is no question that when the documents went to the city council for exhibition the wording of the documents had the approval of each member of the steering committee? A. Yes, I think that is a fair conclusion."

Mr Briger (though speaking of a time two years later) after indicating in evidence that one of the reasons why the council should adhere to the plan was that it was important to uphold confidence in the plan, continued:

"Q. That extends to the public in general but in particular to those in the development industry and those advising developers? A. Yes, in general terms, that is correct."

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Q. You did that because you felt that it was reasonable for developers to have treated the Woolloomooloo study as being a properly prepared document? A. Yes."

Mr Briger, from time to time had to interview developers and their advisors. He was asked a number of questions on the effect of the Woolloomooloo study upon developers and expressed the view (apart from those stated immediately above) that it was reasonable for any developer to make the same assumptions as he and his "colleagues" made, namely, that the SPA would have done its "homework" and that a scheme so put out would be one which was feasible of implementation in a planning sense. He also agreed that following the publication of the study there had been an upsurge in interest in Woolloomooloo by people in the property market. He added that "it was the first study that in fact set some kind of encouragement and certain guidelines to the developers", and explained that what he meant that they were "encouraged", namely, "by the mere existence of the plan".

Mr Baker's evidence, which I accept, was very clear on this matter. He mentioned a number of things in response to the questions he was asked, and I note some of them: that Woolloomooloo was intended to be an extension of the C.B.D.; when he purchased the Bourke Street properties he had in mind at that stage "a mixed type of development comprising then a hotel, some commercial development and some apartments" – that is, not merely development of offices; that his proposals "involved a considerable amount of road closure in order to come to fruition"; when he purchased 36-38

Nicholson Street, he took into account "that it was in an area classed as a key area" and that, in accordance with the brochure (exhibit C) it was suitable for development as set out there. He assumed that there would be a strict pattern similar to that shown on the brochure and that he could have the kinds of activities listed in it; he also took into account the basic objectives for the Woolloomooloo Bay area, referred to a passage under that section of exhibit E which used the phrase "but even more extensive than that found at the Port of Hong Kong", adding that he had been to Hong Kong before that time and relied on that paragraph as indicating that he could have a "multi-storey hotel type of development right on the forefront". I have not referred to all contents of those two important documents. He was asked about them in cross-examination, and I am fully satisfied that his reaction was quite reasonable. Notwithstanding the submissions on behalf of the first defendant suggesting an "over-reliance on the floor-space ratios", apparently when Mr Baker submitted his plans to the council in September 1972 he sought a plot ratio "something less than the maximum". In re-examination he made it clear that after examination of the study he assumed that "the documents in a number of places said that the council will, if necessary, acquire property from a non-willing owner in order to facilitate consolidation" and that it was "an essential part of the whole redevelopment plan that the council must of necessity sell its streets". Mr Baker certainly would accord with the remarks of counsel for the first defendant as to his experience.

That then indicates how Mr Baker as a reasonable developer read that study and acted upon it, later of course relying in addition on the statements from Mr Hill and Alderman Harris to which I shall afterwards refer. At this

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point it is appropriate to record one matter relating to evidence. In an ex tempore judgment I admitted the evidence of town planners who indicated the reaction and reliance of developers to such a study notwithstanding the objections to the contrary; but I state here that from the above, it can be assumed, as is the fact, that if a contrary view had been taken and that evidence refused, I would have reached the same decision which I have already expressed as to Mr Baker's reaction to this study based on his own evidence.

Although the matter of interpretation of the study – and indeed that of encouragement from it – are necessarily related to the matter of reliance upon it, I shall now deal with that matter of reliance separately because of the element in the *Hedley Byrne* rule of reliance on information; or, as it has been described in several judgments, representation.

I shall now set out those representations relied upon by the plaintiffs by copying the relevant passage in the plaintiffs' written submissions. The claim is that the defendants in exhibits C and E, those two principal documents which were published, made a series of express representations as to the care with which the study had been undertaken and as to the feasibility of its proposals. I shall now commence the quotation:

"In terms they advised readers of the documents:

- (i) that the study had been carefully and expertly prepared; and
- (ii) that the proposals contained within it were feasible of implementation.

See

A Exhibit C

(i) On the front cover the study is described as '*one of the largest and most complex redevelopment studies so far undertaken in Australia*'. The Sydney Region Outline Plan (Prelude, ch. 7) stressed the urgency of a comprehensive study and plan for the metropolitan centre. This study and plan for Woolloomooloo is a contribution towards that objective'.

(ii) In bold black letters the following description appears: 'Prepared on behalf of the Council of the City of Sydney by the Professional Planning Organisation of the State Planning Authority of New South Wales'.

(iii) On p. 3 it is stated that: 'The Woolloomooloo redevelopment proposals are intended to lay down certain guiding principles to which the inevitable redevelopment of the area should adhere ... (they) *have been designed such that redevelopment can occur in stages over the whole area by a variety of private developers* The principles on which the proposals are based seek to achieve an effective, integrated system of movement for both pedestrians and vehicles; a high quality environment for people; and a strengthening of Sydney's roles as an international business, tourist and convention centre.'

B Exhibit E

(i) Front page, (see par. 17 of the statement of claim) which refers to the redevelopment plan as having been prepared by the professional planning organization of the authority in collaboration

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with, and on behalf of the city council and which lists the officers involved, together with their professional qualifications.

(ii) Mr Ashton's foreword (p. 1) where he refers to the Minister requesting the authority to consult with the council 'with a view to arranging for the preparation of a (comprehensive plan to guide redevelopment)' and to the city council seeking 'the authority's assistance in undertaking the necessary study and plan'. He notes that 'the basic approach in the current study has been to design a set of proposals which, whilst forming an integrated whole, *are capable of implementation in self-contained stages, with the maximum participation of private enterprise*' and adds that 'It offers an opportunity to private enterprise and public authorities together to achieve an outstanding environment in the heart of this great city'. * *Askin & Norton de facto, instructed Nigel Ashton, to act rid of the labor voters in the*

(iii) Page 4 where it is asserted that 'in order to deal adequately with the integration into the wider city area of the initial study area of Woolloomooloo, it has been necessary for the survey and analysis to extend over a somewhat larger area'. 17.1.2005

(iv) Page 10 where it is stated that 'the proposals have been designed to be implemented in reasonable, relatively self-contained stages, with optimum participation by private enterprise'.

(v) Page 14, where under the heading 'Traffic Circulation' it is stated 'The proposals aim to rationalize traffic movement in Woolloomooloo and close attention has been paid to the basic principles of road functions in combination with questions of accessibility, safety, the safeguarding of the environment and cost'.

(vi) Page 14 where it is stated 'Each area moreover, is capable of being developed at any stage quite independently of another'.

(vii) Page 16 where under the heading 'The Key Areas' it is said '... three particular areas have been the subject of more detailed study because of their importance in relation to certain of the original basic objectives for Woolloomooloo overall. These key areas are:

--Woolloomooloo Bay Area (where the first Plaintiff's land was situated)

--William Street

--Kings Cross'.

(viii) Further, under the heading (i) the Woolloomooloo Bay area it is said 'The study is intended to demonstrate the sort of complex possible, as well as the potential of the area for the purpose'.

(ix) Page 16 under the heading (ii) William Street it is said 'The creation of an important boulevard connecting Kings Cross to the City has been studied with close attention being paid to the scale, form, unification and quality of development fronting William street ... '.

(x) Page 18 under the heading 'The Overall Concept' it is stated that 'A study has been made therefore, to demonstrate how these principles can combine to form a totally integrated and ordered environment when extended over the whole of the Woolloomooloo area'.

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(xi) Page 19 under the heading 'Development Control' (also extracted in exhibit D p. 1) it is said: 'If a rational pattern of land use and movement is to be achieved ... , then a very effective and imaginative level of development control will be essential.' There are three aspects, namely:

Zoning and permissible uses

Density standards

Visual and architectural considerations.

The following paragraphs offer guidance on these matters.

(xii) Page 21 (also exhibit D p. 4) where it is asserted that 'the study has endeavoured to identify a *reasonable pattern of development* which will not only provide for efficient pedestrian and vehicular movement, but which will enable, within the blocks, a satisfactory architectural solution to land use'."

I have already quoted some oral evidence as to the effect of those representations. The plaintiffs say that the representations were untrue, and that the defendants knew or ought to have known that; that they acted upon the faith of the information conveyed to them in those public documents and that therefore they suffered the claimed damage. The key representations are those which are underlined in that long quotation; and by way of illustration, if one takes that first passage in sub-par. (i) and then has a look at the subject study in company with the Artarmon one or any other of those "exhibits" that claim of misrepresentation becomes evident. The portions which are not underlined are obviously relevant, certainly by way of background information, just as the heading on a letter would be when a statement in the letter is being assessed.

A form of defence raised on behalf of the second defendant alone:

*
x the City Commissioners 1967-69 & then
the Sydney City Council (Civic Reform).

To the claims of the plaintiffs in this action most of the grounds of defence were put forward on behalf of the first defendant, and although there emerged some points upon which the two defendants might not wholly agree, all of those grounds were supported and adopted on behalf of the second defendant also. That statement relates to the aspects of the plaintiffs' claim which have already been examined. That examination has of course involved long attention to all of the written and verbal submissions and to the detailed indices of the evidence relied upon to support those grounds; and for the reasons earlier stated (as indeed also with the analysis of the plaintiffs' submissions and indexation) the great part of it has not been repeated here. Not all of those grounds of defence have been specifically set out though my determinations have been made only after consideration of them.

As indicated at the outset there are some other more formal grounds of defence relied upon by each of the defendants, and I shall later deal with them. However, at this point I propose to examine one main defence raised on behalf of the second defendant alone in answer to all those already-examined aspects of the plaintiffs' claim.

While it was conceded that Mr Baker was told by the council that a new Woolloomooloo development project was coming out, and thereafter the council conducted that exhibition to which wide publicity was given and at which documents were distributed by the council, nevertheless it was submitted that the second defendant "through its representatives on the

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steering committee, was not the author nor a joint author of the study"; that it was not "through its representatives on the steering committee, party in any real sense, to the preparation of the study so as to be responsible therefor"; and that "the relationship between the SPA and council was ... merely that of independent contractor (professional planning consultant) and client". Therefore, it was claimed, that no council representative involved with the study was himself guilty of any (claimed) negligence in relation to the preparation of the study and that the council itself was not vicariously responsible for any (claimed) negligence on the part of the SPA or its officers in that preparation.

After examining the submissions in detail and the portions of evidence listed by counsel in support of that submission, I find that that defence fails. This was clearly a joint undertaking between the two defendants, and council cannot resile from joint responsibility for the content and effect of that study. Even if one or more of the above-quoted submissions were established, that would not destroy that finding. It may well be that council officers did not draft, write or print the document referred to and that none of them themselves "carried out" the study. But it was never suggested that the initial agreement reached between those two letters of 8th February, 1968, and 16th February, 1968, was cancelled or varied in substance, and when one re-reads those letters and then notices the town clerk's reference in his minute prepared a month before the publication of the study

to it as "a joint venture of the Council of the City of Sydney and the State Planning Authority" and his identification of the first "fundamental" as being that "an officer of the State Planning Authority would direct the actual study in consultation with the city engineer" and the other fundamentals as expressed, it is clear that this study was a joint undertaking involving joint responsibility.

It would therefore be a considerable narrowing of the word "responsibility" in the light of the evidence given as to the function of the steering committee if that were to be a basis for excusing the council from that responsibility. I quote

merely one remark by Mr Kacirek under cross-examination as to the function of the steering committee when proposals from the planning committee were put to the steering committee "for its imprimatur". He said that the steering committee "was in a position to cross-question the study team to satisfy itself that what was being put forward had a reasonable basis". As to the submission that the involvement of "individual council officers" in the study was incidental or minimal, the evidence outweighs it. It is true that the council's only two qualified planners, Mr McLachlan and Mr Doran, were not placed on that committee, and it was not disputed that their expertise in that field would be probably less than that of the town planners employed by the SPA. However, although the submission therefore stated that neither of them "loomed large" in the preparation of the study, views expressed by them were not apparently sought during the preparation of the study. The "playing down" of the importance of Mr Shaw, the Deputy Commissioner at the time, on that steering committee was in my view not supportable.

I cannot accept the submission that Mr Shaw's participation in the work and decisions of the steering committee was of no significance in the field of town planning. It is true that his qualification in town planning would be of little importance as such because at no stage had he practised in that field.

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However, being Commissioner of Main Roads, Mr Shaw had been an exofficio member of the SPA from its inception, and apart from the fact that public transport on roads in the inner metropolitan area would be a major consideration in that office, there is the evidence of Mr Kacirek as to the nature and quality of the knowledge of Mr Shaw which one could infer would be gained over his few years as a member of the SPA. Though there is understandably no evidence of the precise matters examined by the SPA during those early years, Mr Kacirek stated that he had contact with Mr Shaw after he himself came in January 1967 to the SPA and had been present at authority meetings at which Mr Shaw was present. He there "saw him participate fully in the deliberations that went on", which "included deliberations on planning problems" and included "examining and considering planning reports" and "also included ... deliberations on planning consultants' work ... from time to time". Mr Kacirek also said that he "understood" that Mr Shaw was interested in town planning and that the members of the SPA would have had occasion to make themselves familiar with the sort of work which would have been done by planning consultants in the State and by the authority's office at the time. He said that the meetings of the authority were held either once a week or once a fortnight and that they were to process all the business of the authority throughout the State, which would involve detailed consideration of planning problems requiring the members to address themselves to various planning studies which had been prepared. As to the steering committee itself there would at all times be "the fullest disclosure of information from the planning team". Mr Kacirek when asked in cross-examination as to direct action by Mr Shaw on the steering committee agreed that "the suggestion of Mr Shaw to move the boundary from McElhone Street further east to Brougham Street ... was made by Mr Shaw and was accepted by the other members of the steering committee and found its way into the ultimate study"; and he agreed that Mr Shaw fully participated in the decision to vary the plot ratio to the base ratio of 5:1 with possible bonuses as set out.

In the light of Mr Shaw's high standing and experience as the Commissioner of Main Roads, his supervision of that department, his interest in town planning despite no practice in it at all, his participation in the work of the SPA and his directly being the senior member of this steering committee on behalf of the council I decline to overlook or reduce his obvious participation in the preparation of the study and his responsibility for it on behalf of the second defendant. As to Mr Luscombe, again to "play down" his participation simply because he was obviously not qualified in town planning, is unsatisfactory in the light of the range of his responsibility and therefore knowledge of a lot of matters when developments are to be undertaken. As to the participation of Mr Stevenson, I have already referred to that, and additional detailed comment is unnecessary. He played a direct role, based on his office of city engineer.

If this defence was desired to be established, one type of support for it would have been the calling of witnesses. Senior counsel for the second defendant frankly announced during the hearing that although two of the three former aldermen upon whose statements the plaintiff relied in this action (Mr Port and Mr Harris) have died, other aldermen including Sir David Griffin, Mr Shaw, Mr Luscombe and Mr Stevenson have not. While there may be sound reasons for not calling persons who have retired

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from a busy life over a decade ago, no reason at all was put forward for the lack of evidence from Mr Shaw, Mr Luscombe or Mr Stevenson. While that non-calling does not of course preclude the defence which has been raised, mere reliance on some of the answers and parts of answers given in this long hearing provides in my view most inadequate defence in support of those submissions to which I have referred. Further, I quote two extracts from the document handed out by the second defendant to Mr Baker (exhibit E). The first of them is the initial statement in the study, double spaced and underlined under the heading "WOOLLOOMOOLOO REDEVELOPMENT STUDY":

"By arrangement, this redevelopment plan has been prepared by the professional planning organization of the authority in collaboration with, and on behalf of, the city council."

The second is an extract from the foreword on the same page:

"The city council sought the authority's assistance in undertaking the necessary study and plan; and the present proposals are the result of a collaborative effort between the council and the professional planning organization of the authority."

When all the above facts are only confirmed by those two original letters interchanged between the two defendants in February 1968 and particularly par. (c) of Mr Ashton's letter, that view gains support. This was a joint undertaking, and I find it unnecessary to examine the further submissions that as an alternative the council was vicariously liable for the performance of the planning committee.

For completeness in respect of this defence I state that I do not accept the evidence of Mr Briger which could suggest that the SPA was the "author" of the study in the sense that it was the sole author – that evidence being that he and/or his fellow aldermen "understood" that. It was, as I have stated, a joint undertaking. I also record (though rather redundantly in the light of my finding) that I do not accept the submission on behalf of the second defendant that either of those council decisions to adopt the study was one of "policy" – that is, those of 11th August, 1969, by the Commissioners and of 8th December, 1969, by the new elected council (the latter of which I referred to earlier when dealing with Mr Briger's evidence). I shall refer later to the expressed law on that matter and as to the words there used, neither of those decisions was one of "policy"; each was entirely "operational".

I conclude my examination of this defence by making one comment. In a separate *ex tempore* judgment on the last day of the hearing I ruled inadmissible in evidence a large piece of cardboard with a notice upon it (M.F.I. 16). For completeness I indicate that even if I had determined that the tender was admissible it would not have affected my finding that this was a joint undertaking involving joint responsibility. That tender of course was of no concern to counsel for the second defendant in the submissions with which I have just dealt but if it had been admitted it may have led to some submissions from the first defendant as to lack of responsibility of the SPA. However, in the light of all the other information such as that disclosed in exhibits C and D and the evidence given as to the attitude of the SPA to support the study – coupled with later events such as the granting of concurrence to development approvals and Mr Kacirek's evidence that "it had not been demonstrated" (that is, to the SPA) "it was not a satisfactory proposal on which to determine development applications". I would have

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reached the same decision on that joint undertaking and responsibility even if that tender had been allowed.

Findings:

At this stage I shall record the relevant findings on the matters so far examined, though later reference will be made to two separate claims on behalf of the plaintiffs and other defences on behalf of the defendants. I preface my findings with a brief comment. Earlier I have remarked upon the wide range of this "grey" matter of town planning and I repeat the content of my remarks by acknowledging the deep and wide examination which one must undertake before classifying a study in that area as having been done "negligently". It can be acknowledged that although one exercise has not been performed as carefully as another or others in relation to normal standards that alone need not establish negligence. The prime matter is the nature and degree of non-adherence to those standards in the particular case. In relation to this case I have firmly decided on the evidence given that the standard of preparation of this study was well short of normal standards, and that reasonable care was clearly not taken. The non-adherence to several aspects required by those standards has been set out and the amount of research and the documentation undertaken was small indeed in comparison with that required by those standards. The standards themselves apart from being clearly expressed, were illustrated by those "exhibits" of Mr Clarke (different though each of the studies were).

As will be seen, I have undertaken the task of expressing alternative findings. Although the final paragraph in this section (and, later, that in the section headed "Law: Duty") are intended to cover all elements of liability in the tort of negligence whether under *Hedley Byrne* or under *Donoghue v Stevenson*, I have expressed separate single findings as to some of the matters in respect of which submissions were made; and they and those alternative ones are recorded simply because of differently expressed views – more precisely, differently selected words – in judgments of the higher courts relating to elements in that tort.

Having made the finding that the preparation and the exhibition to the public of that study was a joint action of and by the two defendants, I record my findings first, that the study was prepared negligently by persons for whose acts and omissions the defendants would be and were responsible; and secondly, that information and representations in that published study were untrue as a result of negligence by persons for whose acts and omissions the defendants would be and were responsible.

In answer to submissions made on behalf of the defendants I now record some specific findings which primarily relate to the plaintiffs' claim based on the *Hedley Byrne* rule. The defendants (and each of them) were in the position of an

expert organization whose business included town planning and were known to be such; indeed they let their skill and competence in the area of town planning be known in that published study. The defendants (and each of them) knew or ought to have known that persons such as the plaintiffs and other developers would rely upon their skill and judgment in the field of town planning and upon any information given by them (such as in a study as the one published); and that they were being trusted by those persons to exercise due care and to give information which they were believed to possess; and to that I add, to use the words of Barwick C.J. in

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Mutual Life & Citizens' Assurance Co Ltd v Evatt (1968) 122 CLR 556 that the defendants (and each of them) were thought by the plaintiffs to have, or to have particular access to, information or to have a capacity or opportunity to exercise judgment or both as to the matter in hand. (Indeed the defendants (and each of them) realised that those recipients could well act on the information in the exhibition in relation to the land in the area of the study.) In my opinion the developers (and I use that word in the wider sense to which I have earlier referred, certainly as including investors and guarantors in respect of land purchase, whether under mortgage or not, in the area the subject of a particular study (plan)) were a determinate and an ascertained class to which the plaintiffs belonged. (I note that later under the heading "Law: Duty" I expand upon that matter and the relevant relationships between the defendants and the plaintiffs.)

Mr Baker did so trust the defendants, did so rely upon that information, and did act upon it in relation to that land. As I have already found, Mr Baker was a reasonable developer and in respect of each of those matters his trust, reliance and action, was reasonable.

I now record the two other findings in relation to the claim based on the *Hedley Byrne* rule insofar as either of them may later be necessary. The first relates to Mr Baker. I find that he was an "inquirer" of the information. (The reasons for that are: he made preliminary inquiries and attended the exhibition, sought and obtained documents there and later exhibit E from the council building department; in issuing those documents the council was acting on behalf of both defendants; the information in those documents was just as much an answer to that inquiry of Mr Baker as if it had been supplied to him alone or to him in response to questions.) He accepted the answers. (However as to that I make an alternative finding in the event of that finding being held to be erroneous; that the exhibition of the material was the publishing of information (if not the "pressing" of it) to Mr Baker and other developers.) The previous paragraph applies to either situation. The second finding relates to the alternative basis for responsibility of the defendants, (vide par. 33 in the amended statement of claim). In my opinion each of the defendants had at material times a financial interest in the proposed redevelopment: the second defendant owned property for sale and was the rating authority; the first defendant was paid that sum for the preparation of the "redevelopment plan".

The central findings then are as follows. The information (the representations) so published and so relied upon was false and therefore a misrepresentation, though honest. The defendants were negligent in giving that information (making the representations). That negligence caused the economic loss suffered by the plaintiffs, and such damage by way of economic loss was reasonably foreseeable. (I shall expand upon the matters of causation and foreseeability shortly.) There was no disclaimer of liability by the defendants (or either of them). I find that all elements of liability of the defendants in negligence based on the *Hedley Byrne* rule resulting in damage in the form of economic loss to the plaintiffs have been established.

For reasons later to be given in the section headed "Law: Duty", I shall also find that the plaintiffs are alternatively or additionally under liability in negligence to the defendants on the *Donoghue v Stevenson* principle. On that alternative-or-additional finding, that negligence was in respect of the

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preparation of the study and then its publication; it caused that economic loss and that loss was reasonably foreseeable.

Causation:

On the matter of causation Mr Baker's examination and reaction to the study and his reliance upon it and his consequent purchases of the subject property, supplemented by his later reliance on council verbal information has been set out. The findings of negligence in the preparation of the study and consequent misrepresentations in it are also recorded. But on behalf of the defendants the main submission against causation having been established by the plaintiffs was that the abandonment of implementation of the study did not result from that negligence and/or misrepresentation. (I have used the word "abandonment"; that is the word primarily used in the submissions on behalf of the plaintiffs, and I am not persuaded by the suggestion that because that word does not appear in the council records -- a correct statement -- the claim is wrongly based.) The evidence of the progress of realization of deficiencies in the study especially in respect of the nature and extent of the transportation problem have been referred to above. But on behalf of the defendants it was claimed that the losses of the plaintiffs claimed in this action did not result from that.

As indicated earlier, it was on 9th November, 1972, that Mr Baker first learnt of the non-continuance of the project, that is to say, the decision of the council no longer to deal with development applications by applying the provisions of the study, and to review the study. The submission on behalf of the defendants is that that decision was reached apart from the alleged negligent preparation and subsequent publication of the study. I do not propose to set out here each of the claims of "breaks" in the chain of causation put forward on behalf of the first defendant and which I do not accept. The central event in the dispute on this matter was the recommendation of the Commonwealth Parliamentary Standing Committee on Public Works on 29th August, 1972, to abandon the proposal concerning the Commonwealth office in the area. There was no disagreement as to the importance of that development proposal and Mr Kacirek pointed out more than once that the Commonwealth Centre was a "catalyst" for Woolloomooloo. The decision during the preparation of the study to erect Commonwealth offices was therefore a critical factor in the decision to incorporate significant office space there. Likewise any probability of abandoning it would be a very critical factor in relation to any discontinuance of the project.

The submissions to that committee on behalf of each of the defendants urged a low workforce in the Commonwealth building. The submissions on behalf of the second defendant appear in a long transcript tendered on behalf of the second defendant (exhibit C17, vol. 2, document 32) and they criticise the "Woolloomooloo scheme". The committee ultimately expressed its opinion as follows:

"(i) There is evidence that the implementation of the proposal would contribute to the scale of workforce in excess of the desirable level in the Woolloomooloo basin;

(ii) Staff and public utilization of the complex will strain road, transport and other services beyond capacity and cause serious long term inconvenience to commuters and the public;

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(iii) Public interest would be better served if the Commonwealth used its current need for large scale office accommodation as an occasion to take a significant initiative towards the principle of decentralization;

(iv) The project should be disapproved and consideration given to decentralizing the proposed office complex and future complexes";

and recommended that "it is not expedient to proceed with the proposed work as submitted by the sponsoring authorities".

From those recommendations I form the clear opinion that the content of par (i) and (ii) above is the main foundation for the futuristic alternatives set out in (iii) and (iv) above and therefore the basis of the recommendation.

Immediately after the publication of the Committee's recommendation as Mr Kacirek and Mr Briger stated in evidence, the Opposition spokesman with responsibility for urban affairs said that if his party was successful at the then forthcoming election it would abandon a Commonwealth office development in Woolloomooloo. (And that is what happened after the Opposition had been elected in December; the steps were later taken to establish Commonwealth offices at Parramatta.) At this point I quote from Mr Briger's evidence. After he had

answered questions in cross-examination relating to the position to his view that despite the best endeavours by council there had been no upgrade the transportation facilities beyond those which had been planned; secondly, to the Parliamentary Committee's recommendation, and thirdly, to that announcement from the Opposition, he gave these answers:

"Q. All of those matters were matters that made it appropriate in September 1972 to look again at the question of Woolloomooloo? A. Yes, that is correct.

Q. The action plan for Woolloomooloo then got underway fairly shortly after September 1972? A. That is correct."

An event however which was stressed by counsel for the first defendant was the decision of the council in March 1972 to prepare an action plan for Woolloomooloo (it would be No 7 of the action plans which it had earlier decided to undertake). As to the submission that that was the cause of the council's decision in September to review the Woolloomooloo plan (to which I shall refer shortly) and that therefore the recommendation of that committee is not causative, it is denied by the record of evidence given by the council representatives before that committee (exhibit C17, tendered on behalf of the second defendant). Mr Briger gave evidence on 24th July, 1972, to quote just portion of the longer sentence which does not deny the substance: "It is not right that at this stage we introduce a new code." At least that was confirmed on the next page when Mr Briger was asked: "The Woolloomooloo scheme is the one which you still uphold is it not?" Mr Briger, "Yes"; and to remove any doubt on the matter, Mr Doran, the city planner for the city council (who also gave sworn evidence) made the position clear:

"The council's attitude is this: Until such time as it is proven wrong the council should stick to the published document that was published in 1969 and which has been the basis of site amalgamation there."

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Mr Briger had earlier in July indicated the council's intention to adhere to the provisions of the study.

Following that recommendation of the Public Works Committee on 29th August the *Sydney Morning Herald* in an editorial on the next Saturday morning stated: "Surely it is time for a thorough review of the planning scheme for Woolloomooloo", and Mr Llewellyn-Smith (the then recently appointed chief planning officer) sent a note to Mr Briger, dated 5th September, and a more complete one on 29th September. Clearly Mr Llewellyn-Smith's opinion was that the study was defective and his recommendations were in effect not to proceed with land acquisition on the basis of the study. As Mr Briger put in his statement, exhibit C16: "Mr Llewellyn-Smith submitted to me a brief for the preparation of action plan No 7 for Woolloomooloo involving an examination of the validity of the SPA study". Mr Briger acceded to that view.

At this point I state my finding that the events which occurred after 9th November, 1972, (earlier listed) are not relevant, the main ones being the change in Federal Government in December 1972 and the subsequent "green ban" imposed in early 1973. They were not the cause of any economic loss to the plaintiffs; they happened after the loss occurred and was discovered by Mr Baker; and no subsequent action of Mr Baker was in any sense causative of that loss. This -- as I said earlier -- is not a time for the application of mere hindsight, a point indeed strongly made by counsel for the second defendant.

There were other submissions on behalf of the defendants on this matter and I have considered them. I shall refer however to one in addition to that main one, namely, that the "chain of causation" broke down because the cause of the abandonment of the study "was the council's own assessment of the situation". Again, I have not quoted all the portions of the evidence and exhibits to which reference was made during the submissions, and which I have read, but one thing does appear from the evidence, namely, that the council did strongly desire to continue with this project. There is nothing then in that formal submission which alters my view that it was that deficiency and misrepresentation in respect of the transportation/workforce matter -- for the reasons set out above -- which led to and caused the decision of the council to abandon this matter. In normal "tort" language, the claimed loss suffered by the plaintiff was "caused or materially contributed to by the negligence of the defendants".

Foreseeability:

While foreseeability is primarily related to the alternative basis upon which the claim is made, namely, the *Donoghue v Stevenson* principle, I shall certainly record a finding upon it. In my view reasonable foreseeability of economic loss to persons such as the plaintiffs, whether in relation to the negligent preparation or to the negligent misrepresentation, is obvious in this case, but for completeness I shall expand upon that. The evidence indicated, and it is shown on maps 14 and 15 of exhibit 11, that a considerable proportion of the land within the study area was privately owned. It was therefore foreseeable -- and I consider that the submission made on behalf of the plaintiffs that it was "axiomatic as a matter of town planning practice" that these redevelopment proposals when published would first affect the values of the land within the areas and secondly affect the

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attitudes of investors and potential developers to the purchase of land within the area. The form in which proposals were prepared would have a particular effect of great increase to development potential and expectation. "The proposals were in fact to turn this low scale area into a major and highly intense development area", to quote from the evidence under cross-examination of Mr McInnes, and this was for an area zoned county centre where earlier low land values and much planning uncertainty prevailed. Further the fact that these proposals were published by the two defendants, the first one being the highest planning authority in the State would thereupon lead to a sharp increase in values in the area and to investment in the land by investors and developers -- such investment including those items of purchase, mortgage or guarantee and including the cost related to the holding and financing of land.

The defendants would have been, or certainly should have been aware of those matters and that was only confirmed in substance by the evidence of both Mr Kacirek and Mr Briger. That received confirmation because the steering committee had received inquiries from and had interviewed developers who were awaiting the release of the plan and who had expressed interest in acquiring land for redevelopment. Mr Kacirek gave evidence on that matter.

The chief submission of senior counsel for the plaintiffs was that in these circumstances if either the plan was infeasible of implementation and it for that reason if failed or had to be abandoned, it was foreseeable that loss would be sustained by those who had invested money in land within the study area. I agree with that and with the further submission that "in particular it was foreseeable that a loss would be sustained, under the circumstances mentioned above, by persons who invested money in land within the study area with knowledge of the terms of the study and with the expectation of being allowed to develop (or sell for development by others) in accordance with, and to the extent envisaged by, the study", counsel indicating that by the term "allowed to develop", he intends to include "not only formal statutory approvals but also any necessary co-operation by the defendants (as by the closure and sale of roads and the council works depot), and associated statutory authorities such as the Height of Buildings Committee (HBC) and the Department of Main Roads (DMR)". My finding as to foreseeability is stated above.

I find that the (claimed) loss suffered by the plaintiffs was reasonably foreseeable by the defendants.

Law: Duty:

On the question of the law, I shall deliberately be brief. The ultimate decision is for the final court on appeal or its majority. While several of the statements made in the many considered cases have bearing on the decisions in law to be reached in this case, it nevertheless has features that are without precedent in the authorities and could be described, as it has been, as a "test case". I will therefore refer only briefly to certain passages in the judgments which will be quoted, and indicate my opinion of what is the relevant law for application.

The case for the plaintiffs is put forward as based upon *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; or, to state it more briefly on the *Hedley Byrne* rule. That dependence was reinforced during

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submissions by receipt of the judgment of the High Court in *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 46 LGRA 65. I shall quote extracts from its judgments shortly, but it is appropriate to preface that with some comments. During submissions there has been long consideration of the progress of the law of tort in relation to negligence since the *Donoghue v Stevenson* case [1932] AC 652; and particularly examination of the several cases since *Hedley Byrne* in which its rule has been considered in relation to their differing facts. Though the *Shaddock* case deals specifically with negligence based on wrong information given to a plaintiff's solicitor by the local council, the substance and facts of the present case are certainly deeper and wider. One must bear in mind the number of remarks in the higher courts as to undertaking any "extension" of the ambit of liability in actions based on negligence other than those involving physical damage. I quote from Lord Pearson in the *Hedley Byrne* case itself [1964] A.C. 465, at pp. 536, 537:

"How wide the sphere of duty and care in negligence is to be laid depends ultimately upon the court's assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and width of the range of possible claims has acted as a deterrent to extension of economic protection."

I shall not quote several other extracts on that matter but shall with respect apply the succinctly expressed guidelines in the judgment of the Chief Justice in the *Shaddock* case, when I come to decide whether there is a duty or not in the present case. Because it could be thought upon one or more bases that I could be "extending" liability for negligence by entering a new field I shall "proceed cautiously, step by step", and interpret expressed opinions in speeches and judgments in these important cases "secundum subjectam materiam" (per Gibbs C.J., at p. 71) of the High Court judgment in *Shaddock*). Also before quoting from *Shaddock*, I note that two items in a claim such as the present have been confirmed: first, that "there is no valid ground on which to distinguish between information and advice for the purposes of the rule in *Hedley Byrne*" (per Gibbs C.J., at p. 70); secondly, that the fact that the only damage claimed to be suffered is that of economic loss does not preclude such an action, though the situation of a plaintiff in relation to the negligence relied on is important, and I shall discuss it later.

I quote first from the judgment of the Chief Justice in *Shaddock's case* (at 71, 72):

"From the standpoint of principle there is no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons, whether or not it has a statutory duty to do so. In either case, the person giving the information to another whom he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to exercise reasonable care that the information given is correct. A public body, by following the practice of supplying information upon which the recipients are likely to rely for serious purposes, lets it be known that it is willing to exercise reasonable skill and diligence in ensuring that the

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information supplied is accurate. In the circumstances, diligence might be more important than skill, although competence in searching for and transmitting the information must play a part. However, even if diligence only and not skill were required, a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions.

The conclusion that the duty now under discussion extends to public bodies which follow the practice of supplying information is supported by the decision of the Court of Appeal in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, where a rural district council, whose clerk had negligently failed to mention, in a certificate given in response to a search, made by an intending purchaser, of the register of local land charges, that the plaintiff ministry had a charge on the land, was held liable for the loss suffered by the ministry because the purchaser in consequence took the land free of the charge. It is true that this decision was given before *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556, but since the decision in that case it has been mentioned without disapproval by Lord Edmund-Davies in *Moorgate Ltd v Twitchings* [1977] AC 890 at 920, and applied by Sir Robert Megarry V-C in *Ross v Caunters* [1979] 3 WLR 605 at 621, 622, and it was, in my respectful opinion, correct."

I also quote from the judgment of Mason J., with whose judgment Aickin J. agreed (at pp. 84, 85):

"In the present case we are not concerned with advice given by a life assurance company in relation to an investment in which it had special knowledge, but with information furnished by a local authority, in relation to proposed road-widening proposals. There is no ground for confining the liability to those who engage in a business activity and for excluding those who provide negligent advice or information in the course of discharging a government or administrative responsibility. The citizen is just as likely to rely on the accuracy of advice or information given to him by a government department, a statutory authority or a local authority as he is to act on similar advice or information given by a person who carried on a business. And there is no persuasive reason for saying that the citizen who sustains damage as a result of information negligently given by a government department or authority has no remedy, although the citizen who sustains similar damage as a result of information negligently given by an investment adviser has a remedy.

The suggestion that the imposition of a duty of care and consequential liability would unduly hamper statutory and local authorities in the discharge of their public functions is an unsupported assertion. Local authorities provide information and advice to citizens in connexion with a wide range of matters and in so doing, I assume, make a real endeavour to provide accurate information and advice. Recognition of the existence of a duty of care and consequential liability would make little difference, if any, to the standard of care taken in giving information and advice. An authority can, if it wishes, obtain protection against liability by means of insurance.

It is inconceivable that the practice of giving information as to proposals affecting property will be discontinued merely because the

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provision of inaccurate information may expose an authority to liability. In the discharge of their public functions local authorities have in a practical sense an obligation to provide information of the kind now in question in response to a request. It is information of vital importance to an owner or intending purchaser. It materially affects the use to which the land may be put in the future and its value. Because it relates to intended acts of the authority, it is information which it alone possesses. In these circumstances it is improbable that the practice of providing such information would be discontinued, though it is possible that a fee might be charged and that an endeavour might be made to exclude liability. That is quite a different matter.

The specialized nature of the information, the importance which it has to an owner or intending purchaser and the fact that it concerns what the authority proposes to do in the exercise of its public functions and powers, form a solid base for saying that when information (or advice) is sought on a serious matter, in such circumstances that the authority realizes, or ought to realize, that the inquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice. In Canada it has been so held on a number of occasions -- see, for example, *Windsor Motors Ltd v District of Power River* (1969) 4 DLR (3d) 155; *Gadutsis v Milne* (1972) 34 DLR (3d) 455; *HL & M Shoppers Ltd v Town of Berwick* (1977) 82 DLR (3d) 23; *Jung v District of Burnaby* (1978) 91 DLR (3d) 592. Such are the functions and responsibilities of a local authority that it is possible that a local authority may come under a duty to provide accurate information in connection with its activities or proposed activities. This is not a question which needs to be presently considered -- it was not argued that the respondent was subject to such a duty in the present case."

Stephen J. had earlier cited a number of Canadian cases (to which Mason J. also referred) in support of his statement (p. 78) that:

"It is noteworthy that in Canada a number of decisions have held municipal corporations to be liable in damages for negligent misrepresentation. These cases apply the doctrine in *Hedley Byrne* to situations very similar to the present, *Mutual Life & Citizens' Assurance Co Ltd v Evatt* being seen as involving no relevant qualification."

I add one other quotation again from Lord Pearson, in his speech in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1005 at 1055:

"The existence of the statutory duties does not exclude liability at common law for negligence in the performance of the statutory duties."

The two main differences between this case and the *Shaddock case* are as follows. The first is that between that Town Hall exhibition on the one hand and the vacancy of that portion of that council form on the other hand. In the *Shaddock case* that blank space on the form is to be classified as information for, as the Chief

Justice said, it was "tantamount to the giving of information". In the present case, although there was no request for a specific verbal or written answer at that stage by the plaintiffs, was that study information? In my opinion it clearly was. It could be that every person who examined the study could have overlooked one or more plans or one or more paragraphs in documents, or omitted some other portion, but

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there was the overall information. As I have said earlier in the judgment the study should be assessed in that overall way. The "representations" which I have set out earlier by copy from the written submissions on behalf of the plaintiffs were not chosen in my opinion on the basis put forward in submissions on behalf of the defendants, that is, of reliance of some but "ignoring" of the rest. Mr Baker's evidence is quite to the contrary on that. They illustrate the nature and content of the study and therefore of that "information", and to quote at this point from yet another judgment, I refer to the passage in that of Barwick C.J. in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 573. After a summary of his views as to the nature and effect of the information and advice under consideration, and of the obligations of the advisor, the Chief Justice continued:

"In this connexion, I would observe that it is, in my opinion, incorrect to limit the advice which may carry liability to advice about an existing situation. The exercise of judgment so often involves an element of prognosis."

If there is one thing which a developer is interested in it is prognosis, and those extracts listed under "representations" indicate to a developer the fundamental aspects of future participation. I have no doubt on my finding of this information being given by an overall study, but if a contrary view is taken I would still find that exhibits C and E because of the nature of those representations would alone provide the necessary information.

The other difference between the *Shaddock* case and this case is that there was here (that is upon the findings I have made) clear negligence, in the preparation of the study separate from, though the origin of, that wrong information (misrepresentation). *Shaddock* produces negligence only because of the carelessness in giving wrong information. But I will act on a basis that there is no difference in principle on that aspect. One common feature relevant to it is of course the *Hedley Byrne* characteristic of absence of any fraud or dishonesty, fiduciary relationship or contractual relationship. The short point is that the information provided in each of the cases was untrue -- that word being read in the light of my previous sentence -- and that that falsity was because of negligence.

In the light of my observations on those two matters, perhaps an important next inquiry is: Having regard to the expressions used in all the judgments, is the basis of liability in this case "negligent words" or "negligent acts". My first answer to that is that it is "negligent information", the information necessarily coming under that alternative of "words"; and that the substantial difference (in the two cases above considered) in the type and extent of the negligence which characterized each of them is irrelevant. Here however, I indicate that later I shall examine that question on the other basis, which could possibly be thought to be the correct answer, that is, that in the light of all the evidence the negligence here is not "information" and cannot be called so simply because it produced false "information" but it was directly a "negligent act/omission". (I define "act" with that alternative which the infinite number of cases under this tort would, I think, establish as a correct identification when one is generalizing.)

As said in the findings in this case earlier expressed, the plaintiffs have in my view established all the necessary elements of liability of the defendants

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in this case under the *Hedley Byrne* rule. The particular element which could probably lead to more argument than others against that view is that of the "status" (a loosely-selected noun for the purpose of examining that argument) of the plaintiffs. I have indicated my opinion on the relationship of Mr Baker to this information provided by the defendants. However, it is appropriate for me to express here my views based upon the relevant passages in the judgments in *Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad"* (1976) 136 CLR

529. It could, in my opinion, be difficult to find a more "determinate" or "ascertained" class of persons to be affected by this "information" than developers. That view would surely be confirmed by the fact that the study was directed at developers ("private enterprise" and other phrases might be more particular, but I am dealing with the substance of the matter), and further confirmed by the obvious encouragement easily discernible in it. The developers themselves were "waiting just across the line for the presentation of that study so that they could read it, and therefore they were not merely "recipients" but the persons of the type expected to respond. It could therefore also be difficult to find a more "specific" class of persons. They were certainly "proximate" to the defendants and their actions, and, if affected, they would be "directly" affected. I think therefore that the "status" (vide supra) of the plaintiffs in the circumstances of this case places them within that ambit of the application of the *Hedley Byrne* rule notwithstanding that the only damages are economic loss; and if that were considered not to be so under the existing law, I think that it would be a proper "step" to extend the ambit to take in liability in this case. To apply that "limit" as indicated in the *Caltex* case and by judgments in other cases -- and I refer back to that earlier quotation from Lord Pearson in the *Hedley Byrne* case itself -- would obviously be open in relation to other potential plaintiffs emanating from such a matter as this; for example, in the light of what happened, "outside" persons who had advanced money to developers on a separate business basis between the parties, and suffered economic loss as a result of the non-implementation of this study could well -- depending on the particular characteristics of their case -- fail to establish the requisite duty. In short, such a plaintiff would not be "proximate" but only indirectly affected, in sharp contrast to the position of the plaintiffs. As to the submissions put forward on behalf of the defendants that the qualification needed for maintaining a case here on the *Hedley Byrne* rule was to present oneself at those pre-publication consultations or elsewhere personally and so be "specific", I cannot accept that understanding of the judgments delivered in the *Caltex* case. However, I note incidentally that Mr Baker (that is, apart from inspecting the study, obtained exhibit E from the building department); and that before the publication of the study he had made inquiries from sources as stated in his evidence.

I conclude my comments on the *Hedley Byrne* rule by quoting a passage in the speech of Lord Salmon in the fairly recent House of Lords decision in *Arenson v Arenson* [1977] AC 405 at 438, 439. The appeal was primarily concerned with another matter, a claim of immunity from liability by an appointed arbitrator; but the defendant had prepared a report for a prospectus and included a valuation of some shares, and his Lordship during his attention to the applicability of the *Hedley Byrne* doctrine said:

"If they had negligently overvalued the shares, they could have been sued by all those members of the public who had bought shares on the

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faith of the negligent overvaluation. If they had negligently undervalued the shares they could have been sued by their clients. This is the kind of risk which has been accepted by innumerable firms of accountants ever since the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* apparently without any injury to themselves or to the public interest."

That again would indicate the absence of requirement for contact with a specific plaintiff provided of course that the class of person involved is clearly identified as it was there.

Having made that finding based on the *Hedley Byrne*, I shall now enter the other area (referred to above) of "negligent act/omission" which will be made for two reasons: first, it is appropriate in my view to record an alternative finding in case that one is held to be erroneous; secondly, having made the finding, I shall express the view, although it could also be held erroneous to do so, that it should stand together with that earlier one, and not merely as an alternative to it. The decision will be based on *Donoghue v Stevenson* [1932] AC 562. I shall preface my observations by quoting from the judgment of Sir Robert Megarry V-C in *Ross v Caunters* [1980] 1 Ch 297 at 313, 314:

"But for present purposes its importance is that the House of Lords rejected pure *Donoghue v Stevenson* principles as forming the basis of liability for negligent mis-statements and instead based liability on the plaintiff having trusted the defendant to exercise due care in giving information on a matter in which the defendant had a special skill, and knew or ought to have known of the plaintiff's reliance on his skill and judgment. In this type of case, reliance forms part of the test of liability, as well as part of the chain of causation: and the effect of such a test of liability is to confine the extent of liability far more closely than

would an application of pure *Donoghue v Stevenson* principles. If liability for negligently putting into circulation some innocent misrepresentation were to be imposed on the same basis as negligently putting into circulation some dangerous chattel, the resulting liability might be for enormous sums to a great multiplicity of plaintiffs. One way of preventing any such liability being imposed is to make the test of liability more strict; and that was the way adopted in *Hedley Byrne*. But that does not affect those cases in which the principles of *Donoghue v Stevenson* apply."

My opinion is that that continually-quoted passage from the speech of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at p 580 can be used here. That group of people in the community, developers, would, in the context in which the words appear, be "closely and directly affected by" the exhibition of that study by the two defendants. I can find no other passages in that speech or in the speeches of Lord Tankerton or of Lord Macmillan which remove the applicability of that well-known passage to the circumstances of this case. The plaintiffs were "neighbours" (if not -- to express it perhaps too briskly -- members of a "target") in this case at least as much, if not far more, than that prospective purchaser of that ginger-beer bottle in the *Donoghue case*; and foreseeability of loss consequent upon the breaches of duty which I have found to exist would be clear. It is true that the

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negligence in preparation as such of the study would have no resultant damage to the plaintiffs unless it was to be published; but the defendants published it and Mr Baker acted upon it. The fact that the damages are economic loss alone does not now in the light of recent decisions preclude the application of the *Donoghue v Stevenson* principle. As to the matter of reliance, while it is an integral element under the *Hedley Byrne* rule apart from that also of causation, I cannot see (as was submitted on behalf of the defendants) that its existence in cases which are not "negligent words" cases precludes therefore the applicability of that principle; or expressed in another way, does that element of reliance separate a "negligent words" case from a "negligent act/omission" case? If one just pauses to think upon that matter one can see a range of "negligent act/omission" cases where a plaintiff's reliance on a situation has been followed by action or conduct by him which has led to damage occasioned by a defendant's negligence; a patient relying on a mistakenly-written doctor's prescription, without reading it; a car-owner relying on repairs to his car and driving it away only to suffer injury because of a negligent mechanical defect; and if the word is stretched, a purchaser of a sealed bottle of ginger-beer could pour its contents into his tumbler before tasting the interned snail and regretting his reliance on assumed purity. It is true that the reliance referred to in those examples is somewhat of an "inferred" reliance (though obviously a factual one) as against a positive one, but the question is whether the *Donoghue v Stevenson* principle is to be inapplicable because of "reliance". Those examples certainly involve physical injury but limitation which has been placed on claims for economic loss arising out of negligence are not directly involved in the point being examined here. While I respectfully agree with all the dicta which foreshadow a multiplicity of claims in the area of economic loss unless limitations are imposed and that those limitations must be primarily based on the concept of "direct" or "proximate" or "special" relationship of a plaintiff to a defendant, I would think that that limitation could be correlated with the *Donoghue v Stevenson* principle without risk of narrowing it in relation to physical injury or property damage.

It is not the task of a first instance judge to express new law when the case in any event is proceeding to the highest court in the land. These comments are expressed only because after long consideration of the nature and detail of this interesting case, it is clear there was negligence in the preparation of that study; and if there was an existent duty which was breached but could not be based on *Hedley Byrne* I would think it unfortunate if not unrealistic that it could be held that there was no other base for it in the law of negligence. One can perhaps envisage that this case could be considered to fall "between" the *Hedley Byrne* rule and the *Donoghue* principle. If it does that as against being beyond the outer limit of each of them on its outer side, then some duty should still exist. Presumably there will be in the years and decades to come some further reasoning in relation to negligence, and the possible views which I am expressing suggest to me that there is in fact a common line of thought involved in both cases of negligence, though its application to particular cases may vary in degree at different points.

While I am about to record a finding in respect of this alternative-or-additional claim, in conclusion of this "Law: Duty" section I shall indicate what is the basis for my comments in the preceding paragraph combined

with my earlier remarks about the special characteristics of the plaintiffs-defendants' relationship in this case by respectfully quoting a passage from the speech of Lord Pearson in the *Dorset Yacht* case [1970] AC 1005. His Lordship commenced his speech by quoting the content of an order which had earlier been made by the Master on a summons for directions in that case, and then proceeded (at p. 000):

"The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage."

It is my opinion, as is clear from those earlier remarks, that when the existing law is considered in combination with the facts of this particular case it should clearly produce liability within "the tort of negligence as a whole".

I now record (as an alternative-or-additional one) the finding that all the elements of liability of the defendants in negligence based on the *Donoghue v Stevenson* principle resulting in damage to the plaintiffs have been established, and that such liability in this case, is in respect of damage of the nature of economic loss.

Other matters:

Additional claims of the plaintiffs:

The plaintiffs have made an alternative claim in negligence based on those statements made by Mr Hill and Alderman Harris in the conversations Mr Baker had with them. Because of my findings in support of the main claim of the plaintiffs it is unnecessary to rule on this alternative claim, but I shall do so for completeness and for the reasons set out earlier in this judgment. This alternative claim appears to be primarily based upon the assumption that the plaintiffs could not succeed under the *Hedley Byrne* rule unless the person who relied on the negligent statement is "specific". Mr Baker spoke to the council representatives personally on these occasions and obviously he was indicating to them his own proposed participation in the project.

I shall treat this claim solely as an alternative one, that is, on the basis that the plaintiffs had failed to establish their first claim in negligence. On that basis I would find, notwithstanding the relevantly significant offices held by Mr Hill and Alderman Harris, that is, as to their capacity and authority to give the information they did, there is lack of proof in the other elements required by the *Hedley Byrne* rule in support of this individual claim. I cannot see the information given to Mr Baker on these occasions as creating a situation comparable to that in the *Shaddock case*. I do not see the representations -- that is, again separating those conversations from the whole of the events and incidents prior to the first of them -- as alone constituting negligent misrepresentations in the sense of each or both of Mr Hill or Mr Harris giving information that was false. Therefore I would, if it were necessary, dismiss this claim of the plaintiffs if they had failed in their first claim.

However I cannot leave this matter without stressing another aspect of those conversations. In relation to that main claim of the plaintiffs in which they have upon my findings succeeded, these representations (that is, the statements of Mr Hill and Alderman Harris) together with those that followed them right up to the time of that later talk with Mr (as he then was) Shehadie only strengthen or reaffirm a very important aspect of that main claim. My view is quite clear that Mr Baker relied on each and all of those statements; and although I would certainly hold the main claim established independently of each and all of those statements, they are simply supplementary in respect of that claim because of that reliance. However, notwithstanding that, I am unable, as stated, to hold that there is a separate and independent claim based on the *Hedley Byrne* rule upon them alone.

The final claim by the plaintiffs of liability is in respect of the subsequent adherence to the study although statements as to defects in it as to the transportation/workforce matter continued to be made. The claim is that the defendants were negligent in failing to warn the plaintiffs in relation to those matters. (It is more precisely expressed in par. 34 of the statement of claim.)

Before the end of 1969 the council had received certain criticisms of the study. In a minute dated 28th October, 1969, and sent to the acting city engineer, Mr McLachlan, the then principal planning officer set out a number of comments by way of criticism ending up with the sentence that "time will prove that the State Planning Authority's plan for Woolloomooloo will suffer the same fate as the Rocks area plan"; but apparently little or no consideration was given to it. According to Mr Clarke's evidence there was some antipathy between Mr Stevenson and Mr McLachlan and that could have been a cause of that. By a letter dated 17th November, 1979, sent to the Lord Mayor, the president of the Royal Australian Institute of Accountants, Professor Johnson, made a number of criticisms of the study, and he sent copies of the letter to the Minister for Local Government and the chairman of the SPA. I note that he referred specifically to the absence of any station on the (then being constructed) Eastern Suburbs Railway which would serve the western part of the area and that his institute believed that that omission would "create serious inconvenience". Only a letter of acknowledgement was sent in reply. Next it was in early 1970 that Mr Clarke and his team were appointed for the preparation of the strategic plan, and it was in September of that year that Mr Clarke had a conversation with Alderman Briger and Alderman Port in which he expressed concern about the result of applying the study. Mr Briger acknowledged in evidence that Mr Clarke was clearly of the view that the application would cause problems, particularly transportation problems because of the "enormous workforce" which in Mr Clarke's opinion the plan would produce. Mr Clarke expressed himself in strong terms apparently stating that "we just can't handle anything like that kind of expansion in Woolloomooloo transport-wise, socially, functional, anyway". But council adhered to the plan. There were subsequent warnings by Mr Clarke to Alderman Briger between September 1970 and February 1971 but Mr Briger stated in evidence that although by that latter date he was aware of the size of the workforce-projections which had been nominated by a number of persons as being substantially in excess of the original figure of 35,000, nevertheless council was determined that it would still apply the

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study. Mr Clarke repeated to Mr Briger and Mr Port his strong opposition to the study just before a meeting on that date of 11th February, 1971, and Mr Briger asked Mr Clarke to be quiet at the meeting on the matter, which he did. Those estimates of the workforce (earlier mentioned) had been expressed by Mr Wickham, Mr Crockett, and referred to by the Lord Mayor in a letter. Mr Briger readily conceded in evidence that a figure of 90,000 "in the basin" would create a "major problem". Finally when the City of Sydney Strategic Plan was published in July 1971 there were clear statements of criticism relating to the study. (As noted before these statements had been "adjusted" following "negotiation" between Mr Clarke and Mr Briger, a process that was quite understandable in the circumstances; but what appears in that strategic plan is certainly a far less forceful criticism than the several ones on this matter of transportation/workforce problem which had been expressed verbally by Mr Clarke to Mr Briger over the months.)

That is then a brief summary of the knowledge of criticism held by the council at the (presumably variable) relevant time. Although Mr Clarke stated in evidence that he had a meeting on 8th February, 1971, with Mr Kacirek at Mr Kacirek's office at the SPA, in which he advised him of his own view as to the problems in relation to the Woolloomooloo development, Mr Kacirek said that he could not remember that meeting although he would not deny that it had taken place. Mr Kacirek was aware of the differences in the estimates of the strategic plan and the Woolloomooloo study, but no action was taken on that point. Although then the SPA had less direct knowledge of the criticisms of the study than the council did Mr Kacirek stated in evidence that he would not seek to criticize any of the decisions of the council to continue with the study and he and his planning team had maintained the soundness of the Woolloomooloo proposals "then" and "today". Applications for development had been made to the council and some had been approved, and the SPA had later given its concurrence to some, that is, only those made after July 1971. I note at this point that Mr Baker had no knowledge of the content of all that evidence revealed in files tendered at the hearing.

Brevity in expressing my decision on that claim is adopted only in the interests of avoiding delay, for very thorough submissions were put forward on the matter, particularly those on behalf of the second defendant.

But my decision is a short one. I am of the opinion that no duty fell upon the defendants in respect of this matter. I find it unnecessary to enter here upon an examination of all the evidence of deficiency in the preparation of the study in relation to that central point of transportation/workforce which was given to the council. I have no hesitation at all in reaching a view -- having heard the evidence, particularly of Mr Briger - that council's decision to proceed with the Woolloomooloo study was not other than one of policy.

To quote from the speech of Lord Wilberforce in *Anns* case [1978] AC 728 at 755, I think that the council's decision was "within the limits of discretion bona fide exercised" pursuant to its powers and functions. As for the first defendant, while it did also have knowledge of the transportation/workforce problem and was aware of purchases at Woolloomooloo with a view to consolidation -- certainly after its concurrence to application was required -- in my opinion, because (notwithstanding that it was the council's co-responsible authority) the council at that stage was primarily "handling the matter", its adherence to

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that policy decision of the council was itself a discretionary decision. Having recorded that view I also state a feature of it which is very relevant. Although I have stated that council decision was a policy one and the SPA decision a discretionary one that does not indicate in any way a view of mine that there was not a continuing operation of the original negligence in misrepresentation which I have found established.

For completeness I note here that, separately and apart from the abovementioned successful defence to that alternative claim of the plaintiffs, a submission was made during the hearing on behalf of the first defendant that it was exempt from all liability in this case on the grounds of public policy. Because that submission was one of those which in my opinion after full consideration is quite unacceptable I have not earlier referred to it. The immunity which I have granted above, although it relates to that word "policy" -- is unconnected with that wider and separate submission.

Additional defences:

As to that defence of each defendant based upon the provisions of the *Statute of Limitations Act 1623* and the *Limitation Act 1969*, s (14)(1)(b) of the *Limitation Act* requires a cause of action founded on tort to be brought before the expiration of the limitation period of six years "running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims". In the light of the decision of the English Court of Appeal in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 and of the House of Lords in *Anns v Merton London Borough Council* [1978] AC 728, these defences must fail in these actions founded on negligence. The most recent application of that law expressed in the many judgments which have been studied generally in relation to this case is summarized in the judgment of Mitchell J. in the case of *State of South Australia v Johnson* (23rd September 1980 unreported) in which the judge said:

"An action for damages for negligence arises when the damage occurs *and* the person sustaining the damage first discovers it or should, with reasonable diligence, discover it" (and those two cases are quoted).

The statement of claim in this action was filed on 2nd September, 1976. No damage was suffered by the plaintiffs until the loss on their investment in the subject land (or alternatively until the prospect of them suffering such loss became evident). The earliest time was September 1972 when the city council decided to review the study (more details are set out earlier). Mr Baker only became aware of that decision and the likelihood of financial loss when he was informed of it at that meeting on 9th November, 1972. The damage therefore first appeared on, and could with reasonable diligence have been discovered before, that date, which was less than four years before the commencement of the action. The dates of entering into contract for the purchase of the subject lands or the date of any conveyance is not in my opinion relevant to this argument in the light of those decisions.

As to that defence of each defendant based on a failure by the plaintiffs, or one of them, to serve a notice or adequate notice of intended action before commencement of the action. The relevant sections are s 70(5) of the *State Planning Authority Act 1963* and s 580 of the *Local Government Act 1919*. Because the plaintiffs in this case are concerned only with the economic loss as more fully described earlier, these defences must fail.

In

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respect of the second defendant, s 580 of the *Local Government Act* does not apply for the reason held by the Court of Appeal in *Sydney City Council v Waltons Stores Ltd* (0000) 15 LGRA 317, per Asprey J. with whom the other members of the court agreed (at pp. 319, 320). Because s 70 of the *State Planning Authority Act* is -- in the area of relevance -- similar in content to s 580, that decision applies to it also. Each of those sections has of course been now omitted by the *Notice of Action and Other Privileges Abolition Act 1977*, but they were in force at the relevant time. Separately and in addition to the failure of the defence of the first defendant on that basis, it could not succeed in any event because of the judgment of the High Court in *Hudson v Vanderheld* (000) 118 CLR 171. Though work on the study was done by the plaintiff team of the SPA, and the SPA officers so involved were acting in the course of their employment, the SPA did not formally, under the Act, prepare and publish this study.

During final submissions counsel for the first defendant referred specifically to s 12 of the *State Planning Authority Act 1963*, as the base for a defence to this action against it. I shall deal with this briefly. Counsel referred particularly to pars (c), (d), (e) and (f) of s 12, submitting that they authorized in statutory terms the SPA to do what it did in respect of this study. But the plaintiffs' action -- apart from not being based on any suggestion that the SPA was acting unlawfully in its involvement in the undertaking -- is based on negligence. Already I have quoted the extract from Lord Pearson in the *Dorset Yacht case* indicating that the mere existence of statutory duties does not exclude liability at common law for negligence in the performance of the statutory duties. Lord Wilberforce quoted that same passage in his speech in the *Ann case*, where his Lordship, while acknowledging that there might be some overlap between operational powers and discretionary powers exercised by a statutory authority, nevertheless clearly drew attention to the difference. I have no doubt at all that the participation of the SPA in this study, its preparation, publication and all other relevant matters, was not a decision of "discretion", and not in "the policy area", to adopt his Lordship's phrase; and I hold that s 12 or any part of it does not prevent this action being brought against the SPA. I forecast that on a separate matter in this case I am about to hold a certain decision was one of policy and therefore immune from action.

Announcement: directions:

As indicated earlier I agreed, at the joint request of the parties, to determine the questions of liability before hearing evidence on the matter of damages. Although I have concluded that the plaintiffs are entitled to succeed, no judgment may be entered at this moment. At this stage I simply make the following announcement:

- (1) I have made the findings of fact which are stated in the reasons which I now publish.
- (2) I am of opinion that the plaintiffs' claim for damages in negligence against both defendants succeeds.
- (3) I am of opinion that that claim succeeds on the basis of the *Hedley Byrne* rule, in respect of which I have found that all elements exist in this case.
- (4) I am of the opinion that that claim also succeeds on the basis of the *Donoghue v Stevenson* principle, in respect of which I have found that all

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elements exist in this case; however, in the event of that opinion of a "double" basis of liability being set aside and if my opinion that that claim succeeds on the basis of the *Hedley Byrne* rule were also set aside, I record as an alternative my opinion that that claim succeeds on the basis of the *Donoghue v Stevenson* principle.

- (5) I am of the opinion that the plaintiffs' claim for damages based alternatively on those verbal conversations

with the representatives of the second defendant fails. I stress the meaning of the word "alternative", and that opinion is expressed on the basis that those conversations only were considered. To that I add the opinion that those conversations are not irrelevant to and are supplementary to the plaintiffs' claim specified under par. (2) above.

(6) I am of opinion that the plaintiffs' claim for damages based on an alleged duty of the defendants to warn (in a period from late 1970 until mid-1972) the plaintiffs of deficiencies in the subject study fails because I rule that no such duty existed in the circumstances.

(7) Each party is at liberty to make application to restore the case to the list for further hearing or to make any necessary application in relation to it. Subject to any mention for earlier relisting, I relist the matter for mention on Thursday, 4th February, 1982, at 9.30 a.m. on which day I intend to set a date for the further hearing of the case.

(8) I direct each party to retain one or more copies of their already prepared indices of the transcript, exhibits or submissions.

(9) The exhibits will be retained.

[On 12th May, 1982, his Honour delivered a further judgment in the matter relating to the assessment of damages (including the duty to mitigate them and the inclusion of interest and resumption costs as damages), the council's cross-claim against the authority and costs. That judgment is not reported. In the result his Honour ordered judgment for the first plaintiff against both defendants for \$745,248 plus costs and judgment for the council in its cross-claim against the authority for \$596,199 and costs.]

Final orders accordingly.

Solicitor for the plaintiffs: T. G. Hartmann.

Solicitors for the first defendant: Leon Hort (Department of Environment and Planning).

Solicitor for the second defendant: D. G. Barr (City Solicitor).

TFMN

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