house as a separate piece of property was quite unrealistic. Lord Oliver noted that the complex structure theory had been postulated merely to provide a sustainable logical framework within which to place *Anns* case. If *Anns* case was overruled, the theory may no longer be relevant.

The decision may be of greater relevance then merely in respect of claims against Councils. Lord Keith noted that in the submissions to the house, it had been accepted that the Council owed a duty in relation to personal injuries and damage to property other than the building itself. His Lordship was not convinced that this was the case but declined to make any further comment on it without there being argument.

Comments of other Lords suggested that there would be no reason why a builder would not be relieved of liability in the same circumstances that Council was relieved of liability, unless liability could be established against the builder pursuant to a contract.

There were some reservations expressed about the extent of the overturning of the decision in *Anns* case. Lord Bridge expressed the view that if a building stood so close to a boundary of the owners' land that after discovery of a dangerous defect it remained a potential source of injury to persons or property on neighbouring land, the building owner ought to be entitled to recovery in tort from the negligent builder the cost of obviating the danger whether by repair or by demolition insofar as the cost is necessarily incurred in order to protect himself from potential liability to third parties. This damage is properly categorized as economic loss but the reasons given may be recoverable. This was not a view commented upon by the House as a whole.

The impact which this decision will have on courts in Australia will be interesting to observe. It may be that the Courts will merely see the decision as an extension of *Heyman's* case. On the other hand the Courts may interpret the decision as a significant restriction on the potential liability of builders and the like.

- Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne.

Application To Set Aside An Arbitrator's Award

Gallagher v J & D Clifton Pty Ltd, Supreme Court of New South Wales, Brownie J., 11 August 1989, Nos 12493/89 and 12428/89

This case involved an application by a proprietor under s.42 of the Commercial Arbitration Act 1984, to set aside an arbitrator's award on the grounds of partiality, bias and a breach of the rules of natural justice. The builder made application to enforce the arbitrator's award pursuant to s.33 of the Act.

The Facts

Differences and disputes arose under a building contract entered into in October 1986. This dispute was referred to arbitration and both parties attended a preliminary conference. At the preliminary conference, a standard questionnaire was completed which included this question:

> "Do parties agree that the arbitrator shall not include in the award a statement of the reasons for not making the award?"

The answer recorded that the proprietor agreed not to request reasons, but the builder's solicitor advised that he needed to obtain instructions. The completed questionnaire form was sent to each party and the solicitors for both parties, within their ostensible authority, acknowledged the accuracy of the form except, as to minor matters not relevant. The builders' solicitors also replied that they were instructed that reasons for making the award were not to be included in the award.

The proprietor sought to have the award set aside on the following grounds:

1. the absence of reasons for the award;
2. a combination of the circumstances that, whereas an order had been made under the provisions of a s.30A of the Builders' Licensing Act that the builder carry out certain rectification work and whereas the arbitrator had been notified of that order, the arbitrator nevertheless proceeded with the hearing of the arbitration, and did so in the absence of the proprietor; and
3. a combination of circumstances show partiality or bias or that justice was not seen to be done.

The arbitration was originally fixed for hearing on 17 October 1988. It was adjourned on the application of the proprietor, even though there was no appearance on that day. The matter was re-fixed for hearing on 10-14 April 1989. On or about 30 March 1989, the proprietor telephoned the arbitrator who informed her that the hearing would have to proceed on 10 April 1989. A third firm of solicitors retained by the proprietor wrote a letter to the arbitrator dated 4 April, 1989 advising him that the Building Services Corporation had served a rectification order upon the builder on 31 March, 1989 and enclosed a copy of that order. The letter also stated:

> "Please be advised per medium of this letter that our client feels she would be prejudiced should she embark upon the hearing of the arbitration at the present time and, accordingly, it is envisaged that you will adjourn the presently fixed hearing dates until later in the year. If, contrary to our anticipation, you as arbitrator see fit in the prevailing

circumstances to hear the matter ex parte, it is respectfully suggested that such action could well constitute technical misconduct as interpreted by several recent decisions of the court."

The builders' solicitors refused to consent to an adjournment and their refusal was conveyed to the proprietor by the arbitrator and the proprietor was invited to move the court if she thought that the hearing of the arbitration ought not to proceed. The proprietor took no such action and on 10 April 1989 there was no appearance on behalf of the proprietor, and the arbitrator proceeded, heard evidence and published an award.

The Court held:

1. The preliminary conference form and the solicitors' letters to the arbitrator constitute an agreement in writing under s.29 of the Commercial Arbitration Act.
2. The published award of the arbitrator did sufficiently record the reasons for the award.
3. Orders made under the Builders' Licensing Act, 1971 are orders made, not between builders and proprietors in the course of litigation between citizens, but rather orders made for the protection of consumers or members of the public dealing with builders. There is no question of an issue estoppel arising from an award made as between a builder and a proprietor and proceedings under the Builders' Licensing Act or in the reverse sequence.
4. The arbitrator acted judicially in proceeding in the absence of the proprietor and in acting upon the evidence before him.

His Honour noted that in principle he could see no difference between an action in this court and an arbitration and, despite the extraordinary circumstances of the case, the arbitrator acted judicially and there was no actual partiality, bias or even the appearance of it.

- Kerrie E. Leotta, Barrister-at-Law.

Copyright Decision A Timely Warning To Consultants And Owners

Gruzman Pty Limited v Percy Marks Pty Limited, (16 IPR 87).

A recent decision of the NSW Supreme Court has emphasised the importance of consultants and owners ensuring that express contractual provision is made with respect to the ownership of copyright and use of the consultants' plans.

In *Gruzman Pty Limited v Percy Marks Pty Limited,* in May 1989, the owner engaged an architectural consultant to provide services with respect to the fitting out of new shop premises in Elizabeth Street, Sydney. The consultant prepared plans and engaged a builder to commence work in July, 1989.

However, differences arose between the parties and the owner purported to terminate the consultant's services in October, 1989. During the course of subsequent negotiations in attempting to resolve the dispute, the owner proceeded with the works with modifications designed to reduce costs.

The consultant commenced proceedings in the Supreme Court seeking an injunction to prevent the owner from using the plans for the purpose of completing the fitting out of the shop.

The contract between the consultant and owner contained no provisions regarding copyright or use of the plans.

There was no dispute that the consultant was the owner of copyright in the plans (see s.35(2) of the Copyright Act 1968 (C'th). The consultant argued that the use of the plans would be an infringement of that copyright. Namely, that there would be a "reproduction" of the plans "in a material form" "without the licence of" the consultant (see ss.31(1)(b) and 36 of the Copyright Act).

However, following previous decisions, the Court held that when an architect contracts with a building owner to produce plans for the purpose of their being used to carry out construction work at a particular site, there arises, subject to any contractual provision to the contrary, an implied licence from the architect for the use of the plans for that purpose.

It is suggested that this principle is not restricted to architects, but would apply to other consultants engaged in preparing plans for a particular project.

What is not clear, however, are the circumstances, if any, in which the implied licence may be revoked.

It seems clear that the implied licence is not revoked simply by non-payment of the consultant's fees. In *Ng and Anor v Clyde Securities Limited* (1976), Wooten J said:

> "I find it unthinkable that an owner would agree to a licence revocable if a possibly temporary difficulty prevented him from paying his architect at the agreed time. Unless an architect expressly stipulated for such a devastating right of revocation to regard him as giving the licence in return for a debt recoverable, if unpaid, by ordinary litigious processes."

Note that several standard form and industry consultancy agreements do in fact contain such a "devastating" right of revocation. See for example, the RAIA Terms of Engagement.

In *Gruzman*, the consultant argued that the implied licence was revoked by virtue of the owner's intention to depart from or modify the plans.