or without seeking agreement from the other party. His Honour did not express a firm view on this proposition.

His Honour concluded in respect of this question as follows:

> "In my opinion, therefore, nothing in clause 26 requires fourteen days to pass from the receipt of the notice before any party is entitled to seek a nomination by the Chairman of the Victorian Chapter of the Institute of Arbitrators."

In relation to the suggestion that the builder had breached an implied term in the contract His Honour concluded, assuming that such a term could be said to exist, that no such breach had occurred. The builder had not indicated that it was unwilling to discuss the appointment of an arbitrator and there was sufficient material in earlier correspondence from the owner to suggest that it was most unlikely that the builder and the owner would agree on an arbitrator.

Having regard to the above comments His Honour was of the view that it was not mandatory for the period of fourteen days to expire before an arbitrator is nominated.

When does the fourteen days begin to run?

The answer to this question depended upon the interpretation of clause 27 of the contract. That clause provided that any notice to be delivered by one party to another may be posted by ordinary pre-paid post and shall be deemed to have been received by the other at the time it would have normally been received in the course of ordinary mail.

Evidence was before the court as to when a letter mailed on 17 December 1987 could be said to arrive in the ordinary course of mail. Evidence was given that the letter was mailed at the post box at Mitcham Post Office between 5.00 pm and 6.00 pm on 17 December 1987.

Material was before the Court in relation to the normal practice of Australia Post. The material suggested that if a letter was mailed by a certain time it would be delivered the following day. The letter in this case was mailed by the relevant time. Accordingly, the material from Australia Post suggested that the notice would be received in the ordinary course of mail on 18 December 1987, that is the following day.

Further material from Australia Post provided an explanation as to why a particular letter may not be received on the following day. In this particular case the volume of mail at Christmas time and the consequences of a recent industrial dispute were possible reasons why the delivery of this letter was delayed until 21 December.

His Honour was of the view that there were very good reasons for the sender of a letter, such as this letter, to be able to determine with certainty when the letter is deemed to have been received. His Honour was also of the view that if the letter was in fact received a short time after the deemed receipt of the letter there was not necessarily any prejudice suffered by the recipient. His Honour acknowledged that the clause fixes an artificially precise date for deemed receipt but accepted that it was within the power of the parties to make such an arrangement.

His Honour finally concluded that the owner was deemed to have received the notice on 18 December 1987 and accordingly the fourteen days commenced to run from that date.

When is the arbitrator nominated?

At the outset His Honour observed as follows:

> In the first place, a valid nomination under a clause such as clause 26 requires, in my opinion, assent by the nominee and communication both for the nominee and the parties.

In considering this question His Honour considered a line of cases commencing with an English case decided in 1847 and concluding with a High Court case decided in 1983. The High Court case of *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 concerned the appointment of valuers for the purposes of a rent review clause. In that case the Court gave qualified support for the proposition that the valid appointment of a valuer required three steps. These were communication to each relevant party, communication to the proposed valuer and agreement by the valuer to act in that role. In this case His Honour saw no reason to depart from the principles outlined in *Gollins's* case.

The owner relied on an 1892 English decision, which is referred to in the 20th Edition of Russell on Arbitration at page 123, to support the proposition that it was not necessary for the parties to be notified of the nomination in order for the appointment to take effect. However, the relevant case dealt with the appointment of an arbitrator pursuant to an Act of parliament in particular circumstances and His Honour distinguished this case from the matter before him.

Having regard to this conclusion, His Honour noted that even if the fourteen day period commenced to run on 21 December 1987, being the day of actual receipt of the notice by the owner, that period had expired before the nomination of the arbitrator.

Having regard to the above comments His Honour concluded that the act of nomination was not complete until Tuesday 5 January 1988 when letters were sent to each of the parties from the Chief Administrator of the Victorian Chapter of the Institute of Arbitrators Australia. Confirmation of Mr OBrien's nomination was also forwarded to him on that day.

- **Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne. Reprinted with permission from the Building Dispute Practitioners" Society Newsletter.**

Banks' Duty to Borrowers: Foreign Currency Loans

Mr Spice, a property investor in Sydney, wanted to know about borrowing in Swiss Francs to take advantage of low interest rates. He spoke to his bank manager and to a bank "expert" in these matters. Mr Spice was advised that there was "no catch" to borrowing foreign currency, but he was told that he would have to bear the risk of

exchange losses. He then drew down a five year loan in March 1985 for the Swiss Franc equivalent of A$800,000. Over the next few months the A$ declined substantially against the Swiss Franc and Mr Spice's repayment liability "increased enormously". Was the bank liable to him for the loss?

Yes, held Foster J in the Federal Court of Australia on 1 September 1989 in *Spice v Westpac*, unreported. The Judge found as a matter of fact that although Mr Spice was a careful and cautious qualified solicitor, he was unsophisticated in the matter of overseas borrowing. He was aware of an exchange risk but not the extent.

The bank had a duty to "explain fully and properly ... and provide an explanation of the nature and effect of the transaction which was adequate in all the circumstances". It should have explained the advantages and hazards of entering into an off-shore loan facility, and the mechanisms available for hedging against risk. Moreover bank officials failed to follow the bank's internal guidelines in explaining the risks. Much of the case turned on disputed oral evidence, with the Judge favouring Mr Spice's version of facts over that of the two bank officials.

The Judge applied established principles which show that a duty of care in these circumstances arises where:

- the speaker (bank officer) should realise that he is being trusted to give capable advice;
- the speaker should realise that the recipient of his advice intends to act on it in an important way;
- it is reasonable for the recipient of the advice to accept and rely on what the speaker says.

The result was that Mr Spice was put in the same position as if he had borrowed A$800,000 in local currency at local interest rates.

The case favours borrowers in general more than a similar recent case in the South Australian Supreme Court, *Foti v Banque National De Paris* (1989), unreported. The difference between the two cases is probably that Mr Spice was an individual who, in the circumstances, had had more cause to rely on his bank's advice. Other borrowers in a similar position will now be encouraged to follow his example in litigation.

- **David Archer, Associate, Baker & McKenzie, Solicitors, Melbourne. Reprinted with permission from Baker & McKenzie's Pacific Basin Legal Developments Bulletin.**

Bank Deposits: When a Preference

The case of *Taylor v ANZ Banking Group Ltd* (1988) 13 ACLR 780; 6 ACLC 808, (Supreme Court of Victoria, McGarvie J.) concerned what must potentially be a common situation in the case of the liquidation of a small proprietary company.

Taylor, the liquidator of Downtown Security Co Pty Ltd ("Downtown"), sought a declaration that a payment by the company to the ANZ Bank was void as a preference under the Companies Code. Effectively, payments made by a company which is unable to pay its debts as they fall due are void as against the liquidator if:

- such payments are made within six months before a resolution to wind up the company; and
- they have the effect of preferring the recipient creditors.

On 4 January 1984, a total of $110,554.44 was deposited by Downtown with the ANZ Bank, along with written instructions that this sum be used to repay an overdraft and an advance totalling $57,738,75. It was found that Downtown was unable to pay its debts at the time of the deposit and that the repayments had the effect of preferring the Bank over other creditors.

The liquidator's rights, however, were dependent upon whether the Bank could rely upon the protection given to a payee who receives payment in good faith, for valuable consideration, in the ordinary course of business.

There was no doubt that discharge of the indebtedness amounted to valuable consideration.

As to good faith, a payee is deemed to have not acted in good faith if a payment is made in circumstances which lead to the inference that the payee knew or had reason to suspect that the debtor was unable to pay his debts as they became due and that the effect of the payment would be to give a preference. The Court found that, in this case, on the information available to the bank manager, it was "not satisfied that a reasonable person would have had an actual apprehension or fear that the company was unable to pay its debts as they became due".

Given the requirement of good faith, the "ordinary course of business" aspect appears to focus on the intentions of the debtor in making the payment. Downtown's debts to the Bank were secured by personal guarantees and mortgages over the homes of the two directors. They had a strong reason for making sure the Bank's demands were met first. In the court's view, the repayments were intended to avoid the consequences of insolvency falling on the directors and were, therefore, not in the ordinary course of business.

There are two points of particular interest raised by the case. First, it has been subject to criticism. One commentator has argued that only the intentions of the creditor should be relevant as otherwise the potential fund for distribution amongst all the creditors may be reduced. There may be support for this approach in the more recent High Court decision in *National Australia Bank Ltd v KDS Construction Services Pty Ltd (in Liq)* (1988) 163 CLR 668 where KDS's overdraft at the appellant Bank was also guaranteed by the directors and their wives. The sum of $102,030.33 was deposited by KDS and used to discharge debts owed to the Bank. The High Court accepted that the deposits were made in the ordinary course of business, without reference to the guarantees or the state of mind of the directors.

However, ignoring the debtor's intentions in making a payment in this context has the effect of diminishing the