limits imposed upon the investment of State Courts than as a true definition of judicial power.

Gibbs J. adopts also the same approach as McTiernan and Menzies JJ. while relating the 'history' doctrine specifically to section 84 and section 125. It is perhaps interesting to note that Gibbs J. states[21] that:

> the fact that a court is authorised to create or alter rights and not merely to declare and give effect to pre-existing rights does not necessarily show that the powers conferred are not judicial powers . . .[22]

Once sections 84, 86 and 125 had been upheld as valid, Gibbs J. upheld section 87 since it was seen as merely incidental to the judicial powers of the Court. The argument raised that precise reference should have been made in section 84 to pension entitlements and testator's family maintenance was rightly dismissed by Gibbs and Stephen JJ.

Stephen J. relied principally on the 'context and history' approach to uphold section 84 and section 86 and then upheld section 87(1) and section 125 as being merely ancillary to the above sections. Mason J. tackled the problem in the same way but it is perhaps interesting to note that he states in relation to section 86:[23]

> [t]he provision contains neither the expression of a criterion according to which relief is to be granted or denied, nor a statement of the considerations to be taken into account.[24]

Finally it is appropriate to mention that Mason J. stated that no complete definition of judicial power exists. Such a statement confirms the view expressed by the writer at the beginning of this note that the definition of 'judicial power' can be strained to reach a desirable result.

FRANK BRODY

## PRESSER v. CALDWELL ESTATES PTY LTD[1]

*Negligence—Duty of care—Vendor and purchaser—Contract for sale of land —Agent's misrepresentation inducing sale—Filled land, whether duty to disclose—Whether reliance on agent's skill and judgment.*

This was an appeal by a vendor of land (the defendant) and its agent (third party) from a decision of Thorley D.C.J. in favour of the purchaser. Presser had bought a lot on an estate developed by Caldwell and had built a house on it. A year after he and his wife moved in cracks appeared in the house due to subsidence of the filling, or soil artificially brought onto the lot. Presser sued the other two parties on three counts—fraud, negligent misrepresentation, and breach of collateral warranty. Thorley D.C.J. found for the plaintiff on the second count, accepting his evidence that he had relied on Southern's statement that there was no filling, and holding that Caldwell was in breach of its

[21] (1972) 46 A.L.J.R. 593, 597.
[22] But *cf.* n. 10.
[23] (1972) 46 A.L.J.R. 593, 601.
[24] But *cf.* the judgment of Walsh J.

[1] [1971] 2 N.S.W.L.R. 471. N.S.W. Court of Appeal; Asprey and Mason JJ.A. and Taylor A-J.A.

duty of care owed to Presser under a *Hedley Byrne*[2] 'special relationship'. His Honour held that Caldwell ought to have seen to it that its agent had all the information needed to answer the plaintiff's questions (on filling), and also that it was vicariously liable for its agent's negligence in not discovering the existence of the filling though it knew that another portion of the estate had been filled.

The New South Wales Court of Appeal reversed this decision, basing its judgment on the majority judgment of the Privy Council in *MLC v. Evatt*,[3] delivered by Lord Diplock. It should be noted that Thorley D.C.J. delivered judgment eighteen months before the Privy Council delivered its advice in *Evatt's* case,[4] and based his decision on the High Court judgment which the Privy Council reversed. While it is inevitable that the law must sometimes change between the hearing at first instance and the appeal, this is a particularly hard case, for the time which elapsed before the appeal was heard indicates that the decision to prosecute it may have been inspired by the appearance of the Privy Council's judgment in *MLC v. Evatt*.[4] The hardship to the unsuccessful plaintiff who loses because of a change in the law between judgment at first instance and the hearing of the appeal, raises a case for compensation out of public funds. Unfortunately, the courts cannot award such relief and an Act of Parliament on the topic seems most unlikely, as so few people are likely to be affected.

Asprey J.A., and Mason J.A. (with whom Taylor A-J.A. agreed), held that the estate agent, Southern, was not under a duty to take care. Asprey J.A. felt that Presser's situation was very similar to that of the plaintiff in *Low v. Bouverie*,[5] where the defendant was held to owe a duty of honesty but not a duty to make an investigation, even though information in his own records (which he failed to consult) showed his answer to be wrong. However, in *Low v. Bouverie*[6] the trustee had no financial interest in the transaction, while here the agent received a commission for the sales he made. In *Anderson v. Rhodes*,[7] where the defendant did have a financial interest (its commission) in sales made, the plaintiff recovered substantial damages for negligence in giving information. In that case the defendant's servant stated that the company for whom his employer acted as agent was credit-worthy. In fact, that company became insolvent, and but for his employers' negligence in bookkeeping their servant would have known the likelihood of the other company's bankruptcy. The servant was honest, and not personally negligent, but the company which employed him was held liable. Mason J.A. ignores this case, and the attempt of Asprey J.A. to distinguish it is not particularly happy. He states that 'the defendant had made it known to the plaintiffs that it was personally qualified by reason of its own transactions to express an opinion as to the credit-worthiness of the company'.[8] In fact such a statement was made to only one of the (successful) plaintiffs. Moreover, the management fee paid to Southern was paid for such services as passing the accounts. Since these accounts included one for earth-moving, the agents as a corporation should have known the relevant facts. Mason J.A. disposes of the question of the adviser's financial interest in less than half a page;[9] rather surprising given Lord Diplock's *dictum* in *Evatt's* case[10] on the possible relevance of such a

[2] *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465.
[3] *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* (1970) 122 C.L.R. 628.
[4] *Ibid.*
[5] [1891] 3 Ch. 82.
[6] *Ibid.*
[7] [1967] 2 All E.R. 850.
[8] [1971] 2 N.S.W.L.R. 471, 483c.
[9] [1971] 2 N.S.W.L.R. 471, 492-3.
[10] (1970) 122 C.L.R. 628, 642.

circumstance. He admits[7] that in some circumstances the existence of such an interest may impose a duty to take care, but states that it is not of sufficient importance to do so in the particular circumstances of *Presser's* case.

With all respect to the judges concerned, I submit that the existence of such an interest forms the very nub of the case. Mason J.A. states that a real estate agent owes a duty to take care in giving advice in the course of his business but here, while the purchaser clearly intended to rely on the answer, the inquiry 'did not call for the formation of a professional judgment', but could be answered by anyone in possession of the facts.[11] Curiously enough, Asprey J.A. felt that it was a judgment too difficult for a real estate agent to make.[12] But why should this matter? The agent knew that but for its answer the sale, and its commission, would have been jeopardised; why should it (and Caldwell, its employer) escape when it did not even disclaim liability for its answer? Had it done as much as that the purchaser would have been warned, but in the absence of such disclaimer surely the ordinary purchaser would feel entitled to rely on the information given? An estate agent may not be an expert on the filling of land, but he is an expert on land sales, and I see no reason why, if the agent makes inadequate inquiries and the information he gives is wrong, the purchaser should suffer and the agent escape scott-free. He need not answer, after all. Abbott's advice to Mrs Presser to check with the council might have been construed as a quasi-disclaimer, but it seems not to be in accord with the requirements of public policy that a party (the agent) can shift its responsibility onto another body (the council) without that body's knowledge or consent. Particularly is this so where, as here, that other body cannot be forced to take up that responsibility at all.

It is interesting to compare *Presser v. Caldwell*[13] with the Canadian case of *Bango v. Holt*,[14] which also involved a real estate agent. The Supreme Court of British Columbia held that an estate agent owes the purchaser a duty to exercise skill and care comparable to that exercised by other members of that profession, even though there is no contract between the parties. This does not necessarily conflict with the decision in *Presser v. Caldwell*[15] since the Court there plainly thought that estate agents need not deal with such questions as the plaintiff asked, but nonetheless it is significant as showing a more liberal attitude towards purchasers than that displayed by the N.S.W. Court of Appeal.

Another interesting aspect is the comparison of *Presser v. Caldwell*[16] with *King v. Victor Parsons*.[17] The only important difference between the two cases is that in the one the land was sold as vacant land, while in the other it was sold with a house on it. In the latter case the knowledge of the contractor was held to be the knowledge of the firm which employed him, and the concealment of the fact of filling was held to be fraud (in the equitable, not the criminal sense). The application of the principle of cases such as *King v. Parsons*[18] would have made not only Southern but the vendor, Caldwell, liable, and would have prevented the loss from falling on one who could not on any view have been to blame.

*Dutton v. Bognor Regis Urban District Council*[19] is another noteworthy case. The English Court of Appeal there held a council liable to the purchaser

[11] [1971] 2 N.S.W.L.R. 471, 492.
[12] [1971] 2 N.S.W.L.R. 471, 481.
[13] [1971] 2 N.S.W.L.R. 471.
[14] (1972) 21 D.L.R. (3d) 66.
[15] [1971] 2 N.S.W.L.R. 471.
[16] *Ibid.*
[17] [1973] 1 W.L.R. 29.
[18] *Ibid.*
[19] [1972] 1 Q.B. 373. Court of Appeal; Lord Denning M.R., Sachs and Stamp L.JJ.

of a house for the negligence of its surveyor in allowing the house to be built on defective foundations (in fact, over a former rubbish tip). The house had been bought from the builder by the plaintiff's predecessor in title, and after the plaintiff purchased it it was severely damaged by subsidence. The council admitted giving building by-law approval but denied that they had done so negligently, and claimed that they owed the plaintiff no duty of care. The Court of Appeal rejected the council's arguments. It held that the council's wide powers to control building carried with them a duty to take reasonable care to see that the requirements of its by-laws were met, and that the council was in breach of that duty. Moreover, the duty was owed to owners and occupiers of houses over the building of which the council exercised control,[20] and extended to the plaintiff even though she was not the original purchaser.[21]

Both *Dutton*[22] and *Presser's* case[23] deal with a concealed defect, of which the defendant knew or ought to have known, and of which it did not inform the plaintiff. It seems a curious anomaly that a statutory body, discharging its functions for the public benefit and at the public expense, should be held liable, while a company acting for private profit escaped.

Noteworthy again is the *dictum* of Lord Denning M.R. that a professional man who gives advice on financial or property matters owes a duty only to those who suffer financial loss in consequence of relying on his advice; but if he advises on the safety of buildings, etc., he owes a duty to all those who may suffer injury if his advice is bad.[24] If this curious *dictum* is correct, *Presser's* case quite clearly falls within it, and indeed within both categories. Southern's advice was given on 'property matters', but related directly to 'the safety of buildings'. Does not this call in question the validity of the distinction itself?

D. J. GIFFORD

[20] [1972] 1 Q.B. 373, 407, *per* Sachs L.J.
[21] [1972] 1 Q.B. 373, 396, *per* Lord Denning M.R. The situation was special in that further inspection was impractical once the foundations were covered up.
[22] [1972] 1 Q.B. 373.
[23] [1971] 2 N.S.W.L.R. 471.
[24] [1972] 1 Q.B. 373, 395.