whether failure to comply with the 14 day time limit in the intermediate step (Clause 45(b)) prevented the Contractor from going to arbitration.

Carter J held that each time provision in Clause 45 is mandatory and that since the Contractor had exceeded the 14 days prescribed by Clause 45(b) the Contractor had lost the right to go to arbitration. Nevertheless the Contractor was not precluded from pursuing the case in the courts.

The Contractor then sought an extension of time for complying with Clause 45(b). The Arbitration Act of Queensland (section 36) has a provision similar to S.48 of the Uniform Commercial Arbitration Act which empowers a court to extend the time fixed by a contract for doing any act in relation to an arbitration. It was common ground that the court could extend the 14 day limit prescribed by Clause 45(b) of NPWC 3.

However, Carter J refused to extend the time. Both the Queensland Act and the Uniform Commercial Arbitration Act require that before extending time the court must be satisfied that otherwise "undue hardship" would be caused. Carter J said:

The nature of the claim does not persuade me to conclude that it is one which peculiarly would be a fit subject for arbitration. If that is so then the fact that the applicant has lost the contractual right to arbitrate because of non-compliance with the time limitation of Clause 45(b) does not in itself constitute "undue hardship".

In refusing to extend time, Carter J considered it relevant that the Contractor had failed to comply with the requirements of Clause 45 to provide detailed particulars.

- Philip Davenport

Misfeasance In Public Office

In *Jones v Swansea City Council* (1990) 1 WLR 54 the plaintiff held a lease from the Council of a development site in High Street Swansea. The lease was for 99 years and the permitted use was as a shop, office or showroom. The plaintiff sought Council approval to change the use to that of a social club. Approval was refused and the plaintiff sued the Council claiming that the Council had committed the tort of misfeasance in public office.

The plaintiff's husband, Mr Jones, had previously been a councillor and a member of the Ratepayers Party which, following a bitter election campaign in 1976, toppled the Labour group that for 40 years had controlled the council. The Labour group won the 1979 elections and by a majority vote disapproved of Mrs Jones application. Mrs Jones claimed that the Council had acted with malice. One of the Labour group, in particular, was alleged to have indicated malice towards Mr Jones and his wife and there was evidence that the Labour group were expected to vote the same way unless the group decided to leave the matter to a free vote. That decision had not been made and it was alleged that each member of the controlling Labour group who voted in favour of the decision was affected by the malice even though the member personally may have had no intention to injure the plaintiff.

In the first hearing Mrs Jones lost and she appealed to the Court of Appeal in England. The Court ordered a retrial. There was no finding that the Council was guilty of misfeasance but the Court found that it was open to the plaintiff to argue that all the councillors who voted on the resolution were affected by the malice of one councillor.

Nourse L J at p 85 said:

> The assumptions of honour and disinterest on which the tort of misfeasance in a public office is founded are deeply rooted in the polity (sic) of a free society .... It ought to be unthinkable that the holder of an office of government in this country would exercise a power vested in him with the object of injuring a member of that public by whose trust alone the office is enjoyed. It is unthinkable that our law should not require the highest standards of a public servant in the execution of his office.

It was argued that there was a distinction between the exercise of a power reserved in a contract, in this case a lease, and a power having a more direct statutory or public origin.

Nourse L J at p 85 said:

> True a private landlord who is not by a covenant constrained to act reasonably is free to withhold his consent to a change of user of the demised premises, even if his sole object in doing so is to injure the tenant. That is an illustration of the general rule that a power arising under a contract or other bilateral instrument can be exercised for a good reason or a bad reason or for no reason at all, it having been pointed out that, if it were otherwise, there would be great unsettlement of property titles and commercial transactions and relationships: see *Chapman v Honig* (1963) RQB 502, 520 per Pearson L J that suggests that the rule is one of expedience. No doubt it can equally be supported by reasons of practicality.... But neither expedience nor practicality is a good ground for conferring the tort of misfeasance in a public office in the manner in which it has been suggested. It is not the nature or origin of the power which matters. Whatever its nature or origin, the power may be exercised only for the public good. It is the office on which everything depends.

The principles of law expounded appear to be equally applicable in Australian jurisdictions and the last quotation is consistent with the two NSW decisions, *Hughes Bros Pty Ltd v Trustees of Roman Catholic Church* and *Minister for Public Works v Renard* reported in (1989) 9 Australian Construction Law Newsletter at pp 25-28 where the NSW Supreme Court held that the Principal is not required to act reasonably in exercising the power under Clause 44 of NPWC 3 General Conditions to take work out of the hands of the Contractor. The latter decision is on appeal. However, where the Principal is a minister or council or other public officer and the Principal's decision is motivated by malice rather than a genuine, even if mistaken, belief as to what is in the interests of the

government or council or public authority, the claimant may well succeed in an action in tort for misfeasance in public office.

There may also be remedies under the Fair Trading Acts or equivalent in various jurisdictions and the principle of misfeasance in public office could extend to employees of the Principal such as the Superintendent.

- Philip Davenport

Negligence - Local Authority - Duty of Care
Egger v Gosford Shire Council, unreported decision of New South Wales Court of Appeal, 10 March, 1989.

This case involved the plaintiff claiming negligence against the local council arising from the destruction of her beach-front house following a severe storm. In 1968, the Council had approved the plaintiff's Development Application to erect a three storey building on the frontal dune of an ocean beach. Storm activity and wave action threatened the safety of the building, resulting in the owner carrying out emergency protection works in 1974. The emergency works, being the erection of a sea wall, were allowed to remain until a severe storm of 20 June, 1978 eroded the sand dune to such an extent that the house collapsed. The trial judge was satisfied that the protection works had interacted with the waves, resulting in additional erosion in the area of the house and leading to its destruction and that it would not have collapsed but for the sea wall.

The plaintiff claimed the Council was negligent in having given approval to build the house in 1968, in 1974 when it acquiesced to the protection works and in allowing emergency works to remain until the catastrophy in 1978 occurred.

The Court unanimously held that, assuming a duty of care existed, the danger to the plaintiff's property was not reasonably foreseeable and hence there was no breach of duty. One member of the appellate Court, Mr Justice Clarke, held that the Council was not under any relevant duty of care toward the plaintiff in respect either of its acts or its failure to take action.

Perhaps the most useful aspect of the case is the discussion by Clarke J. concerning the duty of care concept. His Honour traced its development both here and in England since Lord Atkins famous judgment in *Donaghue v Stephenson* more than fifty years ago. Mr Justice Clarke noted that although the approaches in England and Australia may differ in relation to the test to be applied in determining whether the requisite proximity of relationship has been established, the proposition that a duty of care will only arise in the event that the dual tests of foreseeability and proximity are satisfied has been accepted in both countries. The proximity concept is then examined including the criticism it has attracted from Mr Justice Brennan in the High Court cases of *Sutherland Shire Council v Heyman* 157 CLR 4244 and *Hawkins v Clayton* 62 ALJR 240.

His Honour then formulated the following proposition in approaching the question of whether a duty of care exists:

1. A duty of care will not be found to arise unless the requisite proximity is established.
2. In determining whether proximity is established it is necessary to have regard to the processes of induction and deduction (referred to by Lord Diplock in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and Deane J. in *Sutherland Shire Council v Heyman)* and where necessary to have recourse to notions of what is fair and reasonable considerations of public policy.
3. The first step, however, is to analyse earlier authorities and to search for the answer by the ordinary process of legal reasoning. If the application of those processes to the available body of case law provides the answer then there is no need to go further. If, however, they do not then it is necessary to have recourse to notions of fairness, justice and reasonableness and considerations of public policy.

- John Buttner, Senior Associate, Feez Ruthning, Solicitiors, Brisbane.
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Rejection of a Referee's Report
Xuereb & Anor v Viola & Ors 27 November 1989, Supreme Court of New South Wales, Commercial Division No 11404 of 1984, Cole J.

This case concerned the rejection of a report prepared by a Referee appointed pursuant to Part 72 of the NSW Supreme Court rules.

The plaintiffs, Antonio and Carmella Xuereb, were the owners of land upon which a dam was constructed. The defendants were the occupiers of an adjacent property, upon which there existed a small dam downstream from but near to the plaintiffs' dam.

As a result of work done in enlarging the Viola dam, the plaintiffs alleged loss of support to the Xuereb dam, resulting in loss of water from the Xuereb dam requiring remedial works. The plaintiffs claimed the cost of carrying out this remedial work of some $25,000 plus a further amount of $20,000 being the estimated cost of further remedial works required.

In 1983, an action was brought in Equity seeking a mandatory order that Viola carry out rectification work to the Xuereb dam. Pursuant to an application, the action was transferred to the Construction List in the New South Wales Supreme Court late in 1989. An order was made by consent pursuant to Part 72, Rule 2 referring various technical questions to Professor J M Antill for enquiry and report. Part 72, Rule 8(2), subject to the direction of the Court, permits the Referee to conduct proceedings under the reference in such manner as he or she thinks fit, and further that the Referee is not bound by the rules of