DEVELOPMENTS IN FOREIGN CURRENCY LOANS LITIGATION

QUESTIONS AND ANSWERS

Comment - Professor Robert Baxt (Chairman):

Well we have two very interesting and contrasting papers. I would like some questions and comments, but I am going to invite Mr Justice Rogers to comment on some of the things that Tom Valentine has said.

Judge, might I ask you if you would like to respond to some of the things that Professor Valentine has raised in his oral presentation and that might give some people a chance to put their thoughts together to raise a question or comment.

Comment - Mr Justice Andrew Rogers:

Just in the interests of clarity, there are perhaps a couple of things I should say. The first one is that I have now gained a wholly new perception of what the independent expert witness is about. I am afraid Professor Valentine misunderstood me. I did not suggest that a bank should have managed the loan; indeed the whole point I was seeking to make was, that in the absence of the availability of the bank as a manager, who was going to manage the loan? He and I are at odds as to whether or not the task of management is difficult or not. Although I am in the possession of highly confidential information I won't make use of it in order to embarrass Professor Valentine in that regard. But let me go on to more or less controversial matters.

He suggests that the letter to the borrower, the letter of offer, was sufficiently clear to make the facts known and that it was inappropriate to discard the letter as unintelligible. I have not got the letter in front of me but let me take a couple of sentences that I noted from what he was saying. One was on the understanding that the risks are fully recognised. How was the borrower meant to understand the risks when they were not explained to him? It is one thing to get somebody to sign a document or to send him a document saying you understand the risks, but it does not go to prove that the person did so when you have not explained them to him. Another reference was to the availability of hedging. True, you could hedge the loan for the full term. The whole tenor of the draft judgment is that nobody explained hedging to the borrower. You might as well say to him that if you study hard enough you can speak in Swahili. But that does not make the person able to speak Swahili or indeed any other language.

In those circumstances, without being too emotive about it, and using relatively simple language, I want to emphasise that the terms of the letter of offer were not inaccurately described as unintelligible to a borrower, and just pounding the obvious for a moment, unintelligible in the sense that to say to somebody you can hedge, is meaningless, unless you explain to that person what hedging is about.

I think it is important in the interests of the proper administration of justice to explain a couple of things to Professor Valentine. As it happens, in *Lloyd v Citibank* I found in favour of the bank, on the evidence before me. As it happens, I think in *Meta*, perhaps a different conclusion is required. Judges have this extremely strange habit, Professor Valentine, that they decide cases on the evidence adduced and not on any element of prejudice or preconception. That is an advantage economists have over us.

Now he asked a perfectly legitimate question, and that is, what should the banks have done? If I had had the opportunity, which I regret I did not have, of letting him have the paper in full earlier, he would have seen that I extracted a large portion of the evidence given by Mr Allaway as to what a bank should have done. Mr Allaway was the Vice President of Citibank. Now there is a conflict between Professor Valentine's view and that of the practising banker. That is a perfectly reasonable situation in which a judge who hears the case will have to make an assessment of who is to be believed and he might perhaps be not uninfluenced by the partisanship that is exhibited by one or the other. But let me finish my comment by this proposition.

Professor Valentine said, once again quite reasonably, that nobody could foresee the extent of the fall in 1985. True. As it happens Mr Meta borrowed after the fall and what was said in regard to him was that it was perfectly justifiable for the bank to take the view that the market had bottomed. So you win, or you win. Either you can't foresee that the market is going to fall that much, or that market having fallen that much it must surely have bottomed. Neither of those two propositions was right.

In those circumstances what is the relevance of the statement that nobody could foresee the precise extent of the fall? On one view, that merely goes to prove that not being able to foresee the extent of the fall, the risk had to be made very clear.

Professor Valentine was gracious enough to agree with the proposition that entering into this sort of transaction was a gamble. If you are going to invite somebody to enter into a gamble and you owe that person some sort of duty of care, then you make clear something about the odds - you don't write to him and say "on the understanding that you fully recognise the risks which I have never explained to you". But having said all that, we come to this point.

The judgment in *David* may have been perfectly correct on the facts before the court. What I was attempting was to set out the relevant principles in the light of which those facts have to be evaluated. That is not an emotive task. That is not a task which should be approached in any spirit of partisanship. And I am spending time in saying this for one reason only. I do not in the least bit care what Professor Valentine thinks of me as a judge or as a person. But I do care, very deeply, about the proper administration of justice. And it is crucial that the law and its administration should be held in proper respect. Whether we are right or we are wrong, we do our job as best as we see it, and it is inappropriate to approach in a spirit of levity, the question whether a judge is wrong and should be sued if he is reversed. We are going to destroy the values of a civilised community if we make comments such as that. Thank you.

Question - Cathy Walter (Clayton Utz, Melbourne):

If I could address a question to his Honour. Your Honour, you mention that the standard of care increased proportionately to the risk involved in any breach of the duty. Did that also carry with it the notion of an increase in proportion to the damage which would be suffered if that risk were realised?

Response - Mr Justice Andrew Rogers:

If I can just give you the quote precisely because I think it alters the context. The standard of care to be exercised increases proportionately to the seriousness of the *risk* involved in any breach of the duty. It does not increase with the breach of duty; it increases with the seriousness of the possible or likely or foreseeable risk of injury. This I would suggest to you is perhaps a different concept from the one that your question might have suggested. In other words, all that they are saying is that if you are going to be driving without brakes in your car, the seriousness of the risk which arises from that, imposes on you a duty of care which involves turning on your headlights, your siren, blowing your horn continuously, and so on.

Question - Eric Anning (Feez Ruthning, Brisbane):

I propose a question to you, Mr Chairman, and perhaps to the speakers. Is there a danger in dealing with foreign exchange loan cases in isolation? I think we are all very sympathetic to a person who borrows money in an enterprise and loses money and can't pay it back because of unpredictable circumstances which arise after the borrowing. And just to give a couple of examples - there is the small business man (the small business does not have a very high success rate), I am mindful of the rural loans in grazing matters and farming, and cotton farming is more or less up or down, and in all those cases we have unsophisticated borrowers going to financial institutions and asking for a loan. We have financial institutions who somewhere in their operations are mindful that unpredictable circumstances can arise which if

they do happen during the period of this fellow's loan, huge losses might occur. And I am just wondering - I do not agree with some of the things that have been said - whether the spill-over from the foreign exchange cases to other areas of industry is a danger to us and the development of the law that we should be mindful of when looking at the foreign exchange cases. Perhaps you, Mr Chairman, or the speakers would like to comment on that.

Response - Professor Robert Baxt (Chairman):

I would ask Professor Valentine to pick that one up first because I thought he dealt with part of that in some of his concluding remarks.

Response - Professor Tom Valentine:

Well, whenever I speak to lawyers they tell me that this is not relevant because every case is decided on the facts of the case and obviously it will have no influence on any other case - that in other areas is known as "mate work" I guess - "We don't do things simply, we make sure every case is fought out to the end." But I cannot believe that if the foreign currency cases were decided, for example, in the way that Rogers J would like, that we won't see cases based on similar principles brought in, in areas which are totally unrelated to foreign currency areas. In fact, the same people who originally advertised for foreign currency borrowers to come and sue the banks after the stock market crash, advertised for share investors to come and sue the companies they had invested in. I cannot believe that (I don't know what has happened to that, I haven't heard of any such cases, so maybe that didn't carry through); but if the foreign currency cases are found against the banks, I cannot believe that we won't see an extension to many other areas of banking business, because if you look at some of these other areas, and I have been deliberately vague about this because I do not want to be the one who draws a room full of lawyers' attention to the potential, there are many other areas where the principles can be applied directly, without any change whatsoever.

Response - Mr Justice Andrew Rogers:

Well I think that in the United States what is happening is somewhat along the lines that you were contemplating in your question and when you get the full paper you will see a reference to an article in the *Yale Law Journal* in 1989 called "The Economics of Lender Liability" in which there is reference made to cases which have been brought against banks for in effect lending too much or lending inappropriately. At the risk of being branded a lawyer, it does depend, I would have thought, on the circumstances of the case as to (a) whether a duty of care arises, and (b) whether there is a breach of it. It is not impossible, I would have thought, to imagine extreme circumstances where a duty of care arises. But let me go back, if I may, to the proposition with which I started, that generally

speaking the relationship of banker and customer does not give rise to any duty of care, and secondly, that you go to a bank merely to ask for a commodity, namely money, and when you get it you go away with it - and that is the total extent of the relationship. You see, the importance to the law and to a development of the law of this foreign currency litigation, is in determining whether there are extreme situations which impose a duty of care in circumstances where absent the extreme situation, no duty of care would arise.

Question - Professor David Allan (Mallesons Stephen Jaques and the University of Melbourne):

I am very reluctant, in fact I will not buy into the controversy between our two speakers, but I would like to make a couple of comments which they might care to address. The first is I think in all of these cases what has tended to be ignored in most of them is that there is a question of *causation*. Given that the customer proves he has suffered loss, given that the court may find there is some legally culpable conduct on the part of the bank, it is necessary to link the two. And in every commercial transaction, as Professor Valentine says, there is a possibility of gain, there is a risk of loss. I think what you have to ask in all these cases is how much of this loss, to what extent was it attributable to this blameworthy conduct of the bank? I don't think you have to go as far as to say that the customer would not have entered into this but for the conduct of the bank. But when you get to management, and you say "if the bank had advised him, would he have brought the loan back on shore?" you are getting into very difficult areas of causation. That was the first comment I wanted to make.

The second one was to take up a comment made by Professor Valentine, and this may be a point on which I think I detected Mr Justice Rogers would agree with Professor Valentine, I wonder are we not now putting too high a duty on professional advisers - whether they are bankers, whether they are accountants, whether they are lawyers? Mr Justice Rogers referred to Professor Finn's attempts to make us all fiduciaries to those whom we advise. I believe that notion in commercial transactions is to be resisted. But if one looks at the legislation, one finds s 52 of the *Trade Practices Act* which is carried on into the states in the *Fair Trading Acts* and applies not only to corporations; s 51A of the *Trade Practices Act* which deals with future predictions which fortunately have not got beyond the *Trade Practices Act* I think; and the *Securities Industry Code*, s 65 which does not apply to banks, but which is limited to banks which are licensed under the *Banking Act* and it would apply to non-banks, other financial institutions which are giving advice. They all impose a very high standard of care. Now advice can be as careful as you like, but it can still be wrong. If we could be sure as advisers that our advice were always correct, we would not be in the business of giving advice, we would advise ourselves and we would be off enjoying the spoils somewhere else. And I wonder whether the legislation now has not placed too high a burden. I don't think

we are going to give up giving legal advice, or banks giving financial advice, or accountants likewise, any more than banks are going to give up lending money. But it has become a very hazardous occupation.

Response - Professor Tom Valentine:

I think the last question was more of a statement than a question, but it is certainly a statement that I heartily endorse. To come clean with you, one of the problems I have about foreign currency cases is that over the years I have given predictions on exchange rates and share prices and all sorts of things on many occasions, and it seems to me that if these principles are accepted, I become liable for the unfortunate results of that advice. And I might say in spite of the example the chairman quoted at the beginning, I had been predicting that for 18 months before it happened, and obviously for all that time I was wrong; and people who took notice of me a year before might want to sue me. I feel we have gone too far in this area and it is about time there was some re-balance where the recipients of advice are told that or have to accept that the advice is offered with all best intentions, but they have to make the final decision of whether to make use of it or not. And I think these foreign loan cases are just a small example of that.

Coming back to the first question about the bank managing the loan and bringing the loan on-shore, what worries me about that is what happens to the bank if it brings the loan on-shore and it turns out it would have been better to leave it off-shore. It is in just as much trouble then as well. And no bank that I know of, I think quite rightly, would do such a thing without having legal permission from the borrower to do so.

Response - Mr Justice Andrew Rogers:

The question of causation is something that was dealt with by Mr Justice Foster at first instance in *Spice* and what he said in substance is set out in the paper and I won't take time in reciting it now. But what I do want to say is in relation to a second aspect of the matter. We have, as Professor Allan rightly pointed out, put the focus of our attention on foreign currency loans. But predictions range into a far wider area and s 51A of the *Trade Practices Act* gives a fair boundary mark to where the liability is delimited. It reverses the onus of proof and it is up to a forecaster to show that he or she had reasonable grounds for making the forecast. So there is the answer to Professor Valentine. If he can show that he had reasonable grounds for making his forecast 18 months earlier, then there is no problem. If the science is so inexact that there were no reasonable grounds for making the prediction, he would be in difficulties. And the question is, did the Parliament correctly mark out the boundary? But once a Parliament has done that, all that remains for the lawyers and the judges is to find the test that is so clearly set out.

Comment - Professor Tom Valentine:

If I could just say a couple of things. I don't think the judge and I will ever agree on the outcome of *Meta*. I am happy to know that I don't disagree with all judges, since the Full Court apparently has decided in a way which I would regard more in line with commercial practice and common sense than the draft judgment in *Meta*. I have learnt something this afternoon which is that apparently the role of an expert witness is to agree with the judge. This is something which I had never quite got on to before, but your Honour I will bear this in mind in the future. [Judge: But so long as you bear everything I have said in mind we will get on famously.] I certainly will. And in terms of the prerogative of the judiciary never to be sued, that suggestion at the end was as his Honour suggested, a lighthearted suggestion. I really don't want to see lawyers and judges sued. But if everybody else is going to be sued, I think your Honour, that you have to face the fact that you are making decisions with wide commercial ramifications and there are people out there who are going to criticise those decisions if they don't appear to be sensible decisions. And if those decisions end up embodied in law, those of use who feel that they have dangerous implications will presumably try to get our legislators to change the law so that the situation is corrected. I certainly believe the law deserves respect and should not be undermined, but at the same time that does not mean we have to accept that it is right when it is wrong.

Comment - Professor Robert Baxt (Chairman):

Just to finish off on a pessimistic note, David Allan commented on the fact that s 52 of the *Trade Practices Act* and the *Fair Trading Acts* create a glorious new line of opportunity for lawyers. Just in case you were not aware of it there is now going to be a very similar provision in the *Corporations Act* which will give lawyers plenty to do in the months and years ahead.

Ladies and gentlemen, I am sure that you would like to join with me in thanking our speakers for a very entertaining session.