PITFALLS FOR LENDERS

QUESTIONS AND ANSWERS

Question - Ian Davidson (Barrister):

I have a question on **Standard Chartered Bank v Bank of China** for Richard Gray. My recollection is not too clear, but in that case my recollection was that the Bank of China branch in Sydney was the same legal entity as the Bank of China Hong Kong branch. And if that is the case, my question is whether there would likely have been the same or a different result if you had been dealing with the situation of a wholly owned bank subsidiary, if for example, there had been a different type of foreign bank set up?

Response - Richard Gray (Speaker):

I do not know. I do not necessarily think it should. You would still have, do not forget, those English cases and the Denning judgments which look at branches of the nature of this sort of bank as in essence a different operating entity. The logic to me would be much the same. To the extent that it was a different legal entity, the argument, I suppose, would be attractive, that the bank should not have been held to it because it could not have. You would, though, still presumably have arguments of agency. If the branch held out the people in the Sydney entity as having the capacity to authenticate signatures, I am quite sure a judge would happily find that there was an agency role. So, I do not know, but I can see many arguments why the decision would not be different at all.

Comment - Hernan Gonzalez (Corrs, Sydney)

One thing that I would like to suggest on that is, when dealing with documentary credits there is also of course an elaborate process for getting tested telex and all this kind of thing. It seems to me that in a situation like the **Standard Chartered Bank v Bank of China** case where a letter of credit would have been received by tested telex, an elaborate procedure to authenticate the fact that it was sent from the right place, has been processed - that has been gone through - I would have thought it would be more that process than the identity of the legal entity that would be relevant.

Response - Richard Gray (Speaker):

Well, that is probably right. There was a lot of evidence brought in that case about banking practice and the Standard Chartered officers were in a sense on some form of constructive notice that something was amiss to the extent that there was evidence brought that it was a highly unusual manner of presentation of the letter of credit. One of the officers gave evidence that indicated that he might have been aware that things were amiss. That was the point though, of the finding of Mr Justice Giles, that constructive notice does not seem to affect the innocent party - it only seems to affect the guilty party.

Comment - Bob Baxt (Arthur Robinson & Hedderwicks, Melbourne):

I am particularly interested in Reg Barrett's comments in relation to the way in which the law has this habit, especially once you find the chink in the armour, of developing its own momentum to create new law which often is not grounded on sound principles. I take you back to the first session and Francis Neate's challenge to the allegations, almost assumptions now, that there is a duty on the part of the directors to creditors, and how that developed from a throw-away couple of lines of Mason J in **Walker v Wimborne** to the way in which unconscionable conduct, unconscionable contracts, is now gathering its own momentum in creating some concern, I believe an unwarranted concern, in a number of areas including the area of banking.

When you look at Chief Justice Mason's comments in **Northside** and his remarks that banks in certain situations are required (he was not talking about banks specifically, but there was a bank involved) to act prudently and by so doing enhance the integrity of commercial transactions and commercial morality. And you build that on the kind of arguments that were unsuccessfully tried, but will be tried again, in the **Else** case where Max Eise was arguing that the State Bank owed a duty to the National Safety Council to decide just whether it should lend that money because of the nature of the information they had etc. Then you get laws such as the Contracts Review Act being built on top of trade practices law etc, and you do, I think, worry about the way in which these things may develop.

And I mention in the context of, again, a throw-away remark made by the Attorney-General in August of 1991, when commenting on the proposed changes to the Trade Practices Act, without reference to specific recommendations, said that he was going to introduce changes to s52A of the Trade Practices Act to widen it to include all commercial transactions. And Reg, I just think that in the context of what you say that if you really want to arrest some of that development, we have got to start putting arguments in a constructive (and I am not suggesting you are not, and I am not suggesting anyone is not), but I think we need to put arguments in a constructive fashion to try to arrest that development.

If you want a very good example of a court, a New South Wales court, looking at unconscionable conduct and the way in which they are starting to pick up the thread, that case involving the Russian Ship (the Mikhail Lermontov) - the **Baltic** case - even Mr Justice Gleeson in that case I think was throwing his hands up in the air and saying yes, the law of contract has been very clearly eroded by such legislation as the Contracts Review Act.

My only concern is that we tend at times to give up the ghost and not try to fight the principles that should be founded on correct assumptions, because otherwise we will have that same erosion as has occurred in the law of negligence and in the duties to creditors. So I commend Reg's comments to you and suggest that there is a real opportunity to try to at least argue that some of these developments should be founded on much closer attention to principle than they have been in the past.

Response - Reg Barrett (Commentator):

I think Bob, you have issued to us all a very substantial challenge. The problem is, it seems to me, to know where these lines should be drawn. Society, I guess, is made up of a morass of conflicting interests. Somebody up there, or somebody somewhere, is meant to reconcile them and make them compatible. I suppose the judges in their inept way play their part. And the legislators in their necessarily more heavy-handed way play their part. But just how we would go about arresting the development of the processes that we see continually unfolding, I really do not know.

Comment - Mary Hiscock (University of Melbourne):

I want to put perhaps one corrective note into this discussion very briefly. Reg Barrett talked about the sleeper of implied terms. A great deal of that discussion is going to be about so-called generic implied terms that arise out of a banker/customer relationship. Those in the end reflect the practice of the banking industry. So at the end of the day, although it may be a long day, it is the practice which will produce the implied terms - it will not be the implied terms that dictate the practice.

The second point I want to make relates to something that Richard said about the problems of estoppel. A great many of the problems that have arisen in the Australian cases are because the agreement between the parties is not reflected in the documentation. And it is the attempts to try to correct that by unacceptable methods of proof that finally result in estoppel being used. So again, the remedy lies in our own hands. If our agreement is truly reflected in the documentation, at least to that extent the uncertainty goes. And I was somewhat impressed by Francis Neate's statement this morning that they had no standard documentation. I think if you want to find the real problem, it probably lies in word processing systems and people with unsteady trigger fingers on their standard forms. Thank you.

Response - Richard Gray (Speaker):

If I can just make one comment on the estoppel point. I think there are a number of problems in the area of estoppel. I think the first one is that when you read the judgments there is an inordinate amount of time spent on trying to work out what the principle is. There is at the moment, I suppose, a move towards a unified doctrine, a doctrine which will get rid of the distinction between common law and equitable estoppel. The problems, however are, that in spending so much time on trying to work out what the principle is, it is extremely difficult to know what it is, and I think, talking to litigation lawyers, they find it extremely difficult to know what to plead. And in a lot of the judgments you find that the pleadings actually take place at the court level, because there is no set principle.

As to the rider that estoppel is there to reflect the true agreement, I agree that that applies in a number of cases. It clearly applies in the **Whittet v State Bank of New South Wales** case, and cases like **Amadio** where possibly the banks were trying to take a smart point. I do not think it necessarily applies constantly in the areas of promissory estoppel where you literally have two people going off on two different paths. And I think to that extent you cannot say that the arrangements arise necessarily because the arrangements do not reflect the agreement. In most cases there they do not even know they have one.

Comment - Les Taylor (Commonwealth Bank of Australia):

Just a comment on Richard Gray's point on the **Bank of China** case. When that went to the Court of Appeal and the Bank of China won three-nil, the question there was, what actually was the Bank of China asked to perform for the Standard Chartered Bank? And the court then said that in effect all they were required to do was to check the signatures, which anyone looking at a Bank of China letter of credit would realise is not a very easy task! And Standard Chartered sought special leave to the High Court. I always thought it was interesting as to why the Standard Chartered Bank in Adelaide would send across to Sydney a letter of credit and ask them to check the signatures - they did not have the up to date signature book, they then went up to the Bank of China and asked them to get their book out, they had a look, checked it, then the whole thing went back. Why on earth could not the Standard Chartered Bank in Adelaide have just faxed the thing across to Hong Kong and asked them to check it for them.

Response - Richard Gray (Speaker):

Thank you for letting me known about the appeal, which I did not know about.

I think that is right. I personally think that the problem with the case is not trying to analyse what the representation is, because that to me is taking too technical an issue as to founding your estoppel. I think the problem was that there seemed to me clear evidence that the Standard Chartered officers were on some form of constructive notice that something was amiss. And I agree, a simple phone call to the Hong Kong branch of the Bank of China would have sorted the whole thing out immediately. And that is why I think that at the lower level, I am not too sure - I obviously have not read the appeal, and I am unclear as to whether the appeal court decided that constructive notice does not apply to the innocent party. It appears as though it did not. It appears as though it looked at it more on trying to define the representations - which I think is the wrong approach.

Comment - Keith Nathan (Chairman):

Ladies and gentlemen, that brings this session to a close. It is obviously becoming more and more complex for the role of the bank and the duties and obligations that are placed on them, especially when you take into account the way the principles of estoppel are being applied and when you look at say **Ferneyhough's** case and you have inexperienced clients coming in and you have a duty to advise them of certain rights and obligations. It is certainly going to be most difficult as to where those lines are going to be drawn.

I would like to thank the speakers for the papers that they have presented on behalf of the Association. It has been a most complex area and I would like you to express your appreciation in the usual manner. Thank you.