PLAIN ENGLISH IN BANKING DOCUMENTS

Comment by

ALAN CORNELL

Partner, Blake & Riggall
Solicitors, Victoria

Thank you Mr Chairman. I would like to express my thanks to the Banking Law Association for inviting me to be present, and especially to David Bruce who is the Chairman, Convenor, Travel Agent and Caterer of the Convention.

It is very rare that a practicing lawyer can agree wholeheartedly with an academic. However, having read Professor Eagleson's paper I can only applaud. What I can do today is to point out some of the difficulties which will confront banking lawyers in adopting plain English both as a result of their training and of their professional pride and hopefully to offer some defence for our ways. I will illustrate this by a case study.

A partner of mine recently had occasion to draft his 100th leveraged lease. To mark the occasion he decided to dispense with the standard 45 line clause which made it clear it was a net lease and substitute in its place the short clause of seven lines. I tender the 45 line clause.

Net Lease

"This Lease is a net lease and accordingly the Lessee acknowledges and agrees that the Lessee's obligation to pay Rent and all other moneys payable hereunder and the rights of the Lessor in and to such Rent and other moneys shall be absolute and unconditional and (notwithstanding any provision of this Lease or any other term whether express or implied or any rule of law or course of conduct to the contrary) shall not be subject to any abatement, reduction, set-off, defence, counter-claim or recoupment of any kind whatsoever including without limitation abatements, reductions, set-off, defences, counter-claims or recoupments due or alleged to be due to the Lessee or by reason of any past, present or future claims which the Lessee may have against the Lessor, the Supplier, the Lender or against any person for any reason whatsoever nor except as otherwise

> expressly provided herein shall this Lease terminate or the respective obligations of the Lessor or the Lessee be otherwise affected by reason of any defect in the Equipment, the condition, design, operation or fitness for use thereof or any damage to or any loss or destruction of or any liens, encumbrances, security interests or rights of others with respect to or any defect whatsoever in the Lessor's title to the Equipment, the invalidity or unenforceability or lack of due authorisation or other defect of this Lease, or lack of right, power or authority of the Lessee to enter into this Lease, the taking or requisitioning of the Equipment by resumption, condemnation or otherwise, any prohibition or interruption of or other restriction against the Lessee's use, operation or possession of the Equipment for any reason whatsoever, the interference with such use, operation or possession by any person or by reason of any other indebtedness or liability, howsoever and whenever arising, of the Lessor, the Lessee or the Lender to any other person, or by reason of any insolvency, bankruptcy or similar proceedings by or against the Lessor or the Lessee, or for any other cause whether similar or dissimilar to the foregoing, any law to the contrary notwithstanding, it being the intention of the parties hereto that the Rent and all other moneys payable by the Lessee hereunder shall continue to be payable in all events and in the manner and at the times herein provided unless the obligation to pay the same shall be terminated pursuant to the express provisions of this Lease."

This is what my partner suggested:

> "This lease is a net lease and the Lessee acknowledges and agrees that the Lessee's obligations to pay rent and all other moneys payable hereunder are the rights of the Lessor in and to such rent and other moneys shall be absolute and unconditional and shall not be subject to any abatement, reduction, set-off, defence, counter-claim or recoupment of any kind whatsoever."

This, I thought, was pretty good. When the lease was finally signed, guess which clause appeared? Well you are all banking lawyers and I will bet no one here would have bet on the seven liner. This is exactly what happened. My partner gave up in his quest for plain English because his banking lawyer colleagues in the deal wanted to follow precedent and in addition a new short form would have involved worrying about the problem.

Why did this happen? It seems to me that we lawyers fall victim at an early age to the common law system of precedent. If one is trained to follow precedent in the law it is a very short step to following precedent in drafting. When it is all said and done, when you have before you a 100 page lease or trust deed which has been slavishly worked up from a precedent that has stood the test of time, and perhaps a receivership or two, why should you, a

mere mortal banking lawyer, place your head on the chopping block for something as ephemeral as the quest for plain English? Incidentally "ephemeral" is defined by the Shorter Oxford Dictionary as "short lived or transitory".

There are no prizes in the law for being wrong and that is why when the cards are down banking lawyers will generally follow precedent no matter how unintelligible the English in that precedent is. The question then is, how do we rationalise our seemingly irrational conduct to one so erudite as Professor Eagleson? The solution is quite simple. All we have to do is point to one or two classic cases where crystal clear words have been used and then to the turmoil that this has caused. What I now do is plead the case for the defence.

I cite as the first case in our defence the reason that we are all here today. In 1949 in the Bank Nationalisation case the Privy Council upheld the decision of High Court that certain key provisions of the Commonwealth Banking Act 1947 were unconstitutional. If that had not been the case this meeting today could well have been called the Commonwealth Bank Law Conference and who knows, we may have all been the richer for it.

You are all very familiar with the provisions of section 92 of the Commonwealth Constitution; the sheer brevity and clarity demands that I read the first three lines:

> "On the imposition of uniform duties of customs trade, commerce, and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free."

Now if you look at this section carefully today one might wonder how these three lines in their brevity would prevent a 1947 Commonwealth law to nationalise the private banking system. Indeed if the framers of our Constitution were doing the job today they may well have added a few words to section 92 which made it clear that section 92 did apply to prevent nationalisation of private banks.

However the fact is that in 1901 the concept of nationalisation was virtually unknown in Australia. As luck would have it, the task of analysing the plain English of section 92 in this context fell to Mr Justice Dixon, that very fine jurist and lawyer, who had a clarity of expression which was unique. One of the passages in his judgment said:

> "To describe the characteristics necessary to render a law obnoxious to section 92, there has been much use of figurative expressions. It has been said that the law must be 'pointed at' interstate commerce, 'directed against it', 'inimical to it', 'hostile to it', 'antagonistic to it' or that it must 'hit at' interstate commerce. I have never been quite sure what these expressions connote when so used. Indeed, sometimes the question whether a law does or does

> not impair the freedom of interstate commerce seems to be brought down to a choice between dyslogistic and a eulogistic epithet to describe the same legislative provisions."

"Dyslogistic" is defined as having a bad connotation or approprium. "Eulogistic" is defined as commendatory or laudatory.

As a law student it was always a pleasure to read the judgments of Sir Owen Dixon. Every now and then he would state the ratio decidendi in one sentence as he did here. In this case he simply said:

> "I cannot see how to close up every bank but a government bank leaves interstate banking free."

Needless to say the decision of the High Court went to Privy Council and they upheld Mr Justice Dixon on this point. However, it is an undoubted fact that the first three lines of section 92 have probably created more litigation than any other three lines ever written in Australian legal history for which all Australian lawyers must be eternally thankful.

Before the plain English of section 92 was allowed to operate we had to have a judge of Sir Owen Dixon's stature to put it to bed. Now would we banking lawyers take such a risk? I guarantee that our section 92 would have been at least 72 lines long.

The second case which I would like to cite in our defence is the Standard Chartered Bank case [1982] 1 WLR 1410. In that case a standard receivership clause in the bank debenture came under the scrutiny of the Master of the Rolls, Lord Denning. In his usual way he stated the question he wanted to answer with lucidity.

> "When a bank lends money to a private company it usually insists on the overdraft being guaranteed by the directors personally. Especially when a husband and wife are the directors and shareholders of the company. Then when the company crashes and they are unable to meet their liabilities, the bank puts in a receiver. He realises the assets of the company. But not enough to pay off the overdraft. The bank then comes down on the directors of the guarantor on the guarantee. Have they any defence? The directors here say that the assets were sold at a gross undervalue. How far does that give them the defence?"

He then went on to find the hook to hang his hat on. He said:

> "The bank insisted on a debenture. It was dated 25th October 1977, it gave the bank a fixed and floating charge on the assets of the company, it gave the bank power to appoint a receiver who was to have power to take possession of the assets and sell them. It contained an express provision.

> 'Any receiver or receivers so appointed shall be deemed to be the agent or agents of the company and the company shall be solely responsible for his or their actual details and for his or their remuneration.'"

Now what could be clearer than this clause. It was plain English at its best and would require all the mastery of Lord Denning to overcome it, but overcome it he did. Essentially what he held was that the receivers were not the agents of the company and the company was not solely responsible for their acts.

Now this may appeal to the good shepherd in us all but the simple facts are that this is not what the plain English said. The moral is simple - if you want to screw a guarantor, do not rely on plain English to do it for you.

The third case which I would like to cite in our defence is perhaps the most famous loan contract of all. This contract was written in Venice many years ago and the instructions to the person drafting the contract were given by a gentleman called Shylock. I do not have to remind you of the story but this is what the deal was between Shylock and Antonio.

> "Shylock - This kindness will I show, go with me to a notary, seal me there your single bond; and, in a merry sport if you repay me not on such a day, in such a place, such sum or sums as expressed in the condition that the forfeit be nominated for an equal pound of your fair flesh to be cut off and taken in what part of your body pleaseth me.
>
> Antonio - Content, faith: I'll seal such a bond and say there is much kindness in the Jew."

Shakespeare did not let us into the negotiations which then ensued but you should note that the bond which Antonio signed was prepared by a notary and not a lawyer and it is fair to assume that the bond was a seven liner.

When they subsequently came to court some months later, some of the transcript is worth reciting:

> "Portia - A pound of the same merchant's flesh is thine. The court awards it and the law doth give it.
>
> Shylock - Most rightful judge.
>
> Portia - And you must cut this flesh from off his breast. The law allows it, and the court awards it.
>
> Shylock - Most learned judge. A sentence! come, prepare!
>
> Portia - Tarry a little! there is something else. This bond doth give thee no jot of blood. The words expressly are 'a pound of flesh'. Then take thy bond, take thy pound

> of flesh, but in the cutting of it if thou dost shed one drop of Christian blood thy lands and goods are by the laws of Venice confiscate unto the State of Venice."

Later in the hearing:

> "Portia - Why dost the Jew pause? Take thy forfeiture.
>
> Shylock - Give me my principal, let me go.
>
> Portia - Tarry Jew, the law has yet another hold on you. It is enacted in the laws of Venice if it be proved against an alien that by direct or indirect attempts he seek the life of any citizen, the party 'gainst which he doth contrive shall seize one half of his goods, the other half comes to the privy coffer of the State and the offender's life lies in the mercy of the Duke only."

The judgment of the court was given by the Duke:

> "Thou shalt see the difference of our spirits. I pardon thee thy life before thou ask it. For half thy wealth it is Antonio's, the other half comes to the general State, which humbleness may drive to a fine."

Now what would happen if Shylock had engaged a banking lawyer in 1986 and not a notary? For a start I am quite certain that the clause relating to the pound of flesh would have permitted Shylock two pounds of flesh, or such part thereof as Shylock in his unfettered discretion thought appropriate. It would also provide that with the flesh Shylock would have all the appurtenances which normally accompany same, such as blood, hair and the like.

Finally our banking lawyer would in drawing the loan agreement have anticipated the fact that the laws of Venice prohibited the shedding of a single drop of Christian blood. He would have inserted a clause to provide that the contract would be governed by the laws of Fiji, to which all parties to the contract would have unconditionally submitted. He would also have anticipated the risk of having a squeamish judge and would further have provided that any dispute arising under this contract would be finally decided by the Chief of the time being of the Viti Levu tribe who will be deemed to be eating as an expert and not an arbitrator.

Well Professor Eagleson, the defence rests. It is quite clear that if you use plain English in loan agreements you do so at your peril and you will inevitably end up in court. The consolation is that if your English is plain enough, the plain English draftsman will win. But as you say, this is not enough. It is high time that our courts rewarded those who use plain English and penalise those who use the long form simply because it has been there since time immemorial. If we as lawyers are not prepared to use plain English in our documents voluntarily

there is a grave risk that our clients will demand it of us or find another lawyer who will. However, if the threat is made by our parliamentarians to impose plain English by law we need have no worries at all. The simple fact is that if plain English is imposed by our usual tortuous legislation, we as banking lawyers will have the feast which will make section 92 look like Oliver Twist's dinner.