CURRENT ASPECTS OF UNSECURED LENDING
LIABILITY OF LENDERS

JOHN PATTEN

National Manager - Advances
Standard Chartered Bank Aust Ltd, Adelaide

It is no wonder nobody likes a banker: I am given three minutes to respond to a topic that could last for three hours and what happens if I run over your lunch hour?

I recently saw on television a religious minister warning people of the dangers of banks in general and of their plastics in particular. In essence, he is convinced that banks are a part of a world-wide satanic plot!

Richard has convinced me that many learned of men of a more colourful cloth, especially in the U.K. and the U.S.A., may have been listening to that good minister! I guess bankers have always, and probably still are paying for Shylock taking his pound of flesh.

Can I pick up from my earlier remarks and remind you that when you talk about banks, you talk about people, and it won't surprise you to know there are good bankers and there are bad ones. We have certainly got some bad apples but in general terms I don't think we are any less principled than any other industry. On the contrary a bank's name and standing is its lifeblood. So why do we incur these liabilities and responsibilities?

Instilled in most bankers from a very early age are two basics which I heard Richard mention:

Firstly, the banker/customer relationship which to a banker is sacrosanct, and secondly, the banker's duty of care; in everything we do there is a duty of care. But it seems to me that these fundamentals are now being used as contradictions at law. For example, is it possible that our special relationship with a customer may be seen at law as a dereliction of our duty of care to him? I can only say here, at the risk of blaspheming, that this is akin to Moses suggesting that the Ten Commandments are a multiple choice question!

The question of inequality of bargaining has also been raised and certainly I can understand the courts being concerned with this

issue. But surely it can only apply to equal types of creditor; you cannot talk of inequality of bargaining when you are not referring to the same class of creditor.

Banks do seek certain information which might be seen as privileged or unequal in a sense that it is not generally known by other creditors possibly for say competitive reasons. But as I mentioned earlier a banker going into an unsecured lending and not making very detailed enquiry about the borrowing company - not only where it is now, but where it is going to be - is probably risking a duty of care to his shareholders. Surely relativity of the amount owing must have some bearing on the level of information provided or sought for that matter.

Similarly, why shouldn't the largest risk takers, and this is usually the banks, have the greatest say? This principle applies in shareholdings so why shouldn't it apply in creditors?

At the very least, it seems to me that major creditors should be given equal protection at law as that afforded to minor creditors but I gather this is not necessarily the case when banks are involved. One thing the courts cannot take away from us is that very rarely is the banker first out but what is really fair and equal about that?

In a liquidation scenario who really is it at fault in the eyes of the law? Is it the banker possibly for his commercial or eyes open approach? Or is it the insolvent company's management who have mucked it up? And what about the accounting fraternity? If there are any here forgive me but are the financial accounts really a true and fair reflection of a company's position? And if so, which one of the proverbial three financial accounts is the true and fair view?

I heard a lot about the subordination earlier and I thought I understood it until the lawyers beside me got onto it. Surely there is a scope for redesign of a meaningful presentation of financial accounts where everyone can understand the financial position of a company and indeed where each creditor stands. Why can't completely separate and different categories of creditor be created with identifiable priorities? With such changes, maybe secured borrowings, secured creditors might become a thing of the past.

And what of the lawyers? Lawyers who draft the negative pledges for bondholders, for example. Do these lawyers actually expect that anyone will understand their documents with their rather obtuse financial ratios? I heard one earlier which was classic and I suspect so complicated that it can be engineered easily by clever accountants when the need arises. In this context, there is no doubt in my mind that the answers to most of the financial ratios recorded in documentation are already known long before the ratio is designed. In mathematics they call this QED or simply that which we set out to prove.

In conclusion, can I ask you why isn't the brilliance of creative accounting directed to positively solving the perennial issues of the true and fair balance sheet? Why do legislators and lawyers react to changes by adding another 100 pages to the statutes or to the documentation? Is this really the way that changes in the financial world should be addressed? In general, why don't the accounting and the legal fraternities address changes in a pro-active and positive manner rather than in a bandaid fashion? Maybe it is because these perennial questions are too difficult to answer and been left too long?

So, in the meantime, someone has got to take the blame for the losses incurred as a result, so why not the banks? The politicians think and the courts think that they can afford it. But can they? Have you ever looked at the returns of banks lately.

I sure hope the politicians and the courts are right because if they are not, there are a lot of unsecured creditors, or lenders to banks, who are going to find out what the true meaning of unsecured lending is all about; or more to the point, the true meaning of what the paper or the plastic is really worth.