ABSTRACT

In the early 1980s, in the first flush of financial deregulation, three of Australia's four major banks embarked on a strategy of marketing loans denominated in foreign currencies to small businesses and farmers. Devaluation of the Australian currency, especially against the Swiss franc, saw an escalation of principal owed in Australian dollars by such borrowers. The resulting crisis produced a wave of litigation against the banks. Some of the court judgments favoured the borrowers, albeit these judgments were in a minority. Legal precedent, judicial culture and the superior resources of the banks proved formidable obstacles to borrower success in the court system, not least against the Commonwealth Bank of Australia. This paper examines the judicial experience of one litigation in particular – that of Dwyer & Anor v. Commonwealth Bank of Australia. The thrust of Dwyer, although not identical, is representative of the experience of foreign currency loan borrowers in the Australian courts.

Key words: financial deregulation; small business; lender-borrower relations; bank litigation; judicial culture

JEL codes: G21; G28; K41; K42; M14; N27

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If you give me six lines written by the most honest man, I will find something in them to hang him.
Attributed to Richelieu [1585-1642]

1  **Introduction and Background**

Beginning in 1982, and with impending deregulation of the Australian financial sector, three major banks (and some lesser players) fashioned loan products denominated in foreign currencies for small business borrowers. Australian interest rates were high; interest rates in some other countries (notably Switzerland) were significantly lower (roughly 7% compared to 13%). The number of such loans was never established with any accuracy, but it is estimated that between 3000 and 5000 such loans were made, mostly in the 1982-1985 period. The Australian dollar plummeted in 1985, and the principal owing blew out dramatically. A million dollar loan in Australian dollars (a not unrepresentative sum) blew out to over two million dollars as the Swiss franc appreciated against the Australian dollar.

Disbelief on the part of borrowers led to meetings seeking clarification and reassurance or instructions to cope with intolerable debt burdens. Disputation between borrower and lender escalated in the late 1980s and, in many instances, ended up in the courts. A small handful of borrowers were successful litigants, especially against Westpac, but the typical litigating borrower was unsuccessful, especially against the Commonwealth Bank of Australia.

The issues were extraordinarily complex, involving technicalities of foreign currency products and uncertainties associated with the relative movement of currencies (for which economists were brought in by one or both sides to offer ‘expert’ opinion). Contemporary media coverage was substantial, but surprisingly little published academic literature has been generated from this affair. Kingston (1997), and a reply by
Valentine (1997) provide a rare (if narrow) contribution by economists. Weerasooria (2000) gives an impoverished and uninsightful summary from an academic legal perspective. The Martin Committee, in its general inquiry into the banking sector, heard copious evidence from participants in the dispute, only to produce a lamentable summary in its report, *A Pocketful of Change* (Martin Committee, 1991, Ch.17). A speech by one of the judicial participants in litigation, Andrew Rogers, offers rare substance for public exposure (Rogers, 1990).

With superior resources, the banks were successful in many court cases in centring and limiting judicial wisdom to the issue of information and knowledge – what did the borrowers know about the nature of the product they had signed up for. The nature of the facility itself was removed from consideration.¹ By contrast, at the centre of court litigation over foreign currency loans was whether the borrowers went into the contract with ‘eyes wide open’, the nature and extent of information imparted by bank personnel, and whether bank lenders had a fiduciary duty to their borrowers regarding the viability of the foreign currency loan in the hands of the borrowers.

This peculiar emphasis of much litigation deserves attention; it has predictably been neglected because of the excruciating minutiae which forms the building blocks of such cases. Because of neglect, one case is offered as a case study in foreign currency loan litigation – Dwyer v Commonwealth Bank of Australia.² The case went over 19 days (albeit some truncated), producing over 800 pages of transcript (Dwyer v Commonwealth Bank of Australia, 1991a).

What follows is not an impartial account. However, aspects of the strategy of cross-examination and aspects of judicial intervention and judgment, to this author, appear to fall below the standards of integrity that we are led to expect of the legal process in a civilised community. For that reason, considerable attention is paid to details in the proceedings.

2 Dwyer v Commonwealth Bank in the NSW Supreme Court

In one of the Commonwealth Bank’s supplementary submissions to the Martin Inquiry, the Bank claimed that: “CBA’s position is that it responsibly approaches litigation, does not drag out court cases so as to increase the cost, nor does it mis-use the legal system.” (Commonwealth Bank of Australia, 1991: 2464)

The evidence does not support this claim. First, there is the matter of document discovery. Both the CBA and Westpac discovered documents belatedly, begrudgingly and partially. Early litigants against both banks lost cases in the courts in the face of inadequate discovery.

Moreover, court procedure itself exposes rough treatment of borrowers. John McLennan (adviser to foreign currency borrowers) has commented:

I have attended many of the cases heard before the court and frankly, I am disgusted at the tactics used by the Bank’s counsel. It appears the whole circus is run for the benefit of the Legal profession with little or no interest in the real legal issues. I sat through one session in Spice v Westpac where the Bank’s counsel [R A Conti QC] cross examined Mr Spice for four hours over the meaning of a pencil line drawn across a page in his diary. (McLennan, 1990: 1350)

¹ This issue will be considered in a companion paper.
² No transcripts of the Dwyer case are available on the website of the Australasian Legal Information Institute.
The Commonwealth Bank was not to be out-done. The process is exemplified in the CBA’s 1991 defence against the plaintiffs Geoffrey and Gloria Dwyer (Dwyer’s mother) in the NSW Supreme Court.

The cross-examination of the CBA’s senior counsel, J A Sackar QC, was diversionary, abusive and manipulative. It is not until the sixth day of the hearing (and page 243 of the transcript – Dwyer v Commonwealth Bank of Australia, 1991a) that Sackar gets on to the crucial meeting on 1 August 1984 of Dwyer and his solicitor David Baird with Mr Les Savell from the International Division of the CBA at which the nature of the foreign currency loan was discussed.

The transparent object of Sackar’s cross-examination was to highlight Dwyer’s prior knowledge of foreign currency loans and to destroy his credibility so that the role of CBA personnel could be made incidental to Dwyer’s actions. His Honour Acting Justice Staff was suitably impressed. The same drawn-out preliminaries are engaged in with the cross-examination of David Baird, Dwyer’s solicitor, with CBA matters not addressed until the twelfth day (1991a: 551). In the cross-examination of Baird, Sackar regularly interrupted Baird’s replies to Sackar’s questions, compelling Dwyer’s counsel to return to the questions to facilitate a complete answer from Baird. In addition, Sackar perennially objected to the substance of his opposite number’s questioning of all witnesses.

Sackar was also aggressive on admissibility, including bank-discovered documents.

Sackar’s behaviour deserves examination at some length. I claim above that Sackar’s questioning was diversionary, abusive and manipulative.

Diversionary? After the 1 August meeting at the Bank, Dwyer and Baird were taken to the Bank’s dealing room which, for Dwyer, was a public relations exercise oriented to impressing the visitors with the Bank’s competence (of which more below). Dwyer was suitably impressed. Sackar to Dwyer (1991a: 322):

“How big was the room?  
“It wasn’t really all that large.  
…  
“Do you recall what Mr Knezevic looks like? … Do you recall what Mr Fuller looks like? … Go on then?  
“You were asking me to describe the room earlier.  
“I am not asking you to describe the room one bit. … I am not asking you to describe the room, all right?”

Sackar to Dwyer (p.288):

“[A synthetic loan] is a term, I suggest, you picked up from somebody other than the Commonwealth Bank?  
“I recall Mr Savell using that expression.  
“I suggest he never used that description and always referred to it as a simulated foreign currency loan?  
“He also used that expression as well.  
…”  
“In fact it is so confused in your mind you are not quite sure who used the term ‘synthetic’, is that right?  
“No, I specifically remember.  
…”  
“By the way, I suggest [Savell] never used the word ‘synthetic.”  
(p.336A)

Bank-discovered documents for the Dwyer case included the CBA internal paper ‘Swiss Franc forecast – 1984/85’ (G34A), produced by Savell’s International Division in June 1984 (International Division, 1984). G34A has a 2 page attachment (written in February 1984 by J. M. McAnany) titled ‘Synthetic/Simulated Currency Loans’. The
exchange regarding nomenclature highlights that a detailed familiarity with significant ancillary material may not have been a high priority for Court participants.

Diversionary? Sackar to Dwyer (1991a: 305):

“Do you recall a company in Hong Kong called Owari?
“That was my company.
...
“Do you recall business to the value, as at 30 June 1979, of some $6,500 Australian being done through this entity in Hong Kong? … The Hong Kong situation, how was that effected? what was going to be done?”

Dwyer explained that Owari was an agency to facilitate manufacturers exporting to Australia and bypassing their agents in Australia with whom they were unhappy. Sackar was attempting to impute that Owari was both a tax haven for Dwyer and proof that Dwyer had substantial knowledge of overseas currencies. The miniscule scale of activities in 1979 should offer a clue as to the lessons to be learnt from this marginalia. Ignoring Dwyer’s earlier explanation, Sackar returned to the Hong Kong affair again (p.360; p.509) to impute a non-existent international complexity and sophistication to Dwyer’s activities.

Abusive? Sackar, in the context of Dwyer’s [lack of] understanding of the substance of letter of offer he received from the CBA:

“You understood the mathematics involved in the examples given, didn’t you? “I did not.
“You have no difficulty adding or multiplying or subtracting in 1984, did you? … or dividing?” (p.298) And so on.

Diversionary and abusive? Sackar to Dwyer (1991a: 146):

“I see, Mr Dwyer, have you spoken to Mr and Mrs Rahme [also foreign currency loan litigants against the CBA]?
“No.
“Do you say that on your oath? Would you like to reconsider?
Have you spoken to …?
“I have seen Mrs Rahme.
“Did you speak to her over the weekend?
“I did see Mrs Rahme.
“Did you speak to her over the weekend?
“Yes I did.
“Thank you. Why did you say no when I first asked you?
“Well, it’s a personal matter.
“A personal matter? She and her husband are in the back of the court at the moment?
“That is correct.
...
“Did you speak to them about your case?
“No.
“Why not?
“I’m not supposed to talk about my case.
“Did you seek them out or did they seek you out? … Did you ring them? … And did you go to their place or did they come to yours? … Over the telephone?
“Correct.
“How many times?
“Once.
“Which day?” And so on.

Sackar had already previously impugned the hapless Rahmes (1991a: 36). Having again exhausted the possibilities of their connection with Dwyer, he then moved abruptly to another matter.

“By the way, do you feel at all responsible for Mr Dwyer going into a foreign currency loan with the Commonwealth Bank?
“No, I don’t feel responsible.
“Completely a clear conscience?
“Yes, I’m completely aware of the tragedy, both the family tragedy and the financial tragedy [Dwyer’s wife was then (and remains) in a coma].
“I’m not asking about that.”

Manipulative? There is a consistent procedure applied by Sackar. Representative of this procedure is Sackar to Baird (1991a: 490):

“Do you recall [D W Carroll, principal of financier International Currency Services] showing you graphs and pointing to the history of the Swiss franc and how it had moved?
“No, but I am pretty certain that there was no discussion as to history.
“And him saying that the history indicated a risk which could not be predicted as to what would happen in the future?
“He didn’t say that.
“You are quite certain he didn’t say that?
“Absolutely.
“That of course was something you already knew, wasn’t it?
“What?
“That no one could predict where the rates could go in the future?
“No, no, in my view …” [Sackar interrupts]

The following examples are also representative of a process of manipulation and they substantively go to the nub of the matter. They refer to recollections of the crucial meeting of Dwyer and Baird with Messrs Les Savell and Mark Fuller on 1 August 1984. Sackar to Dwyer (1991a: 327-330):

“You recall [Savell] saying something like ‘If a customer did not have a natural hedge which is where the person has a business which is generating income in the foreign currency that they are seeking to borrow there would be an exchange risk’?
“No, I don’t recall him saying that.
“That is something you knew though?
“No at all.
“You were there to have things explained?
“That’s correct. He didn’t explain them in that context. … I recall Mr Savell saying that the ideal currency to borrow was the Swiss franc because it had the biggest cushion against the Australian dollar.
“You of course, having asked for Swiss francs …?
“I hadn’t …
“… Do you deny that he said ‘similarly, if the Australian dollar depreciated against the foreign currency, then the amount required to repay the loan would increase’?
“He didn’t say that.
“…
“You came away from this meeting with an impression that fluctuations were going to be – what?
“No more than 5 per cent.
“You regarded what – Mr Savell and Mr Fuller as guaranteeing that, do you?
“I relied on their advice.
“…
“I want to suggest that [Savell] said to you that there was no limit as to how far exchange rates could move over time?
“He did not.
“You deny it?
“I deny it.
“I also suggest that he gave an example of the Swiss francs and
looked at approximately a rate of 2 to 1 saying: ‘If it moved to 1 to
1 the amount of Australian dollars required to repay the loan would
double’?
“I have no recollection of such a statement.
“I want to suggest to you that he said that ‘Such a movement
indicated the way in which the risk arises and that if the customer
proceeded with this type of facility it was a risk that that (sic) the
customer had to accept’?
“He did not saying of that drift whatsoever (sic).
…
“He also talked to you about parity adjustments?
“He did not.
“You didn’t need any explanation of that, did you?
“I know what they are today.
…
“It wasn’t something that you went along to particularly discuss,
was it?
“We went along …
“Mr Dwyer; please.
“That’s exactly the truth, Mr Sackar.
“Look Mr Dwyer, can you please try and address the question. Do
the best you can this time.
“I’m trying to at all times.
…
“Would you please tell us what exactly Mr Savell said about this 5
per cent.
“I think I’ve already answered that question.
“Are you able to tell us?
“No. I’m only going to repeat myself.
…
“I want to suggest to you you came away from this meeting with a
misunderstanding, would you agree?

“A misunderstanding of the risks, for sure.
“A misunderstanding of what I suggest Mr Savell said to you?
“Not at all.”

On the same theme, Sackar to Baird (1991a: 578ff.):

“I suggest [Fuller] put to you something like this, ‘Hedging is
available to eliminate the risk at any point while you are exposed.
Do you recall that?
“No, I don’t.
“He said then, ‘If you find the exchange rate is moving against you
you may decide after it reaches a certain point that it is better to
pay the cost of hedging and eliminate any further risk rather than
letting the exposure continue’?
“I don’t recall that.
“But you understood that that was always at the choice of the
borrower, to intervene in his interest in that way?
“No, not in pragmatic sense.
…
“I want to suggest to you that he then said something like this, ‘If
you do that, namely hedge, you would be locking in the loss up to
the point of hedging’?
“’Locking in the loss,’ I don’t remember that.
…
“Did you listen to me? … I don’t want to keep repeating myself?
… Would you listen please?
…
“If the exchange rate starts to go against you, you should have
some idea in mind of how far you would be prepared to let it go
before hedging?
“[Fuller] didn’t say that. That is not my recollection.
“Did he say anything like it?
“Yes, he said, ‘If there’s a minor fluctuation that is against you,
even if you hedge later on in the contract you will still be better off
because if you average the interest rate and the fluctuation and compare it to the domestic interest rate you will be better off.

“You must have been having to blink your eyes to see whether or not you were talking to Mr Looke [Dwyer’s previous accountant, and an earlier (ill-informed) advocate of foreign currency loans denominated in US dollars] or Mr Fuller at this meeting, surely?

“No. No, it was confirmation of the understanding that we had at the time.

“I want to suggest the truth is quite the contrary to what occurred at this meeting?

“I don’t agree.

“And that time and emotion have completely confused your recollection of what Looke had told you and what you can recall of this meeting?

“No, I don’t agree.

3 Representative Sackar cross-examination

What are the elements of this process of cross-examination? First, the Bank’s counsel constructs a set of statements claimed to have been presented to Dwyer and/or Baird (the operative phrase is ‘I would suggest’). Such statements, if they had been uttered, would indicate that Dwyer/Baird obtained a comprehensive exposure to the nature and risk of unhedged foreign currency loans and thus there could be no reliance of the plaintiff on the CBA for the consequences of the disaster that subsequently befell him and his mother. No documents were offered to support the veracity of the claim. Bank officers took no diary notes of relevant meetings. The detailed nature and technical complexity of the purported statements impart to the claims an air of implausibility.

Second, Dwyer and/or Baird claim that they could not recall such statements, or they deny that they were uttered. Third, Sackar repeats the propositions, and the ‘can’t recall’ or the denials are also repeated. Fourth, Sackar shifts tack and then insists that Dwyer/Baird did know or should have known the substance of these statements, regardless of whether they had been made. Fifth, the memory and/or motives of Dwyer/Baird are questioned, compounding the attack on the credibility and integrity of the plaintiff and his solicitor. Sixth, having failed to elicit the ‘correct’ answer or to elicit conflicting answers from Dwyer/Baird, Sackar moves quickly to a separate matter but might return later to the same event and repeat the process.

The probable becomes suspect; the improbable becomes likely. Myth and reality are inverted. Truth is determined here not by the quality of the evidence but by the relative resources the respective parties can commit to commanding the historical record for their own side.

4 Some contradictory elements of the cross-examination

Ironically, the general tenor of the exchange resulting from Sackar’s lengthy cross-examination has contradictory elements. Sackar was simultaneously attempting to pin on Dwyer a comprehensive knowledge of (or, as a fallback, a comprehensive exposure to) foreign currency loans yet also slating him for his incompetence.

A detached reader of the court transcript could only conclude that Dwyer’s business skills were more intuitive than formal. Dwyer’s record-keeping appeared to be far from adequate. His success as a jewellery importer rested on his feel for the product and his personality. On any matter requiring technical expertise, Dwyer relied on his accountant or his solicitor. On all dimensions of foreign currencies, Dwyer was totally out of his depth.

A related contradictory elements is that Sackar attempts to construct an environment permeated by both a prescience as to all possible
scenarios for some participants (including the implications of the float of the dollar and the prospects of the decline of the Australian dollar during 1985) and an ignorance of other participants, an environment which was supposed to simultaneously accurately inform and inaccurately mislead Dwyer and Baird. It is the ideal world in which Sackar could, at his discretion, impute either a state of informedness or a state of uninformedness to Dwyer and Baird prior to their dealings with the CBA, so that the subsequent experience of Dwyer as a CBA foreign currency loan borrower could not be attributed to the CBA. The Commonwealth Bank doesn’t appear in Sackar’s world, and the G documents (the label given to CBA internal documents), for consistency, would have to be passed off as forgeries. Another significant imponderable in Sackar’s reconstruction is how Dwyer and his mother came to obtain a foreign currency loan from the Commonwealth Bank. The Dwyers’ business was in trouble, with the jewellery importing component having gone into receivership in 1982 following a tsunamiic fluctuation in the gold price and a subsequent robbery of stock. The Dwyers needed to refinance existing commitments if property was to be retained, and saw a low interest foreign currency loan (following consistently inadequate advice) as their salvation. In Geoffrey Dwyer’s phrase after approval from the CBA, the foreign currency loan appeared to be ‘the greatest thing since sliced bread’. Pending the viability of several new prospects (a new importing contract; development of the building housing the retail business), they could not afford domestic interest rates, and their security was good but not exemplary – two of the demanding criteria by which reputedly hard-headed bank officers were presumed to be judging customers for the granting of a foreign currency loan. Whence, then, the CBA foreign currency loan to the Dwyers?

The loan was obtained because Dwyer’s mother was on friendly relations with a recently retired senior official, Mr James Gerathy, from the Commonwealth Bank. Gerathy was, until his retirement in April 1984, Chief State Manager for the Bank. In his capacity as a regular visitor to the Dwyer’s Randwick shop (horse-racing was a common interest), Gerathy heard of the Dwyer’s difficulties with their then bank, Westpac, and contacted CBA personnel. A Bank-induced statement from the retired banker (Gerathy, 1991) disputes some aspects of the Dwyer’s account of events. But the indisputable fact is that the Dwyers were given the foreign currency loan in atypical circumstances – no representations were made to the Bank by the Dwyers (of which more below). The transcript on this issue, covering 20 pages of feigned disbelief by the inquisitorial counsel, is not merely instructive but adds some overdue comic relief (1991a: 244ff).

“You seriously want this Court to accept that a loan of what turned out to be just under one million dollars was organised without you supplying any information at all to the Commonwealth Bank?

“That is correct.

“I suggest you know that that is completely false.

…

“… you must have found this most extraordinary, that a close friend of your mother’s was able to, what, just dip into the coffers of the Commonwealth Bank and give you and your mother a million dollars?

“That is what happened.

…

“First time you heard of a thing like that happening in your business experience?

“True.

“When you got along to see Mr Wyatt and Mr Rogers you would have thought there was no need to do anything at all?

“That is exactly right.

…”

“Incredible story?

“That’s what happened.

…”
“So here you are a customer of Westpac facing threats from Westpac and, what, the Commonwealth government puts its hand in its pocket for a million dollars without ever hearing from you about what your business was doing?
“That is what happened Mr Sackar.

…

“You only knew him as of October ’83 and July of ’84 as a customer who shared with your mother a mutual interest in porcelain?
“Correct. I might add he was quite fond of the horses and my mother and Mr Gerathy used to talk at length about what was happening at the races on Saturday.

…

“You must have thought he was Father Christmas to organise a loan without you asking for it?
“He was a senior man in the Commonwealth Bank.

…

“Neither you nor, to your knowledge, your mother ever asked Mr Gerathy for a loan?
“In the true sense of the word.

…

“Tell us what happened?
“Mr Gerathy likes buying a French loaf of bread, which is a long …

“I am sorry to interrupt but did you go to the bakery with him, did you?
“No, he goes every Saturday morning.
“Just tell me what he did when he came into your shop, no what he did when ...

“He came in with his regular loaf of Huspen bread or French loaf or whatever you describe it as. He stood in the doorway of the shop and said words to the effect that the funds were available from the Commonwealth Bank to pay out Westpac.
“Is that all he said?

“No, he said a few more words to my mother. I was about six feet away on that particular occasion and he said, ‘As a matter of pleasantries, would you get Geoff – I think he considered me to be a young chap – to pop in to see Mr Wyatt’.
“I want to suggest to you that that is rubbish, Mr Dwyer.
“Well, you ask Mr Gerathy.
“You see, we have and I suggest to you that is absolute nonsense that he never said any such thing to you at all and that you know that what he did was no more than assist you to get an interview with the Commonwealth Bank so that you could try and persuade them to finance you.
“That is incorrect.
“Incorrect, is it?
“It is.
“So is this the truth: when you set off to visit Mr Wyatt and Mr Rogers, you just thought you were going, as you would have it, through the pleasantries?
“Exactly true.

…”

“And here is virtually a total stranger who has a mutual interest with your mother in horse racing and porcelain who has not got a clue what security you are going to offer the bank for the purposes of this loan and who had not got a clue what your statement of assets and liabilities might be but nevertheless, on your story, comes down Belmore Road on a Saturday morning on behalf of the bank, you say, and just says, ‘Here is a million dollars’. That is ridiculous, isn’t it?
“That’s what happened.”

5  The judge brings his learning to bear on the case

As a necessary complement to a consideration of Sackar’s cross-examination, the Dwyer case requires commentary on the contribution
of the presiding judge, Acting Justice Staff. It is not an impressive contribution.

His Honour appeared to be somnolent through Sackar’s long-winded cross-examination, tolerating diversion and abuse of the witness.\(^3\) When Dwyer’s counsel addressed His Honour, on the eighth day of the hearing (1991a: 365) regarding the length of the cross-examination, His Honour replied that Mr Sackar should be allowed to ‘probe the matter’.

Staff AJ came alive on the ninth day during Sackar’s attempt to deny admissibility of a number of key paragraphs in Baird’s written submitted Statements (p.403). They relate to the 1 August meeting, to Baird’s claims of being denied adequate information, and that his advice to Dwyer would have been negative if adequate information had been supplied. His Honour did not accept all of Sackar’s objections, but concurred with many of them. If Baird had memories unacceptable to the Bank’s counsel, then he wasn’t allowed to bring them to the Court.

In particular, Sackar objected to paragraph 51, a three-page list (with sub-sections (a) to (i)) of what adequate information for prospective foreign currency loan borrowers would have entailed (Baird, 1991). This objection induced an exchange between Dwyer’s counsel, Pembroke, and His Honour that transcends the formal impartiality of the bench and captures the essence of the trial (1991a: 404ff.).

[Pembroke] “The case is not merely that a misrepresentation was made. The case is that a misrepresentation – or several – were made and that there were omissions. Mr. Baird, the solicitor, says if these omissions or any one of them had been brought to his attention he would have counseled his client not to take up the transaction …

… [Staff AJ] “As I recollect it, mere silence is irrelevant. In general there is no duty to speak. “The Court of Appeal [in Mehta –v- Commonwealth Bank] made it quite clear that the reason for their observation to that effect was that on the facts there wasn’t any reason to think that Dr Metter (sic) assumed that what he was being told was a full and complete explanation. “The Court of Appeal said there was no duty at law to speak.

… “Yes, but if you speak, as the bank did in this case, if you give a formal representation then you are saddled with a duty. What was spoken was a partial explanation. It is a very major part of the whole case and I would address your Honour on that. … The inference from the whole of the evidence will be that Mr Dwyer would have accepted that advice [a full explanation] and so would his mother, the other borrower. “There is no evidence that Mr Dwyer would have accepted Mr Baird’s advice. “The evidence of Mr Dwyer about this looked at overall is fairly clear. He called along his solicitor to assist him, to explain if need be what was being put to him by the bank. … “Having regard to the way Mr Pembroke puts the case, I think I will admit this material [par.51]. I have grave doubts about its admissibility but it can be debated at the end of the case and if I am persuaded it has some relevance, so be it and, if not, I will just discard it. Certainly I would not treat is (sic) as corroborative of anything that was said at the meeting in the absence of direct evidence from Mr Baird.”

\(^3\) In the subsequent Court of Appeal hearing, Defence Counsel John Sackar plays the legal club card to good effect (1995a: 55): ‘Bearing in mind the transcript indicates that his Honour kept an active eye on what was going on before him, he made crucial findings on active issues’.
His Honour admits the crucial paragraph but denies its bearing. Pembroke and Staff AJ had both read the Mehta judgment but had contrasting interpretations of its meaning. Staff’s appropriation of Mehta is allowed to retire and is not brought forth again from its slumber.

His Honour made a curious and related intervention on the eleventh day, during Sackar’s attempt to clarify from a Baird Statement how many meetings and on what dates Baird may have met with staff of International Currency Services, a finance broker. His Honour (1991a: 484):

“We all know how these statements come to be prepared. They are not the witness’s own words. All I will say is that I think the other evidence demonstrates the imperfection of the witness’s [Baird’s] recollection abundantly.”

The substance of the witness’ recollection in this instance was inconsequential to the case, a product of one of Sackar’s diversions. But evidently, this diversion produced another black mark against Baird’s credibility. His Honour declined to comment on his estimation of the quality of recollection embodied in the swathe of unsworn statements from bank officers offered up by the Bank, some of which differed markedly, and on fundamental issues, from the sometimes strongly-held memories of Dwyer.

6 The judgment

We come now to His Honour’s judgement of the 18 October 1991 (Dwyer v Commonwealth Bank of Australia, 1991b). It is a judgement of extremely low quality and reflects poorly on the integrity of the office to which Mr Staff had been elevated (albeit in an Acting capacity). Of the 10 page judgement, the first seven are central to the case, constituting a mere 2000 words. There are errors of fact. There are generalisations made on speculative grounds. There is no legal argument or discussion of legal principles or precedent. There is no consideration of context. There is no consideration of Bank policy in the light of bank discovered documents, and no contemplation of what bank officers might or might not have said.

The judgement centres on the denial of credibility to the account of Dwyer and Baird. Dwyer is said to have been committed to the obtaining of a foreign currency loan, to have been committed to the view that the risks were trivial, and thus no information from Commonwealth Bank or advice from Baird would have dissuaded Dwyer from this path.

The bias of the judgement is compounded by a range of statements of factual detail which are not supported by the evidence, or (more typically) whose significance is not transparent but is open to alternative interpretations.

- [Westpac] had for some time pressed the Dwyers to reduce the amount of their indebtedness by the sale of one or other of the properties. Mr Dwyer, had, however, resisted the Bank’s efforts … (1991b: 2)⁴
- Mr Looke filled out for Mr Dwyer an application for an unhedged foreign currency loan in Swiss francs which was submitted to Westpac. (p.2)⁵

⁴ Geoffrey Dwyer proceeded to sell his residence in 1983, and exchanged contracts. The sale fell through because Dwyer’s solicitor had not brought the heritage listing of the residence to the buyer’s attention.
⁵ Dwyer acted as a go-between for Looke’s proposal for a bank-mediated loan of ‘not less than US$10,000,000.00’ for a collective of prospective customers in US dollars to Westpac. The solicitor’s letter to Westpac reads: ‘The loan and all interest and capital repayments are to be made in the (sic) United States dollars’ (Roe et. al., 1982: 1).
Subsequently, an application was made by Mr Dwyer to the defendant for an unhedged foreign currency loan, in Swiss francs … (p.2)

Mr Dwyer conceded in his evidence that there was no question of him considering the [CBA] on-shore option as against the FCL option and that the only question which he had then to consider was the option of a simulated FCL as against an FCL. (p.3)

[Dwyer’s recollection of the content of the 1 August meeting] being inconsistent in a number of respects with the contemporaneous notes which Mr Baird took of the discussion … (p.3)

[Dwyer’s recollection] was in my opinion fashioned so as to … discount the fact that he was receiving important warnings and explanations from the Bank’s officers. (p.4)

… I cannot be satisfied that Mr Dwyer would have relied upon or accepted such information or advanced as the Bank would have tendered and in reliance upon it … to put in place some stop-loss mechanism (p.5)

It is noteworthy that the written material indicates that Mr Dwyer, whenever he applied for a loan, applied for an unhedged Swiss franc loan. (p.6)

In support of the general thrust, there is presented the usual canard that Dwyer could not possibly be ignorant of foreign exchange fluctuations ‘having regard to his dealings in his export and import business over many years’. The experience of a small trader with foreign currency is in discrete parcels, albeit Dwyer had had a disastrous experience with a fluctuation in the gold price. A debt roughly commensurate with the Dwyer family’s total assets and entirely denominated in a foreign currency of unknown variability is of a different qualitative order. Moreover, His Honour did not take into account the fact that the Australian dollar was not floated until December 1983 (indeed, not fully floated even then), and that relative currency movements during 1985 and after were now of a different order to that prevailing beforehand.

In addition, His Honour declined to investigate the origins of the Dwyer CBA loan, rejecting a priori as improbable Dwyer’s account (as outlined above). Said Staff J (1991b: 7):

“I could not accept him or his mother’s evidence of the conversations alleged to have been had with Mr. Gerathy at times when Mr. Gerathy was absent from Australia, nor did I consider it probably that Mr. Gerathy would have given the unqualified assurances alleged having regard to his apparent lack of information as to the plaintiff’s financial position.”

Improbable it was, but not unrealistic. This author has advice from a retired bank manager of many years’ experience that it is not unusual for senior bank officers to initiate a loan on the basis of personal connections, with approval not subject to conventional procedures. Dwyer insisted ‘That’s what happened.’ As Dwyer did not approach the CBA for a loan, yet was met with an approval, on what grounds could the ridiculing of the Dwyers’ explanation rest? As this significant issue was pursued anew by Defence Counsel during the Appeal, it will be revisited below.

His Honour’s temper is encapsulated in his judgement of Mr David Baird, suburban solicitor. ‘Mr Baird was an honest witness but had a
very imperfect recollection and in many case, no recollection at all. His lengthy hesitations and his tortured facial expressions, made it obvious to me that he often had no recollection and was seeking to reconstruct.’

(p.6)

In general, Staff’s judgement is reprehensible in its sloppiness and impropriety. It puts at risk the reputation of the Australian judicial system as a vehicle for justice.

7 The Dwyer Appeal: substance

From the trial judgement we move to the court of appeal, presided over by Justices Sheller, Clarke and Handley (Dwyer v Commonwealth Bank of Australia, 1995a; 1995b).

Counsel for Dwyer, R Dubler, argued that what took place at the 1 August 1984 meeting, between bank officers Savell and Fuller and borrower Dwyer and his solicitor Baird, was the crucial issue. Dubler was claiming in tort both negligent mis-statement and negligent conduct in failing to advise. Dubler claimed that Dwyer’s credibility had been tested on other matters and His Honour had ruled against Dwyer’s credibility in toto. Moreover, His Honour had made no judgment on the credibility of bank officer representations. As Dubler noted: ‘there is nothing in the judgement that indicates his Honour’s view of the evidence of Mr Savell and Mr Fuller, bearing in mind their evidence was one of [customary] practice’ (1995a: 29).

The only record of the 1 August meeting was the notes taken by Baird, and Sackar devoted considerable time to persuade the bench that the notes embodied conclusions different to Baird’s own recollections. The bank officers’ testimony referred to customary practice, not to recollections of the specific meeting, and even formal practice remains hypothetical without supplementary confirmation.

The atmosphere was not assisted by the fact that, in numerous interventions during the Appeal hearing, a judge would repeat the inaccuracies written into the trial judgment. These were not corrected by Dubler, and it was left to Dwyer, in a supplementary submission two weeks later, to highlight the reproduction of the inaccuracies.

In the trial hearing, the Bank’s counsel had made much of Dwyer’s earlier attempts to seek information on finance options, in the course of which foreign currency loans were discussed. As a consequence, it was argued that Dwyer ought to have been deeply familiar with their character before he came into contact with the Commonwealth Bank. His Honour found that Dwyer ‘down-played any knowledge he received from other sources’. Dwyer’s claim, through Dubler, was that ‘[t]he thrust of his evidence was he received little advice of significance from the other parties …’ (1995a: 24).

The appeal judges wanted to know why Dwyer was not more assertive in questioning the bank officers. They were also inclined to believe the trial judge’s assertion that, if Dwyer was not listening, there could be no reliance for Dwyer’s subsequent behaviour on the officers’ statements.

Dubler’s counter-claim was that (1995a: 34):

“… if someone is receiving generalised warnings in the terms that Mr Dwyer had heard before [namely, that there will be exchange rate fluctuations, but their scale will be minor and insufficient to offset the interest rate differential available from a foreign currency loan] which is not remarkable nor fatal to the appellant’s case, that he did not trouble himself to make great deal of note of them. … had the warnings been given in clear terms inconsistent
with the beliefs of Messrs Dwyer and Baird at the meeting, would the appellant have ignored them? We say that those findings of not paying attention or not listening can only have bite and meaning if it can be clearly understood what those warning (sic) were. … But it is the case of Mr Baird that what was said was limited and that there was confirmation that negligible risk was the likely result.”

Sackar’s counter-counter-claim is that Dwyer’s mind was already made up – he was set on an offshore loan (1995a: 53). What might or might not have been said at the Savell/Fuller meeting is ultimately irrelevant because Dwyer was not listening. Said Sackar:

“The authority [the Court] does no more than simply advert to the possibility that there are such people in the community who will willfully and successfully pursue a particular course of conduct as is best is best illustrated in Sutton v Thompson …”

Moreover, because Dwyer’s mind was made up, the bank does not:

“… attract a duty to discuss in such as way as to permit of an informed decision the pros and cons of offshore as opposed to onshore generally in the circumstances here …”

Another contradiction arises in Sackar’s interpretation of the 1 August meeting. A good deal of the trial hearing (and the fight over Baird’s notes) involved the attempt by Sackar to claim that the Savell/Fuller meeting provided Dwyer and Baird with an appropriate explanation of attendant risks. This defence is accompanied by the strident claim that the only function of the meeting was to outline the differences between simulated and a direct offshore facility, although the meeting might have gone beyond this point ‘… if [Savell] voluntarily assumed some responsibility’.

The only consistent thread in Sackar’s various and less than coherent defenses is that the Bank bears no responsibility for subsequent events.

The cognisance of, interpretation and lessons from the graphs is another dimension of this circus.

Sackar made much of Dwyer’s seeming incapacity to learn from graphs presented at the meeting, emphasising the lessons regarding potential exchange rate volatility. The graphs are brought up again in the appeal. The graphs at question were the ones typically shown to CBA foreign currency borrowers, with the date span being 1980 to 1984. These graphs were typically shown to present the case for relative stability of the currencies (AUD, CHF, USD). The notion that these graphs presented indubitable warnings regarding volatility is ludicrous.


“Dubler: But in particular some of these graphs do not go back a great deal of time, but they tend to have … Handley: … quite short term – there’s more than five per cent on that page [his Honour makes one of many ill-informed interventions, spontaneously joining the ‘volatility camp’] Dubler: … that is corroborative of an averaging by the Luke [read Looke] theory that there are fluctuations but within a band, and if you wait long enough it will come back. … A lot of these cases will revolve around graphs and it depends which currency you choose, which time period and the like.

Our submission is, as is not uncommon, graphs can speak many different things. It really needs the explanation to make it good, that of all the currencies, for no matter what period you look at, have essential instability in them and there can be no real trend. That is the substance of any relevant advice.
The [Looke] theory was that there was a trend, particularly for Swiss francs and Australian dollars of perceived instability, and it went further, the perceived instability was something a borrower could rely upon as being likely to continue. Something can be made of the graphs one way or the other, and they were in cross-examination of Mr Dwyer, along the lines your Honour has suggested, but the essential conflict is that some of the graphs show different things and there was no clear explanation of what a borrower should draw from the graphs. So we say it is not correct to say, if it be the case that there was simply a production of graphs at a meeting, that they necessarily meant the [Looke] theory was being challenged.”

The detached observer would have to conclude that counsel has made a salient point, drawn from rudimentary lessons in elementary statistics. Yet Dwyer and his solicitor were damned by legal minds partly on the strength of their ‘faulty’ understanding of these graphs. Moreover, here is Sackar later in the Appeal hearing sticking to his last (p.57): “… both of them were cross-examined on those graphs. Both acknowledged they showed volatility … They are graphs Baird conceded he saw …”

8 The tenor of the Appeal

There are notable features of the Appeal hearing that elucidate the character of the judicial process.

First, the appeal judges carried on the trial judge’s neglect of bank documents as pertinent evidence. Dubler’s reference to the adverse implications of several discovered documents for the Bank’s credibility were ignored. In particular, Dubler (1995a: 12) referred to a memo dated 7 August 1984 (G46), a week after the Dwyer meeting (Long, 1984). G46 comments on a 17 July memo (G44) on the expansion of foreign currency loans (Edwards, 1984). The G46 memo highlights doubts raised by the Chairman of the Bank’s Credit Committee ‘some weeks ago’ … “about the desirability of lending to the smaller end of the market and in the discussion which ensued it was agreed that care needs to be taken to ensure that he inexperienced are not assisted or encouraged into a situation they cannot handle. However my understanding of the discussion is such that we were not instructed to hold back from F/C/Ls but merely to lend judiciously.”

The author of G46 claims that, in promulgating [an expansionary F/C/L policy]

“… the following could be clearly conveyed:
F/C/Ls may be marketed to those clients … who would have the capacity to manage their exposures or meet exchange losses which may occur.
F/C/Ls are not a facility for weaker clients.
The terms on which F/C/Ls may be offered. Specific comment on all aspects such a security, margins etc is proposed. (The question of whether existing written instructions are adequate will be reconsidered.) …”

This need for caution, expressed at senior level, was not followed by loan officers; neither were the mooted conditions under which the policy was to be effected. Yet this background proved to be of no import to the presiding judges.

Second, there are myriad interventions by one or other of the appeal judges, and joined by Sackar, making assertions on details of foreign currencies that are inaccurate, diversionary or inconsequential. The

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12 Lies, damned lies and statistics. It was not acknowledged by Defence counsel nor by the bench that bank personnel and expert economists were also having difficulty interpreting the graphs.

13 Text from the G documents are not included in the Appeal transcript.
legal minds presume to display their informedness on a subject of which they are ignorant. The interventions would be comic were it not for the seriousness of the situation. Dubler had to remind them in summation that ‘[the Dwyers] were putting on line their worldly assets on the notion that the risk would be negligible’ (p.83). The judges were only risking their reputation, but the absence of witnesses to such interventions ensured that their Honours’ reputations would remain intact.

Third, Sackar’s defence continued to be manipulative and, at times, liberal with the truth. Three examples are offered below.

First, Sackar returned to the matter of the origins of the CBA loan. Says Sackar (1995a: 61):

“His Honour must have found that, that part of the evidence was a complete invention. It is clear that Mr Gerathy arranged in some way for Mr Dwyer to go and see Mr White [read Wyatt]. … “So [Dwyer] said and swore on oath that prior to 20 July the Commonwealth bank had told him via Mr Gerathy that the facility was in place … “That is his evidence. Is it any wonder his Honour rejected that. In part Mr Gerathy was shown (a) not to have been at the bank at the time, being retired some months earlier and (b) being overseas during the time this conversation was said to have taken place and (c) the commercial unreality of it.”

Geoff Dwyer and his mother were in the shop when Gerathy called, and they have a common account of events. Gerathy differs on timing and what was said. Regarding timing, Gerathy’s Statement has him out of the country between May 4 and July 15, claiming Passport stamps as evidence (it appears that the Passport was not presented to the Court). Given that the Dwyers remember Gerathy coming into the shop after his return from abroad, describing his experience in Alaska as memorable, the trip does notloom as an insuperable obstacle to the Dwyer scenario. Gerathy claims that he only offered (and subsequently carried out) to arrange a meeting with Mr Robert Wyatt, Deputy Chief State Manager.14 Dwyer and his mother claim that Gerathy told them that a loan had been arranged, and that Westpac could be paid out.15

Says Sackar (p.62): ‘It may be his mother had given details of the amounts outstanding in the letter she had shown Mr Gerathy. His Honour for good reason refused to acknowledge that episode ever occurred and all that occurred was that a contact was made and Mr Dwyer went and asked for a loan’.

To repeat, the indisputable fact is that the loan process was in train before the Bank had seen any paperwork. Dwyer’s solicitor forwarded material on the 19 July, immediately prior to the 20 July meeting, and the passage of that meeting is consistent with Dwyer’s view as ‘a formality’. The loan was processed and approved within several days. The process may reasonably be described as embodying a ‘commercial unreality’. Sackar, through the power of language, hopes to turn fact into fiction, a fiction supposedly residing only in the minds of the plaintiffs. Their Honours were passive on this issue.

Second, Sackar also manipulates the situation regarding a contemporaneous inquiry for a loan from Transcity. Sackar implies that the inquiry was begun with Transcity after the exchange with Gerathy. This presumed timing is then claimed to support the claim

14 Wyatt, in a brief Statement prepared for his employer’s defence on 4 June 1991, claims no memory of any process involving the Dwyer loan, though he does acknowledge his signature or initials on Dwyer documentation.
15 As a reflection of her gratitude, Gloria Dwyer gave Gerathy a Royal Worcestershire hand-painted fruit bowl, valued at approximately $600. Such a gift is hardly compatible with a transaction claimed by the Defence counsel to be merely one of the transmission of information and the establishment of a contact.
that the Dwyers knew that no loan with the CBA had been arranged. One piece of manipulation requires another. Yet the inquiry to Transcity through Baird was contemporaneous. The CBA was informed at the 20 July meeting that Dwyer was considering a Transcity loan. Transcity sent Baird an ‘indicative’ letter on 27 July (‘and now set out below the basis whereby Trans City would be prepared to consider providing a multi-currency line of credit …’). By the 27th, the paperwork had been processed at the CBA, and the indicative letter was not pursued.

Sackar also claims that the Trans City inquiry proves that Dwyer was hell bent on an offshore loan, which rendered void any responsibility of the CBA to outline the associated risks. This issue is pursued in the Conclusion.

Third, there is another incident of misrepresentation. John Bamfield, an accountant hired by Dwyer after he had obtained the CBA loan, produced a report on the relative merits of simulated loans versus foreign currency loans. The three page January 1985 report is held by Sackar to damn Baird (and Dwyer) because Baird presumably denies ever hearing the word ‘loss’ used with respect to a foreign currency loan. According to Sackar, the Bamfield report ‘talks about losses, exchange, gains and losses’ (1995a: 56). Sackar returns to Bamfield again (p.71): ‘[Bamfield] adverts to the fact that not only were [gains] possible but losses were possible.’

However the report, natural product of an accountant’s expertise, discusses the magic word ‘loss’ in an utterly pedestrian manner. With respect to a foreign currency loan, Bamfield reports that parity adjustments ‘will be necessary if the borrower is faced with an exchange loss’ – familiar stuff. With respect to a simulated loan, Bamfield offers an opinion on whether net exchange gains or losses, upon repayment of the borrowing, would represent a return of capital or income. There is nothing in the Bamfield report that conveys the impression that Sackar hopes to convey to the bench. The report was offered to their Honours, but did they read it? Sackar also claims that Baird’s supposed dissembling on the Bamfield report was a critical element in his Honour, in the trial judgment, declaring that Baird’s attachment to his prejudices was ‘bordering on blind faith’ (p.72). Had Acting Justice Staff read the short Bamfield report? Blindness is not a trait monopolised by the borrowers, it seems.

Sackar rounds off his revisited demolition of the credibility of Dwyer and Baird with further abuse.

“That [Dwyer’s and Baird’s recollection of receipt of and the import of the graphs, as noted above] is but one piece of evidence but not important (sic) because it does show the very indifference, the very obdurate nature displayed by both people and which his Honour clearly took into account. (p.57)

…

“This is a man [Dwyer] who was not prepared to make too many concessions in the course of cross examination and almost at every turn put his position at its most extreme. His Honours used the word “fashioned”. That was clearly elegant to describe what this witness was doing. It was quite appropriate to use a much more perhaps inelegant and cruder description.” (p.63)

Sackar’s performance is met with rapturous applause by Clarke J. (p.77):

“Mr Sackar, I think you have been able to put your case orally with great force and it is supplemented by very detailed notes. As far as the Bench is concerned I do not think we need to hear you any further. We understand precisely the point you make and I do not think it would be advanced by any further argument.”
Given that Sackar had behind him the full resources of the Commonwealth Bank, the availability of ‘very detailed notes’ is not surprising. This pat on the back marks the end of the appeal and the end of the Dwyers.

Clarke’s concluding words are (p.84): ‘The Court is indebted to counsel for very helpful submission (sic) in what is, in the circumstances, a case with some complexity and difficulty’. This is a diplomatic phrase, but the previous interventions belie the courtesies.

9 The Appeal Judgment

On 30 June 1995 Justice Sheller, Justices Clarke and Handley concurring, delivered a judgment dismissing the appeal (Dwyer v Commonwealth Bank of Australia, 1995b). Relevant text comprises 6 ½ pages. The Record Sheet summary reads thus:

“… it was open to Staff AJ to hold that nothing the CBA officers said at the meeting induced the appellants to make the simulated FCL or the direct FCL.

“The CBA was not under a duty to give general warnings which would have demolished Mr Dwyer’s belief that the risk of adverse foreign exchange fluctuations was negligible as such fluctuations ‘evened out’ over the term of the loan. The evidence that Mr Dwyer had consistently ignored warnings about the risks of foreign currency borrowings justified the conclusion that even if the information and advice produced by CBA was less than its duty required, this would not have altered Mr Dwyer’s decision to borrow offshore.”

On close examination, the Appeal judgment is more guarded in tone than the Staff judgment, but its quality is little better. Partly the common elements are because Sheller repeats some of the inaccuracies of the Staff judgment and perpetuates its parameters. No questions of law are at stake. The issue remains the credibility of Dwyer and, to a lesser extent, his solicitor Baird. Sheller refers to instances of documentation to which Dwyer and/or Baird would have been exposed. Says Sheller (p.14): ‘There was ample evidence from officers of Westpac and other finance consultants of advice given to Mr Dwyer about the ramifications of a foreign currency facility and the risk of exchange rate fluctuations. … [A 1982 Westpac] document referred to the volatility of exchange rates and interest rates’. But such references imply that the meaning of the text is transparent. The Appeal judges to a man exposed themselves during the hearing as novices on currencies. We have also seen how Sackar drew a particular, partisan and dubious interpretation from the Bamfield report.

transient blackmail. The Dwyers did not accept the bribe and rejected the offer. Formally, the matter of the recovery of paid withholding tax remains open.
Sheller’s judgment did us the service of outlining (reproducing the presentation of Dwyer’s counsel Dubler) the steps and the linkages necessary in the Court’s determination of responsibility in the arena of information, advice and reliance (p.10): 

- what the bank wrote or said
- whether what was written or said was incorrect or misleading or written or said negligently
- to what extent, if any, the bank was under a duty to provide more information or give more advice

If in any of these steps the bank was in breach of its duty 

- to what extent and in what way, if any at all, the customer relied upon what was written or said or would have relied upon the further information or advice

If the customer establishes reliance 

- whether loss resulted.

Sheller agreed with the plaintiffs that his Honour ‘short circuited the process by dealing with reliance without determining what representations were made’ (p.11). But Sheller proceeds to perform his own short circuit – ‘On its face his Honour’s approach appears to be unsatisfactory but, on analysis, I think the findings he made justify his conclusion’.

On his way to this evaluation Sheller claims curiously that ‘[Staff] proceeded on an assumption that the CBA was under a duty “as alleged” that is that CBA should have given more information or advice than it did’ (p.10). On the contrary, the idea of fiduciary duty made no entrance in the trial hearing. The transcript of the trial judgment reads (1991b: 5): ‘… if one assumes a duty upon the defendant Bank, as alleged, I cannot be satisfied that Mr. Dwyer would have relied upon or accepted such information or advice as the Bank would have tendered …’. Staff is speaking hypothetically; he did not assume a duty upon the defendant Bank.

Sheller likes Staff’s conclusions but doesn’t like his reasoning. Sheller finds another route to the attractive conclusions, this time circuitous, although without having to retrace Staff’s steps. Sheller claims that the appellants, through Dubler, came before him arguing that the Bank had a duty to ‘demolish the theory attributed to Mr Looke’ (p.13), or alternatively ‘to give general warnings which would have been “necessarily inconsistent with and would hence debunk the Looke theory”’ (p.14).

Kevin Looke was Dwyer’s accountant until 1982, and Looke became aware that some brokers were touting the availability of foreign currency loans. He disseminated this information, but his involvement appeared to be that of generating sufficient interest from businesspeople to join a consortium by which a substantial block foreign currency loan would be obtained; obtaining a bank guarantee for the block loan was also a necessary step. Looke did not attract much interest in this proposition. Looke’s relationship with Dwyer (and hence his capacity for continuing influence and advice) following this early dead-end was a subject of dispute among the parties. Looke died in 1984 so he was not available to constrain the use and abuse of his name in the Dwyer hearings.

The so-called ‘Looke theory’ is the presumption that a foreign currency loan might involve losses and gains from currency fluctuations, but over time these fluctuations would not be great in amplitude and would tend to balance out. In short, the implication of the ‘Looke theory’ is that a foreign currency loan would be a viable proposition.

It is this optimistic scenario, with Looke’s name on it, that the trial judge Staff claimed was held by Dwyer, such that no amount of warnings as to parlous risk would have dislodged Dwyer from his ‘blind faith’.
Sheller claimed that the appellants’ efforts to get the Bank to ‘disown’ the Looke theory damned their case. ‘There was no evidence that CBA or any of its officers were aware of should have been aware that Mr Dwyer was convinced by such a theory and acting in reliance on it’ (p.13). Moreover, the presumed reasoning was ‘… a far cry from the way the appellants ran the trial. Their case before Staff AJ was that Mr Dwyer had a very limited knowledge or and interest in FCLs before his contact with CBA and was almost entirely uninfluenced by Mr Looke’ (p.14).

Said Sheller: ‘This makes their argument on appeal quite artificial’. So the appeal was doomed. But the ‘far cry’ is a concoction. There is a common thread. Dwyer had become aware of foreign currency loans from Looke. He had subsequently inquired about and applied for such a loan on several occasions. Did he understand at any point what he was getting himself into? In his inquiries with Baird he was met with various presentations which appear to be generally of a formulaic nature. The Bank thought that this was more than enough in quantity and quality. The Trial judge agreed. So did the Appeal judges. The crucial Savell/Rogers CBA meeting was, to Dwyer and Baird, little different from meetings with other potential lenders/brokers, if anything probably less informative on the key issue of risk.

The Appeal judges added additional subtleties to Staff’s conclusions. First, Sheller confronts the divergence of memory between the two sides of what was said at the Savell/Rogers meeting (indeed he opens with this issue). Savell is alleged by Dwyer to have claimed that the floating of the Australian dollar and the fact that foreign currency loans are mediated through the US dollar both contribute to a stable regime for a foreign currency loan. Savell denies having made either claim. The colour of Sheller’s articulation is such that he cannot conceive that a bank officer’s memory might be flawed. It doesn’t matter that ‘Mr Savell had no recollection of meeting Messrs Baird and Dwyer’ (p.12).

It is sufficient, concurring with Staff’s reasoning, that Dwyer’s account was not corroborated, including by Baird’s notes.

Second. Sheller hedges his bets and transcends the difficulty of establishing veracity by reasoning that it doesn’t matter. ‘It is not self evident that if [Savell’s] statements were made they were wrong’ (p.11).

Third, reliance is everything. The importance of reliance provides an additional layer for why what was said was not of primary concern. Dwyer was held to come to the meeting only to hear about the difference between two forms of foreign currency loans. In this Sheller concurs with the Trial judge. Sheller goes further in claiming that, insofar as Dwyer shifted from the initial simulated loan to a direct foreign currency loan in early 1985, that extra step and the deliberations behind it vitiated any notion that the Savell/Rogers meeting was decisive in determining Dwyer’s long term path of action.

10 The Missing Background

The Dwyer court cases were run almost completely without context. The economic backdrop entered only through the murky character of graphs displaying relative currency ratios.

Remarkably, legal precedent played the most minimal of roles in the Dwyer hearings. Foreign currency cases figure in the submissions of the parties both before and following the Trial hearing. The plaintiffs forwarded Potts v Westpac (1990) and Mehta v Commonwealth Bank (1990), among others, as relevant to a ‘duty of care’ (Dwyer v Commonwealth Bank, 1991c). They also forwarded Quade v Commonwealth Bank (1991), Spice v Westpac (1990) and Chirabaglio
v Westpac (1990) for general reference. All five judgments favour the borrowers.


None of this mattered, save for brief cameos. Most surprising of all is the absence of Quade. Quade appealed on the grounds of non-discovery, a problem for all early litigants. The Appeal judgment overturning the Trial judgment that favoured the CBA is, to this author’s knowledge, the only foreign currency case proceeding through the courts that was lost by the Commonwealth Bank. Non-discovery itself was a telling factor. According to Burchett J (Quade v Commonwealth Bank of Australia, in ALR, 1991: 577/8):

Here, the evidence was withheld from the appellants by the default of the respondent in the performance of its obligation to comply with an order relating to the discovery of documents. …

It is only in the narrowest sense that a trial can be said to have been regularly conducted when a vital procedural step involved in the preparation for it has been stifled by one party’s default. …

In my opinion, in such a case the principle on which the general rule is really founded [regarding the treatment of fresh evidence, Dixon J in Orr v Holmes (1948)] … must be modified by its collision with the equally important principle that a party should not be permitted to mock the orders of the court, which would surely be mocked if the opponent could be deprived permanently of a fair prospect of success by a party’s failure to comply with the obligation or an order so important in the conduct of litigation as an order of discovery. … To revert to the language of Dixon J … an appellant is entitled to claim there is an imperative demand of justice to be fulfilled.

It was found that the Bank assumed the responsibility to advise, that there was reliance, and that the advice was inadequate. This judgment was in February 1991, three months before the Dwyer case began in May. Quade had been consigned to oblivion in three months.

Bank documents were available in the Dwyer case (thanks to Quade?). They made only a cameo appearance in the Court hearings (given their contents, this absence hardly does credit to the Dwyer counsel). Bank documents (especially the ‘G’ documents) and other material will be the subject of a paper complementary to this one.

11 Conclusion

The prospect of the Dwyers winning in their court actions was close to zero. One begins with the structural asymmetries in court actions. The banks command massive resources. They can purchase the cream of legal talent, and John Sackar’s powerful performance in Dwyer indicated that he is clearly in that category. Behind counsel, it is clear that there was an army of staff devoted to gathering material to demolish the Dwyer case. Of course, there was more at stake than this single case. There was the necessity to sustain the momentum of victories in foreign currency litigation and to stem the damning
indictment of the Bank in Quade, based on the content of Bank documents, from being used as precedent in further litigation.

In the case of Dwyer v Commonwealth Bank of Australia there are merits in being an outsider to the legal process. From an outsider’s perspective, the Trial Court process was conducted with an absence of ethical standards; the judgment itself, as noted above, was sub-standard in quality. The Appeal Court process predictably centred on technicalities, de facto reinforcing the legitimacy of the Trial Court process. Here was the Commonwealth Bank, born as the People’s Bank in 1911 to offset unequal access to finance then prevailing, employing its disproportionate command of resources and bullyboy tactics in the singular pursuit of the commercial ‘bottom line’.

Court transcripts are typically perused with a clinical eye solely for the purposes of tracing the lineage of precedent. Dwyer v Commonwealth Bank of Australia might profitably be used in courses on business ethics that now populate business programs purporting to train the next generation of business leaders in Australia.

12 References


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