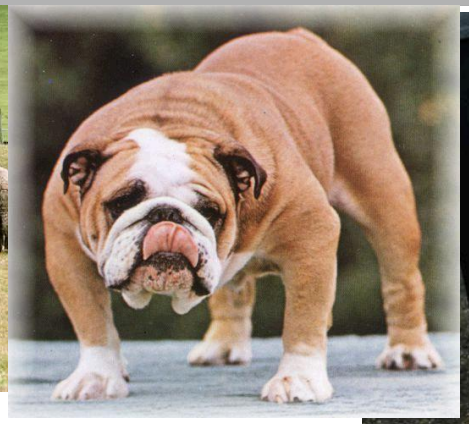
Allens Arthur Robinson

The changed role of the agent in syndicated financings – sheepdog, bulldog, poodle, or lead husky?



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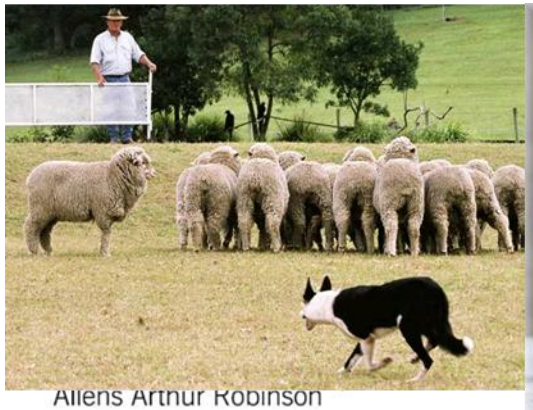
Outline

- The historical understanding
- The current experience
- Legal analysis of the Agent's role and position
- The issues
- Voting in syndicates





The historical understanding

- Agent a major relationship bank
- Agent has “skin in the game” – retains strong hold
- Agent may also be the lead arranger – natural succession
- Syndicate composed of banks with similar interests and outlooks (though they did not always agree)
- Syndicate composition fairly static
- As a consequence in documents the Agent’s role was “loose-tight” – significant discretion but little responsibility, and a lot of protection

The historical practice – Agent as sheepdog or lead husky

- Agency staff closely aligned with wider bank staff – no separation
- In times of consent, waiver and enforcement, relationship and other staff involved
- Agent bank had significant exposure to protect
- Agents would see it as their role to be “proactive” – formulate, negotiate and drive through proposals
- Fees normally a fixed annual sum – recompense for extra effort in other ways
  - New arranged deal
  - Reduction in losses

The current position – the rolling maul syndicate and the brawling maul syndicate

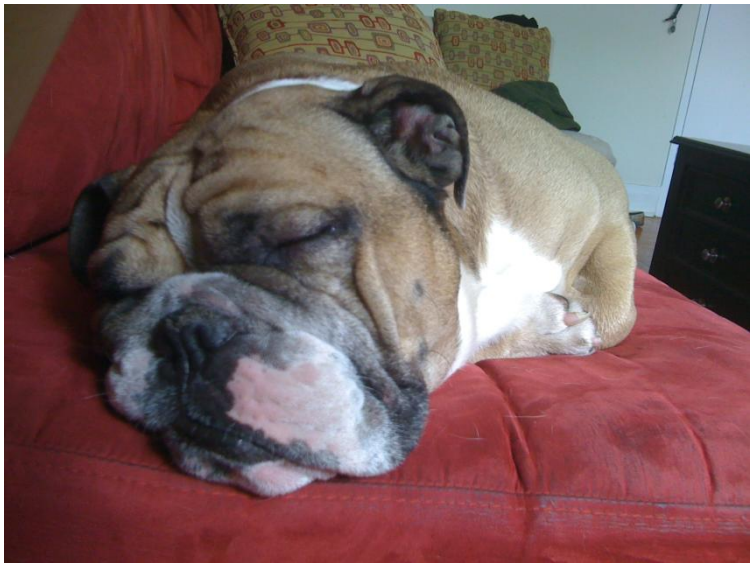
- Participations actively traded
  - Sometimes large shifting syndicates
  - Old banks sell out on distress to be replaced by funds
- Funds as participants often aggressive protectors of their position, often have own advisers
  - No relationship with borrower or others
- No community of interest or approach
  - can be different exposures eg hedge, working capital
  - can be other agendas
- Active leaking of information and proposals

The current position – the Agent

- Agent bank itself may sell down and have little exposure
- Often separation between agency and other relevant parts of bank – less involvement of other bank staff
- Fees often cover other activity but are not always charged, sometimes transfer fees a significant earner
- Agents sometimes take a more passive role

Why more passive?

- Structural separation of agency team from other bank staff
- Some suspicion by other participants of conflicts
- Concern about conflicts internally, the rise of the compliance function and risk aversion
- Less reward
  - May not have stake
  - Don’t want unpaid arranger role
- Participants sometimes have their own proposals and advisers or “bad bank” team
- Formal or informal lead group
  - sometimes undocumented



The agent's role – analysis

Introduction

Title "Agent" is unfortunate

Three propositions:

1. The Agent is an agent but not in all respects
2. The Agent should be a fiduciary but not in all respects, and probably is not one if agreement says it isn't, and doesn't behave as one
3. Any fiduciary and other duties it owes are very limited (both because of limited role and express limitations)

It would be better to give it another name like:

THE GRAND PANJANDRUM

The Agent's role – analysis

What the Agent does but not as agent

- Fix rates
- Calculate amounts
- Keep accounts and register of participations
- (in the APLMA doc) receive and pass on utilisation notices
- (in the APLMA doc) receive and pass on payments
- (Under APLMA practice) instruct lawyers and consultants

The Agent's role – analysis

What the Agent does as agent

Under the documents

- Review and bless CP documents
- Receive and pass on documents, other notices (including of default) and correspondence
- Sign transfer certificates (as agent of all other parties)
- Sign amendment and waiver docs on behalf of participants
- Give consents and approvals
- Declare a default and accelerate debt

It is a party to the facility agreement and agrees to provide agency services as principal

Is the Agent a fiduciary?

- High authority that an agent is not necessarily a fiduciary but not general view
- In any event extent and existence of duties depends on its role and is subject to contract
- Agent has little material discretion except acceleration and (in some cases) acceptance of CPs
  - In most cases subject to majority direction
- Some documents (including APLMA) say it is not (though they say it must act in ‘best interests”)

What would be its duties absent contractual limitations?

- Fiduciary Duties
  - Not to place itself in a position of conflict
  - Not to profit
  - Disclosure of information relevant for decision on above duties
- Other duties
  - (implied or express contractual)
    - Reasonable care and skill (maybe also equitable)
    - Good faith
    - Pass on relevant info obtained in course of agency
    - Possibly, implied duties to monitor obligors and ensure
  - (tort)
    - Reasonable care
  - (statutory duties)
    - Not to mislead or deceive

Can these duties be limited by contract?

- Contract can define role, and function, and fiduciary and other duties flow from role
- Fiduciary relationship “must accommodate itself to the terms of the contract “ (Mason J in *Hospital Products*)
- Contract can limit or remove duties (but maybe not entirely allow fiduciary to fraudulently or willfully disregard interests of principal) (see *ASIC v Citigroup, also NZI v BNZ*)
- Contract can define and limit contractual obligations and limit tort exposure (but not statutory)

What the agreement says

Duties and role

- Expressly appointed agent (except for certain tasks)
- Authorised to exercise express powers plus incidentals
- “Solely mechanical and administrative in nature”
- No duties other than expressly given
- “Not a trustee or fiduciary”
- Notify if given express notice of Default as being a Default
- Notify of payment default
- Act as instructed (except if not secured for costs and liabilities), absent instructions can act as it sees fit in best interests of Participants
- Need not breach law, fiduciary and other duties and confidence

What the agreement says

Powers and exclusions

- May delegate
- May rely on:
  - advice
  - what Obligors say
- May assume no non-payment Default
- May disclose info received as Agent
- Can act separately through agency and other divisions
  - Can treat as confidential info received through other division
- Not responsible for information, effectiveness of docs, Obligors' credit
- Liability excluded except gross negligence, willful default
- Can resign if there is a replacement

Some particular issues – conflicts of interest

- Agent bank may be a participant
- May have other facilities, hedge arrangements, mezzanine debt
- Should not prevent it voting in that capacity
- Pure view would stymie any activity
- May well prevent Agent initiating material action without instructions
- Need to have robust authorisations in facility agreement
- May need robust approach and depend on instructions
- Should, in any event, disclose interest
- One possible solution is to delegate

Some particular issues – insider trading under Australian law

- Under Corpse Act, loans to holding companies and treasury subs who on-lend are "*debentures*" and therefore "*securities*" and therefore "*Division 3 financial products"*
- s1043A(2) ban on providing material price-sensitive inside info in relation to Division 3 FP's "able to be traded on a financial market operated in this jurisdiction"
- Is there a "*financial market*", requires a *"facility"* (s767A)
- If participations can be so traded Agent who gives info to fund who may trade would be in breach
- Issue also arises if info relates to secured shares and fund may be buyer or may be advising buyer

Some particular issues - information and knowledge

- General law, Agent obliged to pass on info received in the course of agency (but not other info)
  - If strictly applied makes negotiation difficult
- Syndicate deemed to have info given to Agent (*Bell Group)*
- BUT syndicates leak like sieves
- Participants use info to trade

What to do about leaks? Strategies:

- Separation (see below)
- By-pass agent and set up working party, lead bank
  - BUT they can be agent for knowledge (*Bell Group*)
  - And no protection or mandate without new doc
- Use financial adviser
- Impose obligation of confidence (depends on doc)
- Alter docs to allow withholding
- Rely on possible illegality

Information barriers and separation, why have them?

- Clarifies which info should be given to the syndicate
- Commercially addresses conflict
  - But NOT legally (except for confidentiality issues)
- If Agent bank is a trader, assists “chinese wall” defence for insider trading (s1043F)

Some things that may be considered

- Separate entity?
  - A number of difficulties – eg credit, confidentiality, greater separation, “trustee company” attitude
- Providing for lead bank role?
  - Shifts issue sideways
- Adding to Agent protection in the document?
  - Eg allowing restriction of information
  - Strengthening ability to act in conflict
- Restricting discretion?

The “locked-in” Agent syndrome

- Agent can’t resign unless there is a replacement
- If no replacement stuck with role and issues
- LMA leveraged document deals with the “Impaired Agent” (one who is broke)

Voting issues – the changing syndicate

What happens if:

- Participants change their mind before majority formed
- Participants in majority change their mind after majority is formed but before instructed action?
- A participant transfers to a buyer with opposite views in either of the above situations?
- Need clauses binding transferees, locking in majority
- “Record date” concept, or freeze transfers?

The changing syndicate - a case study

Strategic Value Master Fund Ltd v Ideal Standard International Acquisition S.A.R.L.

- LBO
- Borrower breached ratio and assets < liabilities
- Agent on majority instructions called event of default and placed loan on demand
- Sponsor bought from 2 largest participants – now had majority
- Reversed instructions, instructed agent to waive default, revoke notice, place loan on normal maturity
- “Stuffee” minority banks sued, and lost.

Other voting issues

- Can a Participant split its vote?
  - Should it be able to do so?
- Can a Participant abstain?
- Should we always have “snooze you lose” clauses?
- What about “yank the bank”?
- Should sponsors and other borrower mates be disenfranchised?
- Should defaulting participants be disenfranchised?