## LIABILITY OF LENDERS TO OTHER LENDERS FOR MISLEADING AND DECEPTIVE CONDUCT

### — Recent Developments

## QUESTIONS AND ANSWERS

**Question - Denis Clifford (Buddle Findlay, Wellington):**

I am interested in this question of the efficacy of disclaimer or waiver clauses under section 52 or section 9 of New Zealand's legislation. If I was a plaintiff and had won on liability but had not proceeded to have damages assessed, would I be allowed to waive by deed and hence without consideration my right to damages? Could I do that in advance by a properly worded and executed clause in a syndication agreement?

**Response - Stephen Charles (Speaker):**

I think in the first situation you have obtained the judgment and you are giving up the fruits of that judgment by deed, I do not see any reason why you should not be entitled to do that. That is after the event, the miscreant has been punished by being taken to court, you have got your judgment, now anyone is entitled to release somebody else from the consequence of a judgment. But I do not think that you can do that in advance of the making of a contract. That really is precisely the situation that was covered by what Mr Justice Lockhart said in the **Henjo** case. If you do it before the contract is engaged in you are contrary to public policy promising someone that you either indemnify them or will not take proceedings against them if they contravene the Act. That I think is what you are not allowed to do.

**Question - Denis Clifford (Buddle Findlay, Wellington):**

You do not think that you can draw the distinction between trying to contract out and saying you will not incur liability to me because ... as opposed to saying even if you incur the liability, I am not going to enforce it?

**Response - Stephen Charles (Speaker):**

I think that that really is precisely what the judge had in mind when he talked about it. It would be wrong to allow a public policy statute to be ousted by private agreement. What Parliament has done is to stamp out unfair conduct contrary to public policy. Any special condition to deny or prohibit a salutary remedy for offending conduct will be caught by this provision.

The only thing I can see that is likely to be helpful is if you have a strong enough provision in a contract which says that the other party will not rely on what you do and guarantees to undertake its own investigations. That must be highly relevant to the question whether the party has in fact relied on anything you say and it may make it much harder for that person to establish reliance. But even that will be capable of being overcome in a fact situation where you establish the misleading conduct and the plaintiff then persuades the court that no matter what the contract said the plaintiff relied on it.

**Question - DI Everett (Bond University):**

One of the issues that comes up is, if your exclusion clause does in fact break that causal connection for the purposes of civil liability, it seems to me that it may raise another question under section 53 which is that it is a separate criminal offence as well as a civil problem if you misrepresent in any way rights, remedies, guarantees or liabilities. I was wondering what you feelings on that argument would be? You have got a double jeopardy situation with an exclusion clause under the *Trade Practices Act.*

**Response - Stephen Charles (Speaker):**

I do not think I have got anything to add to the last answer I gave.

**Comment - R. Baxt (Chairman):**

Before I thank the speakers I just want to say a couple of things about the conference as this is the last opportunity that we have together. This conference, from what I have heard from all who I have talked to, has been a successful one. Its success is due of course to the fact that we have had considerable help from a large number of people. On behalf of the Association I want to thank all the speakers, the commentators, and the chairmen who have conducted the sessions. They have all gone very smoothly. With one or two minor exceptions, I think we have been able to keep well within the time limits so that you have had plenty of time to have coffee, lunches etc, and even in those cases where we have run over, that has been because the sessions have been so interesting and stimulating.

On behalf of the Committee and the Board of the Association I extend our thanks to all the speakers, commentators and chairmen. Finally, this conference and its predecessors would not have been as successful if we had not had the continued hard work (and I am sorry she is not here to hear this) of Fay Stewart (and John, her husband). I am sure you would like to join with me in thanking Fay, John and their helpers for making this conference a success.

This panel gets a second lot of thanks because now I am going to ask you to thank them. As with all of these sessions, it takes a good deal of time and effort to put together discussions, papers, which are very thoughtful in relation to the issues. The particular issue that we have discussed today is a very important one for the banking industry. I would like you to join with me in thanking Stephen, David and Schuyler for their papers and their presentation.

That brings to a close the 10th Banking Law Association Conference and thank you all for your attendance and your participation.