The Role of the Syndicated Loan Agent & Security Trustee - Some Practical Legal Considerations

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Scope

The purpose of this paper is to outline and discuss the core duties of Agents and Security Trustees, together with some of the numerous legal and practical issues that arise for those parties in the loan market.

A summary of the paper will be presented by the author in order to frame a panel discussion at the BFSLA Conference to be held in Brisbane on 31 August & 1 September 2017.

1. The Agent

1.1 General

On the back of English jurisprudence below to support its view, the LMA describes the Agent's role as "solely mechanical & administrative in nature"[2]; with the intention being that the duties of the Agent not extend beyond those expressly specified in the loan agreement.

Torre Asset Funding v Royal Bank of Scotland plc [2013] EWHC 2670 affirmed that view. There it was alleged by Torre that the RBS Agency team was aware of events during July 2007 that constituted a default and RBS had a common law duty to inform Torre of them. This was rejected by the English High Court, which concluded that the facility agreement (based on standard LMA agency terms) circumscribed and limited the scope of the agency to the express terms of the document.

There is some doubt as to whether this decision would be followed strictly in Australia in all scenarios (noting, for example, misleading and deceptive conduct statutes and Australian fiduciary law principles)[3]. But in any event it remains essential for an Agent that the loan agreement be drafted from the outset with clarity in mind; and that the drafting ensure that additional/nebulous responsibilities do not "creep in" and expand the nature of the Agent's role beyond those of an administrative nature.

Anything where the Agent has a general or independent discretion on how it should act[4] might also be problematic and something it is reluctant to utilise. In some literature it is suggested that an

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[2] See also clause 28.3(a) of *the APLMA Term and Multicurrency Revolving Syndicated Facility Agreement (June 2017 revision)* (**APLMA SFA**) where that is expressly confirmed.

[3] See "*Syndicate agent's "solely mechanical and administrative" duties upheld by English High Court*" (September 2013) Nuncio D'Angelo and Fiona Evans, Norton Rose

[4] For example per 28.2(e) of the APLMA SFA.

Australian facility agent exercising any discretion independently of instructions from the lenders, will be bound by concepts of honesty, good faith, and genuineness and the need to avoid arbitrariness, capriciousness and irrationality[5]. And the need to act in good faith, for example, may be a nebulous concept in some scenarios.

Conversely given *Torre* the Agent only has a duty to act in a *particular way* where this is expressly stated (and that duty may be qualified).

Generally, however, the Agent will wish to take a risk-averse posture and act on instructions only, with the document specifying the voting majority required for each type of relevant decision.

If the loan agreement is simply not clear as to the Agent's precise responsibilities, the Agent will usually seek external legal clarification (upon which it is usually entitled to rely under the express terms of the loan agreement[6]). It may also follow market practice, where relevant. Finally, it may choose to seek instructions from all lenders (in writing) in the rarer cases of difficult ambiguity.

The Agent has no express obligation to monitor the Borrower (including whether it is in default) and is entitled to rely upon representations given to it when acting[7]. Generally, it only becomes aware of a default upon formal notification or actual knowledge thereof [8].

As *Torre* indicates (and loan documents usually acknowledge) the Agent entity may also be involved in a transaction in a number of capacities (including as Lender) – and the knowledge of its Lender team is not *prima facie* imputed to its Agency team as "actual knowledge"[9].

More practically, an Agent in particular has two "customers" to work with on a matter; the Borrower and the lending syndicate. Given the Borrower is primarily responsible for the Agent's fees (and has engaged the Agent to satisfactorily administer the loan and "manage" the loan syndicate), the Agent will wish for things to run smoothly from the Borrower's perspective. But the Agent's formal legal responsibilities lie in favour of the lending syndicate[10]. Managing both relationships concurrently can throw up practical challenges – with the Borrower not always fulsomely appreciating the Agent's "true role" in a legal sense.

1.2 Key Responsibilities

1.2.1 Disbursement of Funds

The Agent's core task is to handle the disbursement of loan funds and interest (to the Borrower or back to the Lenders). The Agent is not usually required to disburse funds prior to actually receiving them from the applicable party[11]. But the Agent may choose to do so (ie. pre-disburse/pre-fund) on an assumption that the relevant borrower/lender funds will arrive shortly thereafter.

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[5] See *Policeman or Post Box? The Role of Facility Agents in Australia after the Torre Asset Case* (9 April 2014) Jeremy King, Corrs Chambers Westgarth
[6] cl. 28.7(e) APLMA SFA
[7] cl. 28.7(a) & 28.9 APLMA SFA
[8] cl. 28.7(b) APLMA SFA
[9] See also cl. 28.6 APLMA SFA
[10] cl. 28.1(a) of the APLMA SFA
[11] cl. 32.4(a) of the APLMA SFA

This creates a credit risk for the Agent personally in relation to the Lender/Borrower it is pre-funding; albeit with a clawback right that Agents are generally reluctant to utilise/ rely upon[12].

1.2.2 Calculation of Interest

Another key task is the calculation, collection & disbursement of interest in accordance with the terms of the loan agreement. The Agent will usually determine it via the applicable screen rate for the selected interest period at the appropriate time[13]. Then, if a screen rate is not available for the relevant period, an interpolated rate will be calculated[14].

If there is no screen rate at all, then the Agent will usually be obliged to seek reference rates from specified "reference rate lenders" (and utilise the average of those reference rates – if they are provided). Failing that, the lender's notified cost of funds will be used[15].

In Australia, the ASX has recently taken over responsibility for the provision of screen rates. At the time of writing this article their role, and how it sits with the existing operational practices of Agents is still being finalised.

1.2.3 Amendment, Consents & Waiver

The Agent will facilitate the amendment of loan documents required from time to time (usually in conjunction with the help of external solicitors).

It will also receive requests for waivers of breaches of loan documents and/or facilitate the process of obtaining lender consent (such as for the disposal of assets), where this is required under the loan agreement.

In practical terms, the Agent generally acts as the "go-between" who will collate lender questions in respect of the proposed consent or waiver and ask them of the borrower. The aggregated response will then be provided to the lender group for information. But it is highly possible that information flows between a Lender and the Borrower (not involving the Agent) may also be occurring in tandem.

A key task for the Agent will then be for it to calculate votes in respect of any matter that requires [Majority] Lender consent in accordance with the terms of the loan agreement.

This task may be impacted by "snooze and lose" clauses that require a lender to indicate their vote within a prescribed time period or not be counted (at all) for voting purposes. It may also be complicated if there has been secondary market trading of loan participations and a vote is to be taken in the midst of that trading (see further discussion below).

[12] cl. 32.4(b) of the APLMA SFA
[13] cl. 10.4 of APLMA SFA
[14] cl. 12.2(a) APLMA SFA
[15] cl. 12.2 (b) & (c) APLMA SFA

1.2.4 Acceleration etc.

The Agent will usually be tasked with notifying the lenders of any default of which it is (actually) aware and seek votes on whether to accelerate the loan and/or take enforcement action (or instruct the Security Trustee to do so)[16]. Or, in some cases, it may instead have the right to appoint an investigating accountant to the Borrower to report back to the loan syndicate.

2. The Security Trustee

2.1 General

The role of the Security Trustee is generally considered more passive on a "day to day" basis up until a default occurs. A Security Trustee, and the Security Trust it manages, are largely custodial in nature (and devoid of actual assets), at least up until enforcement when the Security Trustee becomes active.

Its initial role is primarily to hold security for the benefit of a pool of Beneficiaries – which may be comprised of bank lenders, noteholders, hedge counterparties, transactional banking services providers and other types of financiers.

Accordingly, prior to a default, its role is usually limited to: (1) holding and releasing security as may be required /permitted by the Security Trust Deed from time to time; (2) keeping track of the Beneficiaries for which it holds the security (and facilitating changes, such as by countersigning accession deeds for new Beneficiaries or executing amendments to loan documentation).

Upon (actually) becoming aware of a default, the Security Trustee's immediate task is usually to facilitate a vote on whether to enforce the security. As part of that, it will be necessary to calculate voting entitlements in accordance with the provisions of the Security Trust Deed.

If the Beneficiaries vote to enforce, the Security Trustee's next task is usually to appoint a receiver and/or mortgagee in possession. It then monitors and reports on subsequent enforcement action to the loan syndicate and other secured creditors who are voting beneficiaries (and seeks votes in accordance with the Deed on significant matters, such as asset sales).

Ultimately, when or if enforcement proceeds are received, it then distributes those monies in accordance with the terms of the Security Trust "waterfall" clause[17] which defines priorities (in other words, among its other functions, a Security Trust Deed can embody the inter-creditor principles agreed among the various classes of secured creditors, eliminating the need for a separate inter-creditor document).

The Security Trustee has a different legal relationship to the Beneficiaries than an Agent does to loan syndicate members because it holds property for their benefit & is also a trustee[18]. This places a

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[16] cl. 24.14 APLMA SFA

[17] For example per clause 13.3 & 13.4 of the *APLMA Stand-Alone Security Trust Deed (December 2016 revision)* (**APLMA STD**)

[18] This issue has led to significant discussion around the form of appropriate limitation of liability clauses for Security Trustees. APLMA issued suggested template clauses in September 2015 that have regard to the general law obligations of a trustee. A discussion of the precise legal nature of the Security Trustee's role (and the extent of its "qualified" fiduciary duties to beneficiaries) is beyond the scope of this article.

natural limit on the degree of exculpation it can pursue, given the 'irreducible core' of duties adhering to all trustees.[19]

2.2 Risks

A Security Trustee is also exposed to different potential legal risks to the extent it bears the responsibility for:

a) holding security in safekeeping (and not releasing it unless authorised under the terms of the Security Trust Deed). Such security can sometimes be governed by foreign law, and there is a particular risk that unfamiliar security registrations could inadvertently lapse[20]; and

b) facilitating enforcement of the security in a manner that achieves the best recovery outcome for the Beneficiaries (with the assistance of receivers and mortgagees in possession), while respecting the many duties involved in enforcing security (eg s.420A Corporations Act and at common law).

Express duties to act in specific scenarios (so as to protect the Beneficiaries' interests) are sometimes included (albeit usually with an important countervailing entitlement for the Security Trustee to not be required to act where it may be illegal). [21]

The most obvious example is where a voluntary administrator is appointed to an Obligor. Often an Australian Security Trust Deed will say the Security Trustee must (although some say **may**) enforce the security prior to the expiration of the 13 business day "decision period" per section 441A of the Corporations Act, if it has not already been instructed by the Beneficiaries to do so [22].

This course of action makes sense from a Beneficiary perspective to preserve security enforcement rights, but what if the Security Trustee is uncomfortable as to whether it will be duly indemnified as to the costs of enforcement from security trust assets or its lender group?

If the ST hasn't been able to even get direct instructions from its Beneficiary group, how could it be comfortable it will be adequately indemnified by the Beneficiaries (particularly if the security trust assets seem likely to be insufficient to meet the Security Trustee's costs; let alone ultimately lead to a distribution to the Beneficiaries)?

The New South Wales Court of Appeal considered this scenario in *The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd* [2015] NSWCA 225. There a clause of the Deed (6.1(b)) stated that the security trustee was required to act within the "decision period" in circumstances where it had not received instructions from the beneficiaries in time to enable it to do so. Separately, there was an indemnity clause (4.11(b)) that provided that the security trustee need not act unless its liability was limited (which the parties to the litigation agreed would have been satisfied by the Beneficiary's grant of an acceptable indemnity to the Security Trustee).

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[19] *Armitage v Nurse* [1997] EWCA Civ 1279 per Millet LJ, *Maleski v Hampson* [2013] NSWSC 1794.
[20] See cl. 3.11(c) of the APLMA STD
[21] See 3.7(a) of the APLMA STD
[22] cl. 3.20(d) of the APLMA STD. It is submitted by the author that use of "may" (rather than "must") is even less desirable for a Security Trustee, as it leaves it open to criticism that it exercised its general discretion inappropriately in given circumstances.

Bathurst CJ found that cl 6.1(b) imposed an unqualified obligation upon the Security Trustee to appoint a controller during the decision period, and that it was not limited in the manner contemplated by cl 4.11(b).

The result was that the Security Trustee in that case was held prima facie liable in negligence for damages or equitable compensation relating to the loss of opportunity to the Beneficiaries in having a controller appointed (which it was said would have had value because it would have empowered the security trustee to release the security over the assets of the Company to enable an early trade sale to be negotiated).

This case has led to a rethink on the drafting of these clauses – with a Security Trustee now more minded to ensure any clause *requiring* it to act be expressly qualified by its right to be indemnified before it must do so[23]. Also, it has led to a revisiting of the indemnity clauses in STDs to ensure that they cover the ST "automatically" in the circumstances discussed above; without the ST having to seek a specific and particular indemnity at the time of it acting.

3. Points of Contention/ Practical Issues

3.1 Indemnification

The Agent and Security Trustee's role is generally considered largely administrative. But they are often required to enter into agreements with third parties (such as deeds of appointment/indemnity in favour of receivers, tripartite deeds and/or retainer agreements with external lawyers and advisers) where they agree to be responsible for certain (monetary) liabilities and obligations, subject to:

a) limitation of liability language incorporated in the relevant third party agreement; and

b) the indemnities they receive under the syndicated loan document/Security Trust Deed from the Obligors and Lenders/other Beneficiaries.

Accordingly, before entering into such agreements, particularly where they will result in material monetary liabilities (such as for legal & other adviser fees), the Agent/ST may wish to be indemnified to its satisfaction - including seeking funds on account of anticipated costs.

In addition, the Agent/ST may want *independent* rights to be able to take further action if they have relied upon an indemnity; and the Obligors/Beneficiaries have not met that indemnity (leaving the Agent/ST personally exposed to monetary liabilities).

These issues are canvassed extensively in the template APLMA Security Trust Deed released in 2015 (and revised in December 2016). Aside from indemnities and rights to require the payment of monies on accounts of costs[24], the Security Trustee is also given a right to *independently* trigger enforcement action if costs (above a certain agreed $ threshold) are not met[25].

The appropriateness of an ST having this right has been debated in the loan market. But from a

[23] See eg. 3.20(d) of the APLMA STD
[24] cl. 3.7 of APLMA STD.
[25] cl. 3.6(f) of APLMA STD.

Security Trustee's perspective it is seen as important – particularly to address a potential future scenario where:

i) urgent advice is required (in advance of the provision of funds by Lenders to the Security Trustee);

ii) the assets of the Lenders indemnifying the Security Trustee are unknown and/or it would be impractical to take legal action to recover monies from those Lenders; and

iii) in good faith, expenses are incurred by the Security Trustee and not reimbursed, and the only realistic option to recover those monies is to enforce against the Borrower.

In scenarios where loan exposures have been sold in the secondary loan market to foreign SPV entities (whose sole asset may well be their loan participation), this scenario is not an academic possibility.

3.2 Decision Making Processes

In a variety of scenarios under loan documents and Security Trustee documents, lender (or Beneficiary) consent is required for consents, waivers or (enforcement) actions to be taken.

Most decisions will usually be made by Majority Lenders or Majority Beneficiaries. Generally these definitions will link back to a definition of "Commitment" or "Exposure". Where the only "Exposure" under the structure is drawn commitments under a syndicated loan the calculations (and the logistics associated with making the calculations) will be simple.

But where:

a) one class of Beneficiaries is foreign noteholders (who may or may not have a note trustee who acts for them and collects their individual votes);

b) it is a club loan and the Security Trustee has limited to zero visibility on the current exposures of each lender to the club;

c) hedge counterparties are involved (particularly hedge counterparties outside the core lender group) who may be difficult to contact ;

d) "highly contingent" exposures are secured under the structure (for example transactional banking lines) that are difficult to assess at the time of voting,

the task can be far from simple. It is very important that the loan agreement/Security Trust Deed is clear on what information the Agent/ST is entitled to *rely upon* for calculations of "Exposures" in all respects – as they will often have no practical ability to verify amounts specified by individual Beneficiaries. Generally the Agent/ST should be entitled to rely on all information submitted to it at face value.

As noted above, "snooze and lose" clauses[26] (and other clauses such as "deemed service" clauses[27]) may legally assist the Agent/ST where a Beneficiary group is widely dispersed and uncommunicative.

[26] Eg. cl. 9.4 of the APLMA STD

But Agent/ST's can be reluctant to rely upon those provisions so as to not unfairly disenfranchise their Lenders and/or to avoid a risk of later dispute. Good lines of communication are preferred.

Some practical issues can also arise in the context of administering "snooze & lose" clauses. How do you treat a bank who communicates their *intention* to shortly lodge a vote (but not their actual vote) on the last day of a specified "snooze period"? When does the "snooze period" run from & end if further supplementary information is received & then provided to the syndicate during the specified "snooze period"? Careful consideration of documentation may be necessary (as well as considerations of commercial fairness to all parties).

3.3 Resignation of Security Trustee

In a large secured syndicated loan, it is likely that the entity appointed to the Security Trustee role at the inception of a loan transaction will stay in that role for a considerable period of time[28].

The simple reasons for this are:

a) the cost and time involved in transferring all underlying security documentation to a new Security Trustee (and associated administration) is likely significant. The position can be particularly time consuming where Tripartite Deeds are held in the name of the Security Trustee and negotiations are needed with third parties to agree replacement deeds;

b) potential challenges in finding an entity willing to take over the role, particularly if a loan becomes distressed.

For that reason, the resignation provisions in a Security Trust Deed can be a source of focus (and in particular the costs associated with a Security Trustee exiting the role). On the one hand, the Borrower would contend that it should not have to pay the Security Trustee's costs of unilaterally deciding to exit the role, but on the other hand a Security Trustee would not necessarily agree it should be required to stay in that role indefinitely.

Resignation may also become a real focus if the Security Trustee is one of the syndicate banks (or an affiliate) and that bank sells out of or is repaid its loan participation (and thus has no further economic interest in the facility, or the security trust, except to the extent of Security Trustee fees & expenses). Traditionally Banks have perhaps viewed the distinct role of Agent and Security Trustee as "adjunct" to their loan participation, and not a role they wish to continue with after exiting as a lender.

3.4 Non Bank Lenders

In recent years, Agents and Security Trustees have also observed the increased prevalence of Lenders under loan documents that are not "traditional banks".

Whilst a detailed consideration of the issues that arise from that trend are beyond the scope of this paper it is observed that:

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[27] Eg. 27.3 of the APLMA STD

[28] It is submitted that Agent roles change more frequently (and with less procedural complication than security trustee roles). But similar issues around the Agent's right to resign may also arise.

a) some SPV entities who wish to act as Lenders commonly now seek to limit their liability – eg. to SPV trust assets.

Those assets will be likely $ unknown (but are presumed to be nominal) and that may pose additional risk considerations for an Agent & Security Trustee to consider in the context of their lender/beneficiary indemnities (as against when it is working with traditional regulated banks with a known credit rating);

b) those entities may have a different regulatory framework (and hence seek new requirements to address that regulatory framework which may be unfamiliar to Agent/ST's); and

c) widely held debt (such as noteholder debt) can pose additional logistical challenges to manage.

All of this points to a change in the landscape and arguably greater complexity in the role of Agent & Security Trustee. A feature of that may be an increased need for them to obtain independent advice more frequently than has perhaps historically been the case to protect their own interests.

3.5 Enforcement Issues

3.5.1 Customer Relationships & Costs

As a matter approaches potential enforcement (or actual enforcement) the role of Agent and Security Trustee clearly changes.

At a practical level, the problem of satisfying the needs & commercial expectations of both Borrower and lending syndicate becomes more acute.

For example, when things are "running smoothly" it is likely the Agent will have agreed arrangements with the Borrower for the payment of all fees and expenses that will be followed closely. A quote for costs and expenses will be provided to the Borrower and approved – and the Borrower will be consulted on any adjustments as work is performed.

When an account becomes distressed, these "usual" arrangements may no longer apply. The lending syndicate may want urgent legal advice; or they may want an investigative accountant to consider the financial position of the Borrower. The lending syndicate may want this work done irrespective of the Borrower's views as to its necessity; and without seeking the Borrower's views on the precise scope of work proposed. The syndicate may not even want the Borrower to be advised of the work being carried out (at all).

But the lending syndicate usually expects the work to be paid for by the Borrower nonetheless.

Difficult challenges can arise for the Agent in these scenarios. They will be tasked with seeking repayment of the expenses incurred from the Borrower (in the first instance). And the loan documents are not always clear on the Borrower's responsibility for the costs claimed in specific scenarios.

And what if the costs are formally challenged by the Borrower (and they seek to assess the detail of

the work performed)? A need to preserve legal professional privilege of the lending syndicate may arise (if they are legal expenses), but also a need to justify the expenses to the paying Borrower to establish they fall within the scope of their indemnities.

The Lenders might be asked to make up any ultimate shortfall in cost recovery; but in the intervening period the Agent is "caught in the middle".

3.5.2 Voting - Selldowns

At times of enforcement/ pre-enforcement, loan exposures are often freely traded by lenders. For the Agent/Security Trustee knowing even whom to seek votes from (and how they are to be counted) can be complex.

For example, how do you count the votes where an enforcement related decision is made in the midst of a lender selldown? If a vote was requested prior to the trade being consummated and the exiting lender voted in a certain way, but the replacement lender wishes to vote differently (and the deadline for votes has not yet passed) how is that to be handled?

What about the interim period between loan sale documentation being entered into by Lenders and formal transfers under the loan document occurring? Whom does the Agent seek instructions from (in a practical sense)?

Some of the other general challenges noted above around seeking instructions/votes from a wide class of Beneficiaries are also more problematic at enforcement time, when decisions are more urgent.

3.5.3 Appointing & Managing Receivers/ MIP's

It is often perceived that Security Trustees assume the role of "postbox" after they appoint a receiver and manager or mortgagee in possession (collectively referred to as "**Receiver**" hereafter).

In some respects, that is true. The Receiver is likely to do the bulk of work required to realise assets of the company to which it is appointed. And at a day to day level the Security Trustee's role will be to circulate information to Beneficiaries sourced from the Receiver and handle money flows derived from their activities. And convene meetings of Beneficiaries to make formal decisions on key matters.

In an economic sense, however, the Receiver acts primarily for the Beneficiaries and its role is to maximise their return on their distressed debt. This may necessarily involve the need for creative options to realise maximum value; which can in some scenarios carry inherent risk.

Occasionally, that can lead to challenges. The Security Trustee is the named security holder and appointor of the Receiver. It will bear the primary legal and reputational risk that flows from that position. So it may be reluctant to engage in an enforcement strategy that carries such risk, even if it has the protection of indemnities from the Beneficiary group.

Environmental liabilities are an example of a risk that can create difficulties. Upon appointment and/or taking possession of a site with environmental clean-up issues, a Receiver and thereby the Security Trustee generally assume responsibility for those matters which may continue long after the

sale of assets is completed. Ensuring that the Security Trustee has sufficient resources (long term) to meet those obligations may require some careful thought; and the perspective of Beneficiaries on how to approach those matters may be different to that of the Security Trustee whose reputation in the community might be affected if the environmental outcome was to be later criticised.

3.5.4 *Managing Divergent Interests of Different Beneficiary Groups*

In recent years there has been an increasing trend towards hedge funds (and other distressed debt purchasers) purchasing distressed debt under the so-called "buy to own" strategy.

In those scenarios, the debt purchaser will have usually purchased the debt at less than par with a view that the debt can ultimately be converted to an equity stake in the distressed entity (which is then re-capitalised and later sold at a profit). This contrasts with the position of "original" lenders who may be more focused on recovering the maximum portion of their debt via conventional enforcement mechanisms (such as asset sales), and less interested in becoming equity holders.

Extreme care needs to be exercised by Agents and Security Trustees in situations where the debtholders are a mixture of "original lenders" and distressed debtholders. In essence, it is crucial for the Agent and Security Trustee to carefully follow all processes and procedures envisaged under the loan documentation (and seek legal advice on any "grey areas") since the litigation risk may be high.

More practically, it may simply be difficult to prioritise and determine the key issues for decisioning in circumstances where vastly different agendas are at play for different Beneficiaries (often on tight timeframes).

3.5.5 *General Approach*

The legal documents do not explicitly guide the Agent and Security Trustee on how to conduct their role in every respect. They merely provide a framework. And hence different approaches can be adopted – particularly in a workout situation.

At the one end, the Agent and Security Trustee may see their role as "strictly formal" and limited to responding to requests from the secured parties from time to time. In that scenario, the detailed discussions around workout strategies may be conducted by the Beneficiaries without the involvement of the Agent and Security Trustee, except when instructions are delivered and/or formal votes are required.

At the other end, the Agent and Security Trustee may adopt a more "proactive" role aimed at assisting the Beneficiaries to make timely decisions; taking the lead on seeking advice and obtaining information to assess options.

It is not submitted that either approach is necessarily wrong – but clearly the Agent and Security Trustee needs to be careful to steer clear on "guiding" the Beneficiaries on the appropriate course of action to adopt; since that goes beyond the scope of its role.

The role of Agent and Security Trustee can also be impacted by "Lender Committees" that are formed on some distressed matters to assess options (usually when the total number of lenders is

large and unwieldy). Care needs to be taken around the protocols for such arrangements & discomfort for an Agent and Security Trustee might emerge in certain circumstances – such as where it becomes aware of important (time sensitive) information that is yet to be communicated to the broader lending syndicate.

Conclusion

The "actual" role of the Agent and Security Trustee is often misunderstood.

Their role has also become increasingly complex in recent years for a variety of reasons, with some of the more challenging aspects of their job often arising well after most of the original parties to the loan documentation have since departed from the transaction.

To that end, Agents and Security Trustees are likely to be ever more reliant on independent legal advice to protect their position; including so as to ensure that the provisions in loan documentation relevant to them are able to "withstand the test of time" and work satisfactorily in a variety of potential future scenarios.