SYNDICATED LENDING

QUESTIONS AND ANSWERS

Question - Roger Drummond (Bell Gully Buddle Weir, Wellington, New Zealand):

Taking up Bruce Foy's last comment, I would be grateful for a comment from either himself or from Neville Cleary as to whether there are any current trends towards tighter provisions in favour of banks in the syndicated loans documentation? In particular I would be interested in the comments on event risk provision such as material adverse change where they sit in the syndicated loan documentation.

Response - Neville Cleary (Commentator):

It has always been an evolving thing as far as I am concerned. Despite the fact that word processors tend to revolutionise documentation anyway, individual experiences do the same. So there is certainly a lot more thought being given into the tightening up generally within documentation. I think that is the first point is it not?

In terms of the event risk the old material adverse change clause is something in fact that I alluded to when I was mentioning what happens when you do get a piece of information which in your view is important to the company, that you feel as though it is something that they can live with. If you circularise all the participants the information you may have despite the fact you think it is OK, many people will seize on those types of clauses to say that there has been a material adverse change. Actually the only material adverse change has usually been in and expired. But if you put those sorts of things in willy nilly like that you will find that it comes back to haunt you. I think we will be moving the other way on the event clauses.

Response - Bruce Foy (Commentator):

Certainly there has been a lot of tightening up particularly in the covenants and trying to define more things which otherwise or earlier was left to somebody's judgment about materiality. There are a lot more covenants concerning up-streaming and side-streaming of funds. In terms of the materiality clause, it is a clause that I do not like. I try to make sure that it is not in any documentation, although it does come in, that we are parties to. The real problem you get into that with is that when things are going bad and you want to call it, every lawyer in town advises you not to.

Questions - Tom Bostock (Mallesons Stephen Jaques, Melbourne):

I must say I think Bruce Foy put my position better than I could have put it. I suppose the only difference between what I recall being my position nine years ago and John's position eight years ago is that I think one can define those duties in contractual terms whereas I think it was said in the paper John's view is that you cannot modify them in contractual terms.

Response - John O'Sullivan (Speaker):

Well John can speak for himself, but I think it is probably fairer to say his view was that there was a limit to the extent to which you could define them. And he is rising now - it is always dangerous making comments about people's papers who are actually here, especially when in John's case they have taught you equity!

The one interesting comment I would add to the **NZI** case and what flows from all of that is, I think there is a reasonable argument that at least in relation to the no conflict rule the relationship is not fiduciary at all, that it can be excluded totally. It is perfectly possible to have a relationship which is fiduciary in some aspects only and if the court is saying and it is clearly saying that yes, we are quite happy to exclude the no conflict rule, then it is just not fiduciary in that sense.

Comment - John Lehane (Allen, Allen & Hemsley, Sydney):

Well, I am sorry, I was not going to stand up because I thought I had said quite enough today and time was going on, but I seem to have been challenged. So very briefly I think my view is roughly this, that it is a mistake to think that the Australian courts are going to be over-cautious about introducing fiduciary and other equitable concepts into commercial transactions.

I think Sir Anthony Mason in particular has made it quite clear that he has very little hesitation about that at all. I think the trend is probably to the contrary of the bare majority judgments in the **Hospital Products** case. The second thing I would say is this: on the exclusion of fiduciary obligations there are two points. One is that undoubtedly the scope within which fiduciary obligations arise in a particular relationship is defined by the documents or transactions which give rise to the relationship. In other words, if it arises out of a contract then certainly the contract can define its scope and does. But the other aspect of that is that while unquestionably - and I have never doubted this - you can eliminate the application of the conflict rule to an extent, that is to say by saying that notwithstanding the fiduciary rules, the fiduciary may enter into a contract in which his own interest may be involved, may have cheque accounts, may do other banking business, may as fiduciary enter into contracts with other concerns of which he is a director or a partner or whatever - that is perfectly OK. I think there is ample authority that says that.

There is I think a central core of obligation in any relationship which is in the end fiduciary which just cannot be eliminated. And that I think is the obligation in the end to act in the interests of the person to whose benefit the relationship exists - I was about to say circularly, to whom the duty is owed - persons for whose benefit the relationship exists. In a trust deed, for example, to take the clearest case, you can undoubtedly provide as innumerable trust deeds do that the trustee may have a fee, the trustee may enter into business of other sorts in which his own interests may be involved. But however far you go along that track, you can never eliminate the core of the trustee's obligations which is to act in the interests of his beneficiaries.

Likewise with a company director, you have the standard clause in the articles about directors' interests which I do not think there is any reason to doubt is fully effective. But what you cannot eliminate is the fundamental fiduciary obligations of a director - statutory obligations of course is another think altogether - you cannot eliminate his fundamental fiduciary obligation to act in the interests of the company. Certainly he can enter into a contract as a director with some company in which he has an interest if the clause is in the articles, but if he enter into that contract in disregard of the interests of

the company and merely to promote the interests of himself or that other company in which he is interested, then it is bad. I think that is the real distinction. And my own view about the IBM product analogy is that it is wrong.

The essence of an agency relationship is that the agent does what he does on behalf of and in the interests of his principal. Certainly if the contract allows it within the scope of the agency he may do things that involve his own personal interest by, for example, contracting with himself or with his family or with his family company or whatever. But what he cannot do is usurp his power as agent to act for his own benefit rather than for the benefit of his principal. Sorry, that took rather longer than I thought, but having been challenged, I thought I should at least explain what my view was and say that unfortunately it has not changed very much.

Comment - Phillip Taylor (Chairman):

Thank you John. During your little talk I got a wind up signal from Fay Stewart, a very enthusiastic one I thought, and I am not going to refuse that, and I am sorry we have gone a little late, but I just thought the topic was of sufficient interest that we should have that discussion. I would like you to thank the panel - I think it has been an extremely interesting talk and a lot of food for thought. Please thank them in the usual way.