SYNDICATED LENDING

THE ROLES OF MANAGERS AND AGENTS IN SYNDICATED LOANS

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INTRODUCTION

Recent defaults on syndicated loans have provided a new battleground for the conflict between equity lawyers and contract lawyers. Some plaintiffs believe, or at least hope, that whenever the contract they have entered into fails them, and they suffer loss, there is an equitable remedy waiting to rescue them. One special ray of hope to the disappointed contractor is equity's willingness to grant remedies based on the proposition that the relationship between the parties was not "merely" contractual but was fiduciary. Thus we have seen participants in syndicated loans which have "gone sour" taking refuge in the allegation that fiduciary duties owed to them by managers and/or agents of syndicate facilities would have, had those duties been observed, protected them from loss.

This paper primarily examines the nature of the relationship between members of syndicates (or "participants") and the managers and agents of syndicated facilities. To examine the nature of the relationship between syndicate members on the one hand and managers and/or agents on the other, it is however necessary to traverse areas wider than the simple question "is the relationship fiduciary?" Thus this paper will also cover issues such as:

- Is the relationship one of partnership?
- Is the relationship a "joint venture" and does that label have any significance?
- Do syndicated facilities involve a "security" within the meaning of the Corporations Law and, if so, what follows?
- The other sources of liability which may be relevant to managers and agents of syndicated facilities such as:
  - fraudulent misrepresentation
  - negligent misrepresentation
  - the Trade Practices Act
  - secret commissions legislation

- To what extent are exclusion clauses or disclaimers of liability effective?
- What specific duties does an agent bank owe?
- What obligations do participants owe to each other?
- To what extent can a majority force its will on a minority?

You will note that I have used the terms "manager" and "agent" to apply separately to the bank "leading" a syndication before and after contract, respectively. This is quite deliberate, and, in my view, assists the analysis. I will adhere to the distinction during this paper notwithstanding that in Australian domestic syndicates at least, the manager and the agent are usually one and the same.

The "manager" is the bank which initially negotiates with the borrower, is granted a "mandate letter", prepares the information memorandum, initiates the documentation process and is generally responsible for bringing the transaction to the point of execution of a syndicated loan agreement. Upon execution, the "agent" takes over. Unlike the manager, the agent's role is precisely defined in a written agreement (the syndicated loan agreement). The agent has little discretion and even less need for the exercise of judgment. As documented, his is a relatively "low risk, low reward" job.

The differences between the functions and the nature of the roles of manager and agent require that they be treated separately. Separate labelling helps that task.

IS A SYNDICATE A PARTNERSHIP?

Before discussing whether or not a syndicate is a partnership, it makes sense to explain why the question is being asked.

If a syndicate is a partnership:

- fiduciary duties will clearly apply to the members of the partnership to the extent not specifically excluded or restricted by the partnership agreement - these duties will very likely apply not only once the "partnership agreement" (the syndicated loan agreement) is signed but, possibly more significantly, during the period of negotiations and discussions leading to execution (see **United Dominions Corporation Limited v Brian Pty Limited** (1985) 59 ALJR 676 at 677, per Gibbs CJ and at 680 per Mason, Brennan and Deane JJ);

- membership by an Australian bank will breach s63(1) of the Banking Act and will be avoided, so far as it concerns that bank, by s63(2) of the Banking Act;

- the syndicate may be treated as a partnership for tax purposes (noting of course that the test of partnership for tax purposes is different and more likely to be satisfied than the test for partnership at general law);

- individual members of the syndicate may be able to bind each other, may have joint liability for their individual acts and may be liable to indemnify each other.

A fundamental element of all syndicated loans is that the syndicate members' obligations to lend are several. Whilst payments are made, through the medium of the agent, on a "gross" basis (ie the agent deposits one lump sum in the borrower's account on drawdown and the borrower, on repayment, pays one gross amount to the agent who then redistributes it), no bank has any proprietary interest in or entitlement to amounts lent by or repaid to any other bank. Further, although there are mechanisms for "collective action" (eg security is granted to the agent as trustee for all the banks and some decisions must be taken by a majority), those provisions are designed as administrative conveniences designed to enable better enforcement of the individual rights of the participant banks. Similarly, sharing clauses are designed to reinforce the individual, *pari passu* entitlements of banks not to change the nature of the relationship between the banks.

With that background in mind, let us turn to the definitions of "partnership" contained in various Australian Partnership Acts. Partnership is typically defined as "the relation which exists between persons carrying on a business in common with a view of profit". That definition is usually supported, in each State Partnership Act, by rules which assist in determining whether a partnership does or does not exist. Those rules include provisions that joint tenancy, tenancy in common, joint property or part ownership do not of themselves create partnerships, nor does the sharing of "gross" returns.

It is usually thought (eg see Higgins and Fletcher *The Law of Partnership in Australia and New Zealand* 4th Ed, p40) that profit sharing is an essential element of partnership.

Whether individual members of the syndicate make a "profit" from their participation in the syndicate is entirely an individual matter. It will depend upon the cost structure of each participant bank. Some banks may make handsome profits from their participation in a syndication, some banks may "break even" and some banks may even lose.

Loan syndicates are therefore not partnerships and negotiations intended to create a syndicate do not (without more) create fiduciary relationships.

IS A SYNDICATE A "JOINT VENTURE"?

The High Court decision in **UDC v Brian** strikes terror into the hearts of those who believe it stands for the proposition that Australian law now recognises a new form of legal association, the "joint venture", which creates fiduciary obligations between its members. If the case was authority for any such proposition, it could result in "syndicates" creating fiduciary relationships on the ground that they are "joint ventures".

However, **UDC v Brian** stands for no such thing. Each member of the High Court based his decision on the fact that what was described as a "joint venture" agreement in that case, was in truth a partnership agreement. The High Court further held (at p680) that "a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement had been settled" (see too Gibbs CJ at p677). Thus the prospective partners in that case owed each other fiduciary duties during the negotiation phase.

The majority judgment also made it clear that in Australia at least the description "joint venture" is insufficiently precise to enable it to be said by way of general proposition that the relationship between joint venture partners is necessarily fiduciary. (See p679).

SYNDICATED LOANS AND THE CORPORATIONS LAW

1. General

Significant and, for participant banks, potentially irritating consequences could flow if a syndicated loan constituted a "security" within the meaning of s92 of the Corporations Law. Syndicated loans will create securities if one can say they give rise either to a "debenture" or a "prescribed interest".

What are the consequences if a syndicated loan gives rise to "securities"?

The following is a list of some of the more important potential results of a finding that syndicated loans create "securities":

(a) Prospectus Provisions:

Written documents, such as information memoranda, soliciting participants to acquire securities, will be "prospectuses" (see definition "prospectus" in s9 of the Corporations Law).

Unless the relevant issue is "excluded", a prospectus would need to be lodged and registered with the Australian Securities Commission and (if the relevant security is a "debenture") a debenture trust deed or (if the relevant security is a "prescribed interest") a prescribed interest trust deed must be executed. If the issue is not an "excluded" one, a host of other consequences follow eg there will be criminal and civil liability for material mis-statements/omissions in the prospectus and the draconian restrictions on advertising securities issues covered by a prospectus will apply.

Of course, even if syndicated loans do give rise to "securities", the relevant issues will, in practice, almost invariably be "excluded" (ie they will fall within one of the categories of exclusion set out in s66 Corporations Law and regulation 7.12.06 Corporations Regulations eg because the minimum amount of any subscription will be $500,000, there will in the case of a debenture issue only be less than 20 invitees or because all the invitees will fall within one of the categories of "consenting adults" set out in those provisions).

However, even if the issue is "excluded", s995 Corporations Law (which is the Corporations Law equivalent of s52 of the Trade Practices Act and prohibits, *inter alia*, misleading and deceptive conduct in connection with prospectuses) will apply to it. This means that civil liability under s1005 will apply to those involved in any contravention of s995 or those deemed by s1006 to be involved in any such contravention. Because the analogous Trade Practices Act provisions have no equivalent of the deeming provisions of s1006(2) of the Corporations Law (and thus persons caught by those deeming provisions cannot appeal to the refuge of knowledge offered in relation to Trade Practices Act liability by **Yorke v Lucas** (1985) 158 CLR 661), the net cast by the Corporations Law is wider than that cast by the analogous provisions in the Trade Practices Act.

(b) Licensing Requirements:

If syndicated facilities give rise to securities, banks dealing in them will require dealers licences under s780 of the Corporations Law.

Regulation 7.3.14(1) of the Corporations Regulations provides that the licensing provisions do not have effect in relation to an Australian bank (ie a bank with an authority to conduct banking business under the Banking Act or pursuant to State or Territory legislation) if the only conduct by that bank which would attract the licensing provisions is that "in relation to the carrying on of the business of banking, the Australian bank ... (b) accepts appointment, or acts as, banker in respect of an issue of securities". This exemption does not however, in my view, assist Australian banks which act, not merely as banker to the issue of securities but actually take up the issue in their own name and for their own account.

Failure to obtain a licence when required can bring drastic consequences. This is because Division 2 of Part 7.3 of the Corporations Law enables agreements between unlicensed persons and their clients in relation to dealings in securities (such as syndicated loan agreements) to be avoided or modified.

(c) Recommendations:

Securities dealers (whether licensed or not) who make recommendations about securities (such as the recommendations which could conceivably be expressed or implied in an information memorandum) are required by Part 7.4, Division 3 of the Corporations Law to have a reasonable basis for those recommendations. That Division imposes in effect, a statutory "due diligence" obligation on the person making the recommendations. The Division also imposes a strict obligation to disclose not merely the existence but "**particulars**" of any benefits which the person making the recommendation may receive which could affect his recommendation.

(d) Liability of Securities Dealers for their Representatives:

There is a little known provision, s821, of the Corporations Law which has a significant impact on the ability of securities dealers to exclude or restrict their liability for the actions of their employees. Indeed s821(4) actually prohibits persons from attempting to make agreements which would be avoided by s821(1).

(e) Insider Trading:

Now that the requirement of "relevant connection" has been abolished it is likely that managers and agents of syndicates will (assuming always that syndicated loan agreements create "securities") be affected by the insider trading provisions. (It was possible that they would have been so affected under the prior law in any case but the matter is now beyond doubt).

It is now appropriate to turn to the substantive issue: do syndicated loan agreements create "securities"?

2. "Debentures"

Do syndicated loan agreements create "debentures"?

The only point upon which there is unanimity is that a debenture is not something which can be precisely defined. (See for example the comments of Needham J in **CAC v David Jones Finance Limited** (1975) 2 NSWLR 710).

However, despite some English suggestions to the contrary (see **Slavenburg's Bank NV v Intercontinental Natural Resources Limited** [1980] 1 All ER 955 at 976) the traditional Australian view, certainly in the stamp duty context, was that a debenture created or acknowledged the existence of an existing, specific debt. (See **Burns Philp Trustee v Commissioner of Stamp Duties** (1983) 83 ATC 4477 and **Handevel v Comptroller of Stamps** (1985) 62 ALR 204, 216-217).

The Corporations Law definition of "debenture" (like its predecessors in the Companies Code) however casts doubt on the proposition that because syndicated loan agreements usually simply create a framework of facilities which may or may not, depending upon satisfaction of conditions precedent and the borrower's whim, be drawn upon, they cannot be "debentures". This is because the opening words of the definition in s9 Corporations Law make it clear that a "debenture" can include a document which evidences or acknowledges indebtedness of a corporation in respect of "money that is **or may be** deposited with or lent to the corporation". The language of futurity suggests that the stamp duty cases do not apply here.

Prima facie therefore, there is a reasonable argument that syndicated loan agreements are indeed "debentures". (There may be an argument that syndicated loan agreements which provide only for bill facilities, letter of credit facilities or guarantee facilities do not evidence or acknowledge "indebtedness" and therefore cannot be "debentures", but I shall pass over that on the ground that syndicated facilities almost invariably include cash advances).

It is tolerably clear that the legislature intended paragraph (a) of the exclusions from the definition "debenture" to catch agreements such as syndicate loan agreements. That paragraph excludes from the scope of the term "debenture", documents entered into by companies, otherwise than as part of the conduct of a "business of borrowing money and providing finance", in respect of money lent by persons who make the loan in the ordinary course of their own business. The difficulty with the exemption however is that many syndicated loans are made to special purpose "treasury" companies which may well be thought to be in the business of borrowing money and providing finance.

Let us ignore that problem for the time being and assume for present purposes that we have negotiated that definition successfully. Is that the end of our travail? Unfortunately, no. Section 78 Corporations Law still stands in our way.

Section 78 is based on provisions taken from preceding company law. Its forerunners were designed to prevent avoidance of prospectus provisions by using oral offers or invitations for debentures or other cunning methods of avoiding the making of offers or invitations which fell within the relevant prospectus sections eg, ss95, 96, 97, 99 or 169 of the old Companies Code.

It is quite likely that s78 no longer serves any particularly useful purpose in the Corporations Law context because the new Corporations Law provisions effectively catch all offers and invitations, written or oral (see s1018(1)). Its presence however creates significant difficulties because it arguably "deems" any "invitation to deposit money with, or lend money to, a body corporate" to be a "debenture" even if the "debenture" would otherwise fall within one of the exclusions from the definition of "debenture" contained in s9.

This can only be an unintended drafting error. Hopefully the courts will give s78 sense by treating it as dealing with the circumstances in which relevant offers of securities are made rather than going to the question of whether a security exists in the first place.

However, in the absence of such a sensible interpretation, there is a significant risk that syndicated loan agreements will be "debentures" even if they fall within one of the exceptions set out in s9. *A fortiori*, if the syndicated loan agreement is entered into by a "treasury company" and thus does not fall within the exclusions from the definition in s9 at all.

3. Prescribed Interests

Do syndicated loan agreements constitute "prescribed interest"?

Were it not for the warning by Mason J in **Australian Softwood Forests Pty Limited v Attorney General (NSW)** (1981) 148 CLR 121 at 129, it would be tempting to say that syndicated loans cannot possibly be "prescribed interests" and pass over the issue.

That warning by Mason J was that "there are real difficulties in the suggestion that the court can read down the very comprehensive definition of 'interest' by reference to the supposedly unintended consequences of a literal reading on every day commercial transactions. The definition is so general and all-embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words".

A prescribed interest is defined to include a "participation interest" which is itself defined to mean a right to participate, or any interest in:

(a) any profits, assets or realisation of any financial or business undertaking or scheme whether in Australia or elsewhere;

(b) any common enterprise whether in Australia or elsewhere, in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any "investment contract" (which is in turn defined to mean "any contract, scheme or arrangement that, in substance and irrespective of its form, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, that, under, or in accordance with, the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, acquired in or under like circumstances").

There is a substantial risk that syndicated loans generally will fall within paragraph (a). Mason J in the **Australian Softwoods** case made it clear that an interest need not be proprietary and that the word "scheme" is a very wide one, sufficiently wide, in my view, to cover activities such as those encompassed in syndicated lending schemes.

Paragraph (b) of the definition should not apply to syndicated loans since any "profits, rent or interest" will not be derived from the efforts of the promoter of the enterprise or any third party but rather from the lender's enjoyment of his own asset (the loan). (See **Streeter v Pacific Seven** (1985) 9 ACLR 790 and **Maunder-Hartigan v Hamilton** (1984) 2 ACLC 438).

A literal reading of paragraph (c) makes it strongly arguable that syndicated loan arrangements whereby security is granted to the agent as trustee for the lenders will be a "prescribed interest". (See **Munna Beach Apartments v Kennedy** (1983) 1 ACLC 721).

4. Conclusion on "Security"

It is quite arguable that syndicated loans are "securities". Indeed, it is more likely than not that syndicated loans to "treasury companies" and secured syndicated loans are securities.

THE ROLE OF THE MANAGER AND ITS RELATIONSHIP WITH PARTICIPANT BANKS

The starting point of this discussion is to ask whether the relationship between the manager and participant banks is a "fiduciary" one and, if so, what obligations flow from that finding.

I will first discuss in general terms the nature of the relationship between the manager of a syndicate and participant banks and then turn to a discussion of three specific aspects of the relationship, and the liability which may be imposed on the manager in consequence of those aspects of the relationship, namely :

- preparation and circulation of the information memorandum;
- payment of management fees;
- negotiation of loan documentation.

1. Is the Relationship Fiduciary?

There is a decision of the English Court of Appeal, **UBAF Limited v European American Banking Corporation** [1984] 2 WLR 508, in which the Court seems to suggest that the relationship between the manager and participants is, at all relevant times, fiduciary. (See the comments of Ackner and Oliver, LJJ at page 520 in particular).

The Court of Appeal, in that case, was called on to decide an interlocutory application concerning leave to serve outside the jurisdiction and thus some care needs to be taken in relation to the decision. With respect, it seems relatively clear that if the Court of Appeal was suggesting the relationship was always fiduciary, and was fiduciary in respect of all stages in the process of syndication, the suggestion was not completely considered nor necessary for the decision. At most, the case decided that in respect of information memoranda (or similar documents such as the letter circulated in the **UBAF** case), the manager has, to the extent he has prepared the information memorandum, a fiduciary duty of care to the recipients. That duty extends to an obligation to correct any mistakes in the information memorandum which are discovered after its preparation or circulation.

It seems sensible to discard the possibility that the manager owes fiduciary duties to the participants at all stages during the syndication process if only because it seems relatively clear that during the early stages of the process at least, the manager is acting as agent for the borrower. The borrower gives the agent a "mandate letter" appointing him agent for the borrower to procure participant banks to enter into the syndicate. True it is that lawyers for managers, and managers themselves, go to great lengths to ensure that the mandate letter does not constitute a binding obligation to lend money or underwrite the loan by others of money. However, the mandate letter is, I would suggest, usually a legally effective appointment of the manager as agent for the borrower for a limited purpose viz. for the purpose of endeavouring, on a "best efforts" basis, to induce banks to enter the syndicate.

The fact that the manager would seem to be initially the agent for the borrower has spawned what I call the "shifting" theory of the fiduciary duty (typified by the paper given by Bostock and Hambly, "Loan Syndication", in July 1983 at a seminar at the Law Institute of Victoria and by Lehane's paper "The Role of Managing and Agent Banks: Duties, Liabilities, Disclaimer Clauses" in the June 1982 edition of *International Financial Law Review*). This theory holds that whilst the manager is initially agent for the borrower, at some point (usually at about the commencement of the negotiation of the loan agreement) the manager commences to act as the agent for the banks and thereafter owes fiduciary duties to the banks.

Finally, there is a school of thought that considers the relationship between manager and participant banks is in no sense fiduciary. This view is well expressed by Clarke and Farrar in their article "Rights and Duties of Managing/Agent Banks in Syndicated Loans to Government Borrowers" ((1982) *University of Illinois Law Review*, p229) when they say, at p234, that "although conservative financial lawyers will counsel their manager clients that they should expect to be held to the fiduciary standard, the better view is that the syndication process represents a classic arm's length transaction and, therefore, fiduciary obligations should not be imposed on the manager. The members of a syndicate are 'buying' a product developed, marketed, and serviced by the manager/agent. While the members undoubtedly rely on the reputation and experience of the manager, the relationship is not fundamentally different from the relationship between IBM and the purchaser of a large computer system."

While Clarke and Farrar wrote about syndicated loans to sovereign borrowers, I consider, for reasons set out below, that the same principle applies to domestic syndicated loans to corporate borrowers.

Bostock & Hambly, and Lehane, wrote their articles prior to the High Court's decision in **Hospital Products Limited v United States Surgical Corporation** (1984) 58 ALJR 587. That decision represented a significant victory for contract lawyers over equity lawyers. The High Court made it quite clear that courts should be very reluctant to find fiduciary relationships in commercial arrangements entered into at arms length by parties on an equal footing. (See Gibbs CJ at p98 and Wilson J at p618 in particular although the comments of Mason J, in dissent on this point, at p610 should not be overlooked). The High Court further pointed out that a relationship of confidence, in the sense that one person "trusts" another will not of itself create a fiduciary relationship (see Gibbs CJ at 596 and Dawson J at p628). Something more is required. This will usually be found in the "vulnerability" (see Mason J at p608 and Dawson J at p628) of the person to whom the duty is owed.

For sophisticated participant banks, with knowledgeable syndication departments devoted to investigating syndicated credits, which follow internal procedures carefully laid down to ensure that quality decisions are reached, to plead that they are innocent and ignorant participants, vulnerable to the depredations of agent banks is, in my view, at odds with commercial reality. The law dealing with fiduciary relationships was not designed to protect people such as participant banks. If protection is required for participant banks, it will be found in s52 of the Trade Practices Act, ss995 and 1002G of the Corporations Law and the law of negligent and fraudulent misrepresentation.

2. The Information Memorandum - Sources of Liability and Disclaimers

Whether or not a manager will have liability for the contents of an information memorandum will depend to a large extent on his involvement in its preparation. Assuming however that the manager does have a significant role in its preparation, what are the sources of his potential liability?

The following potential areas of liability will be well known to all of you:

(a) fraudulent misrepresentation (see **Derry v Peek** (1889) 14 App Cas 337);

(b) s995 Corporations Law (see discussion above and note in particular s765 which reverses the onus of proof in relation to statements about the future);

(c) s52 of the Trade Practices Act and, possibly, s53(aa) (prohibiting false representations that services are of a particular standard, quality, value or grade) and s53(g) prohibiting false representations concerning the "existence, exclusion or effect of any condition, warranty, guarantee, right or remedy". Note also s51A which is similar to s765 of the Corporations Law;

(d) negligent mis-statement (see **Shaddock & Associates Pty Limited v Parramatta City Council** (1981) 55 ALJR 713);

(e) insider trading provisions contained in ss1002G(2) and (3) Corporations Law (see too s1013).

Of course liability is usually comprehensively disclaimed both in the information memorandum itself and in a clause in the syndicated loan agreement whereby participants acknowledge they have made independent credit decisions without relying on the manager.

Whether or not those disclaimers are effective will depend on the source of liability which would, absent the disclaimer, apply and on external circumstances (eg whether or not there have been any contrary oral warranties or conduct giving rise to estoppel).

In addition to the voluminous law on exclusion clauses contained in contracts, which I shall not attempt to canvass here, one should bear in mind:

- that one cannot disclaim a liability for fraud, although one can disclaim a liability for negligent misrepresentation (see **Hedley Byrne v Heller** [1964] AC 465 and **Shaddock v Parramatta City Council**);

- exemption clauses will not defeat claims based on s52 of the Trade Practices Act (**Petera Pty Limited v EAJ Pty Limited** (1984) 7 FCR 375) nor, by parity of reasoning, s995 Corporations Law or s1013 Corporations Law - although "non reliance" clauses **may** be effective to negate s52 Trade Practices Act, s995 Corporations Law and s1013 Corporations Law liability (**Sutton v A J Thompson Pty Ltd** (1987) 73 ALR 233 and **Benlist Pty Limited v Olivetti Australia Pty Limited** (1990) ATPR 41-043);

- that it is conceivable that obtaining, or even attempting to obtain, an exclusion clause may, in appropriate cases, breach s821 of the Corporations Law and falsely representing that a disclaimer is effective may breach s53(g) of the Trade Practices Act; and

- "non reliance" clauses may be defeated by contrary oral warranties, by ambiguity, by showing that neither party intended it to be acted upon or by estoppel (see **Waltons Stores (Interstate) Limited v Maher** (1988) 164 CLR 387).

3. Payment of Fees by the Borrower to the Manager

On the theory that money concentrates the mind like no other substance, let us examine the fees traditionally paid, often in large amounts, by borrowers to managers for procuring the syndication. If it is true that participants repose such confidence and trust in managers as to give rise to fiduciary or "near-fiduciary" relationships, how can one justify the payment by borrowers to managers of large amounts to procure participants to enter into loan transactions with the borrower? If the relationship between participants and managers is such that managers are obliged to put the participants' interests ahead of their own (this being the hallmark of the fiduciary duty), how does one explain the invariable custom that participant banks allow, indeed expect, managers to extract significant fees from borrowers without even disclosing the size of those fees to the participants?

The answer of course is that the relationship is not fiduciary (see discussion above) and no party to it ever really expected that it would be. Payment of fees cannot be attacked on that ground.

Leaving aside s849 of the Corporations Law (discussed above), this leaves as the only potential source of attack on fees paid by borrowers to managers, the Secret Commission legislation.

Secret Commissions legislation exists in one form or another in all States and Territories of Australia and at the federal level. Some of the legislation is extraordinarily wide - see especially s4 and s9 of the Commonwealth Secret Commissions Act. Some commentators eg Bostock and Hambly, have worried at length about the application of those provisions to managers of syndicated loans.

Whilst the language of the legislation is frequently so wide that I do not for one moment suggest it be treated in cavalier fashion, I consider that many of the concerns about the application of the Secret Commissions Legislation have been exacerbated by the view that managers are "agents" (in the usual legal sense) of the participants during the pre-contract stage as well as the post-contract stage.

For the reasons set out above, I consider it is more accurate to think of the manager as a vendor of a product and certain services to the participants during the pre-contract stage rather than the agent, during that stage, of the participants. It is certainly difficult to reconcile the argument that the manager is agent for the participants with the fact that the mandate letter usually has the effect of expressly constituting the manager as agent **for the borrower** to procure participants to enter into the syndicated loan.

Thus, whilst the legislation in each particular State must be individually reviewed, I would suggest that the fears of its application have been exaggerated.

4. Negotiation of Loan Documentation

It is during this phase that it is most frequently said that the manager is agent for the participants and therefore owes them fiduciary duties. For the reasons given above, I consider it quite inappropriate to inject agency and fiduciary concepts into the commercial relationship between the manager and the participants, even during this stage. Bankers are very familiar with syndicated loan documents, are given the opportunity to peruse the documents during the drafting stages and (if they choose) to obtain such legal advice as they require. They sign the documents quite voluntarily.

Again, the notion of managers acting as agent for the participants and owing them fiduciary duties in the preparation and negotiation of documents collides head on with the fact that the manager has been, to the knowledge of all the participants, expressly appointed the **borrower's** agent, in the mandate letter, to procure the participation by syndicate members in a loan agreement having certain terms and conditions (which are usually itemised, albeit in a general way, in the mandate letter and cover the key terms of the proposed syndicate agreement). How can participants reasonably argue that the manager is under a duty to advance their interests in preference not only to the interest of the borrower but possibly in preference to the interest of the manager itself (where the interest of the manager and the interest of the participants conflict) when they know that the manager has undertaken an express obligation to the borrower to the effect that the syndicated loan agreement will be on certain terms and conditions?

THE ROLE OF THE AGENT AND ITS RELATIONSHIP WITH PARTICIPANT BANKS

1. General

Generally, I find the role of the agent rather less difficult, and therefore less interesting, than that of the manager.

This is because the role of the agent is so precisely defined. The usual syndicated loan agreement provides expressly that the agent has only those rights and duties set out in the document and those reasonably incidental thereto.

The agent's discretions and powers are usually reduced to a bare minimum on the basis that no participant bank is prepared to delegate to the agent bank the management of the participant's asset (namely the loan to the borrower).

Some authors have written at length about the duties and obligations of agents in syndicated loans. However, the bulk of what has been written is extracted from the general law of agency. The propositions based on the general law of agency are usually expressly negatived in the loan contract and thus one does not need to be unduly concerned with those rules.

In truth therefore provided one accepts that the contractual negativing of the agent's duty is effective, there is not much of interest to be said about the duties and obligations of agents. In general (and slightly simplistic) terms one need only read the loan agreement to ascertain the duties and obligations of the agent.

The most controversial question about the agent's duties will therefore usually be the effectiveness of the lengthy exclusions, restrictions and disclaimers contained in the loan agreement.

Whether these exclusions work as a matter of contract law can be a very difficult question. I refer the reader to treatises on the law of contract to educate himself on such matters as the alleged doctrine of "fundamental breach", the *contra proferentem* rule and the rule that exclusions of liability for negligence have to be specifically worded. The discussion above concerning the circumstances in which one can contract out of liability for fraudulent misrepresentation, negligent misrepresentation, s52 Trade Practices Act liability, liability under s995 or s1013 of the Corporations Law and about the application of estoppel is also relevant.

It is however worthwhile examining in particular the effectiveness of what is probably the most important disclaimer clause contained in any syndicated loan agreement. The relevant clause was the subject of litigation in New Zealand recently and I am indebted to Denis Clifford of Buddle Findlay for drawing to my attention what appears to be the first discussion in the Commonwealth legal world of the duties of agents in syndicated loans post-contract (although the **UBAF** case discussed the liability of managers pre-contract). The case, which is as yet unreported, is **NZI Securities Limited & Ors v Bank of New Zealand**, a decision of Wylie J given 11 February 1992 in the High Court of New Zealand. The clause litigated in that case, which is typical of clauses found in syndicated loan agreements in Australia and New Zealand and, as far as I know, in other common law jurisdictions as well, read as follows:

"**Agent as Participant and Banker:**

(a) The Agent in its capacity as a Participant shall have the same rights and powers under the Transaction Documents as any other Participant and may exercise the same as if it were not acting as the Agent.

(b) The Agent may (without having to account to any Participant) engage in any kind of banking, trust or other business with any Relevant Company as if it were not the Agent and may accept fees or other consideration for services in connection with any Transaction Document and otherwise without having to account to the Participants."

Commentators who emphasise the fiduciary aspects of the relationship between agents and participants deplore clauses such as these and argue that an agent's fundamental obligation "to exercise the powers entrusted to them *bona fide* for the benefit of their ... principals" will override the contractual limitation. (See for example Lehane at p241).

In the **NZI Securities v BNZ** case, the plaintiff participant bank alleged that the agent in entering into certain transactions with a borrower (which was in severe financial difficulty) in relation to loans between the agent and the borrower other than the syndicated loan, prejudiced the members of the syndicate. The plaintiffs argued this breached the agent's fiduciary duties because the agent was in effect trying to improve its position in non-syndicate loans at the expense of the lenders in the syndicated loan. The agent relied on the clause just quoted as entitling it to enter into the transaction.

Some care needs to be taken in placing too much reliance on the judgment because it concerned an application for summary judgment, but Wylie J did make it quite clear that in the absence of "understandings or commitments between the banks which might result in a different conclusion" (presumably referring to actions giving rise to estoppel or oral warranties contrary to the loan agreement itself), it was quite appropriate for the agent "to have acted as it did in apparent conformity with its rights under the very agreement which created, **but at the same time confined**, the fiduciary relationship." (Emphasis added)

The decision recognises the primacy of the contract as the source, and measure, of the duties and obligations of agent and participant banks. The view of Wylie J that the contractual foundation of the arrangement confines the scope, and marks out the boundaries of, any alleged fiduciary relationship is consistent with the judgment of Mason J in **Hospital Products Limited v US Surgical Corporation** at p608-609. See also the judgment of Deane J in **Chan v Zacharia** (1984) 58 ALJR 353 at 364.

Indeed, whilst counsel for the agent in the **NZI Securities v BNZ** case conceded that it was in a fiduciary relationship to the participants, and Wylie J described that as a proper concession, in my submission that concession was neither necessary nor appropriate.

As Gibbs CJ (at p598) and Mason J (at p609) pointed out in the **Hospital Products Limited v United States Surgical Corporation** case, a relationship where the alleged "fiduciary" is entitled to, and expected to, act in its own interests in a particular respect, will not be fiduciary, at least in that particular respect. It is of the essence of a fiduciary relationship that the party to whom the obligation is owed is entitled to expect that the fiduciary will put his principal's interest ahead of his own.

This does not necessarily mean that the relationship has no fiduciary aspects, simply that one particular obligation normally associated with fiduciaries (the obligation to avoid conflict of duty and interest) does not apply to the relationship. As Finn said at p2 of his book "Fiduciary Obligations":

> "A fiduciary for one obligation is **not** ipso facto a fiduciary for all, or indeed any, of the other obligations." (The emphasis is Finn's).

2. Particular Duties

It follows from the foregoing that contractual attempts to modify or eliminate fiduciary obligations which might otherwise apply to the agent for a syndicated loan should, in my view, be successful.

Before closing, it is appropriate to conduct a brief examination of what duties might be thought to apply to agents for syndicated loans and the way in which those duties can be, and usually are, negatived:

(a) Duty of Care:

In the absence of relevant contractual provisions, the agent would be under a duty to observe reasonable care in the performance of his duties. The usual syndicated loan agreement however negatives that duty of care by providing that the agent has no liability to participants except in the case of misconduct or gross negligence.

(b) Duty to Monitor Performance:

One aspect of the duty of care which might be imposed on an agent, particularly an agent which had, as most agents will have, a close relationship with the borrower through day to day banking activities, is a duty to monitor compliance by the borrower with the loan agreement. In particular it might be thought that the agent had a duty to advise participant banks of any event of default of which it becomes aware.

Syndicated loan agreements not only typically relieve the agent from the duty of monitoring performance by the borrower, but by the insertion of carefully drafted "ostrich" clauses (deeming an agent bank to have no knowledge of an event of default and no requirement to notify events of default to other participants unless a specific written notice of the existence of the event of default is given to it), significantly confine the duty to notify participants of any event of default of which the agent does become aware.

Such clauses also solve two other potential problems faced by syndicated agents:

- the possibility that it may be required to breach its duty of confidentiality to its customer; and
- the problems of establishing when notice to an individual officer of an agent bank constitutes notice to the agent bank itself. (This latter can be a particularly difficult problem where the agent bank deals with the borrower through a number of its divisions eg corporate banking, corporate advice, trustee, foreign exchange, money market or underwriting divisions).

(c) Duty not to Delegate:

Agents would, in the absence of provision to the contrary, be precluded from delegating their powers, at least where the identity of the agent was a matter of some importance to the participants. The syndicated loan agreement however usually confers upon the agent specific powers of delegation to expert advisers and consultants.

(d) Duty to Avoid Conflict and not to Profit from the Agent's Position:

As discussed above, this rule is usually comprehensively, and in my view effectively, excluded.

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I trust it will be clear from the foregoing that if I regard the relationship between the agent and the participant banks as primarily contractual, the relationship between participant banks *inter se* is almost exclusively contractual. In the absence of most unusual circumstances giving rise to allegations of partnership, fiduciary relationship or estoppel, participant banks are entitled to exercise their rights, and have only the obligations, set out in the contract or in a relevant statute.

An instance of this is the power of the majority to bind the minority on any matter on which a vote is to be taken provided that the loan agreement is strictly complied with and the majority do not defraud (or to use language which is more frequent in this context, "oppress") the minority.

CONCLUSION

In my view, the fears that many have expressed that managers and agents of syndicated loans are faced with impossible conflicts of interest are greatly exaggerated. No doubt managers and agents have difficult tasks in coping with the Corporations Law, the Trade Practices Act and the terms of the contracts they enter into. However, the view that equity sits above them, waiting to swoop, is misplaced. In the usual case, managers will have no fiduciary obligations and agents will have only specifically limited fiduciary obligations (if they have any) and the extent to which they face equitable retribution for confusing the duty they owe to participants with their own interests has been overstated.