The Fiduciary Principle in the Commercial Domain: Implications for Syndicate Loans

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I: INTRODUCTION

Over the past decade the fiduciary principle has undergone a series of judicial barrages, adapting it to suit a wider range of circumstances, particularly in the commercial sphere. Its expansion in this field has been driven by the plaintiff's need for redress in certain instances, and by a general desire to use the method and remedies of equity. Much controversy has surrounded this expansion. The development of the fiduciary principle is by no means complete. Inevitably the debate as to its scope and content will continue. This uncertainty that surrounds fiduciaries is plainly manifested in syndicated loans. While judicial consideration of this area has been minimal, several principles have emerged. The courts' treatment of syndicated loans has important implications not only for standard form contracts, but more significantly for the process by which loans are syndicated.

II: THE CHANGING NATURE OF THE FIDUCIARY PRINCIPLE

The expansion of the fiduciary principle is not a new phenomenon.[1] Its origins lie in the equitable concept of a trust.[2] Central to trusts, and therefore early fiduciary relationships, was the protection of property.[3] These early fiduciaries were not "agents", as fiduciaries commonly are today. The inclusion of the agency range of

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1 For a detailed discussion see Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1; Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World - An Australian Perspective" in Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 11, LQR 110 [1994] 238.

2 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68.

3 The seminal case is *Keech v Sandford* (1726) 25 ER 223. The central notion of property is illustrated by the later case of *Boardman v Phipps* [1967] 2 AC 46 where counsel argued that information was trust property.

relationships, including partners, solicitor and client and director and company, represented the first expansion in the scope of the principle. It recognised that two features were central to the trust and needed guarding. First, the trust property itself; second, the powers and duties given to a trustee to advance the beneficiaries' interests, governed by a duty of loyalty.[4] This provided the basis for the first expanded range of fiduciary relationships.[5]

Loyalty can be defined as the requirement to act in the interest of the beneficiary.[6] It is the strictness or extent with which this duty is enforced that determines the scope of a fiduciary relationship. The more scope the fiduciary is given to pursue personal objectives, the greater the number of relationships that could fall within its ambit. In 1726 the boundaries of loyalty, and the two "rules" that flowed from it were so strictly construed that the only relationships exhibiting the required degree of loyalty were the traditional fiduciary categories. The strictness of the test necessarily meant that commercial relationships, where both parties sought to profit, were excluded.

During the last twenty years the fiduciary principle has evolved to accommodate a second discrete class of fiduciaries. These relationships arise where the circumstances are sufficiently similar to those found in relationships deemed fiduciary "by law", so that they too attract fiduciary obligations.[7] The category of fiduciary which a party belongs to will have important implications for the burden of proof, and determining whether or not a breach of any duty owed is rebuttable. Where a party is in a relationship that is deemed fiduciary "by law", equity will assume the usual fiduciary obligations in that relationship. If, in fact, an aspect had been contracted out of, or express consent was given to breach an obligation, it is for the fiduciary to rebut the assumption of wrongdoing. Trustees remain the only possible exception to this observation.[8] Conversely, the burden of establishing an "ad hoc" fiduciary ought to rest on the party raising the claim. That party must prove that a fiduciary standard was intended and assumed, and the extent of the fiduciary obligations. Similarly, any breach will be rebuttable.

There has also been a weakening of the degree of loyalty exacted. It is now acceptable for a fiduciary's role to be the promotion of a joint interest rather than solely the interest of the principal.[9] The consequences for parties in a commercial transaction are significant: while the growth of negligence protected the general degree

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4 See *Hodgkinson v Simms* [1994] 117 DLR (4th) 161, 173 per La Forest J and *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 29, 40, 61 and the academic and other authorities cited therein.

5 These two categories of fiduciaries have been respectively termed "traditional fiduciaries" and "fiduciaries at law". See Warren, "Fiduciary Duties of Finance Packagers" (1996) Aust Bus L Rev 172, 174 .

6 *Hospital Products*, supra note 2 at 96.

7 See Finn, supra note 1 at 41.

8 In *Chan v Zacharia* (1983) 53 ALR 417 (CA) a distinction was drawn between the first two categories of fiduciary, namely that of a trustee (the seminal fiduciary), and fiduciaries "at law" (the first expanded category of fiduciary).

9 Examples being *Hospital Products*, supra note 2, and *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311.

of competence with which the job was done, if business associates betrayed the high level of trust, the parties' need for a remedy increases. The recent expansion of the fiduciary principle has allowed equity to sanction such behaviour by recognising fiduciary obligations in the commercial sphere.

While, as La Forest J acknowledged, fiduciary obligations and commerce are no longer strangers,[10] much controversy still surrounds commercial transactions conducted at arm's length. Chief Justice Gibbs in *Hospital Products* stated:[11]

> [T]he fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose.

It is respectfully submitted that Gibbs CJ wrongly inferred that a commercial relationship necessarily means an arm's length transaction. In this he is not alone. Justice Gault in *Liggett v Kensington* noted "[a]rm's length commercial transactions rarely will give rise to fiduciary obligations...".[12] Similarly, the Court of Appeal in *DHL International (NZ) Ltd v Richmond Ltd* stated "[a]rm's length commercial transactions rarely give rise to fiduciary obligations".[13]

No arm's length transaction will be a fiduciary one, even under the expanded fiduciary test, since one party has chosen not to rely and trust the other to promote its interest and therefore can have no fiduciary expectation.[14] In such circumstances the central concept of loyalty will not be present. Loyalty is also unlikely to be central for commercial parties who have *not* dealt at arm's length. Nevertheless, the circumstances of a commercial relationship may leave one party sufficiently vulnerable and reliant on the other for a fiduciary duty to be assumed. This was acknowledged by Mason J in the High Court of Australia when he noted that "[t]he fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that it is universally true in relation to every commercial transaction".[15]

The advantages of successfully asserting a fiduciary relationship in a commercial setting, and in particular in a syndicated loan, are significant. The ability of equity to remedy a claimant via the constructive trust is commonly cited as a primary incentive to come within equity's bounds.[16] The method of equity, however, can prove to be equally powerful. In addition to reversing the onus of proof, equity traditionally disregards foreseeability, remoteness of damage,[17]

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10 *LAC Minerals*, supra note 4 at 43.
11 Supra note 2 at 70.
12 [1993] 1 NZLR 257.
13 [1993] 3 NZLR 10, 22.
14 See *MacLean v Arklow Investments Ltd*, infra note 64 at 692, per Gault J.
15 *Hospital Products*, supra note 2 at 100.
16 A detailed discussion of equitable remedies is outside the scope of this paper.
17 Examples are: *Re Dawson* [1966] 2 NSWR 211 and *Farrington v Rowe, McBridge & Partners* [1985] 1 NZLR 83 (CA).

causation,[18] and contributory blame,[19] and is not constrained by the Limitation Act 1950.[20] Furthermore, and of specific importance, parties to a syndicated loan have generally been slow to acknowledge the potential for fiduciary obligations to arise in a commercial setting and may not have taken sufficiently extensive measures to limit such potential liability.

In their eagerness to access both the remedies and methods of equity, parties often overlook the nature of the wrong they are asking the court to sanction. It is agreed that the traditional fiduciary principle exacts a proscribed duty of loyalty.[21] This is manifested in the two overlapping requirements on fiduciaries: not to profit from their service or be in a position of conflict.[22] Professor Finn was at pains to emphasise "no more than loyalty is exacted" by these two proscriptions.[23] Certainly, little more was needed when the fiduciary principle sanctioned a narrow category of relationships based primarily on property.[24] However, now that the principle has expanded to cover ad hoc fiduciary relationships, both counsel and courts have questioned whether the content of the duty should still be constrained by the historical concepts of property. In particular, confusion surrounds whether the fiduciary principle cannot now exact a prescriptive duty.

The idea of a prescriptive duty in equity is not new. In June 1914 Nocton was held liable for breach of a fiduciary duty owed by him as solicitor to his client.[25] However, the traditional remedy associated with breaching a fiduciary relationship, a reward in specie, was neither appropriate nor forthcoming. Instead, Nocton was instructed to personally remedy Lord Ashburton by compensating him for loss arising from the breach of duty. Viscount Haldane reasoned "the jurisdiction of equity extended to a defendant in a fiduciary position in respect of matters which at law would also have given rise to damages for negligence".[26] The decision was an important victory for Lord Ashburton and indeed for any lender of money. One would imagine it would prove to be a touchstone for loan litigation in the years to

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18 The mercenary advantages of equity are demonstrated in *Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co* (1991) 3 NZBLC 99, 217. In that case a fiduciary claim succeeded where a negligence claim failed due to a lack of causation. See also *Maguire v Makaronis* [1997] 144 ALR 729 (HC).

19 Compare *Day v Mead* [1987] 2 NZLR 443 (CA) 451 in which Cooke P adopted "contributory responsibility" as a defence to breach of fiduciary duty.

20 The Australian equivalents are the Limitation Act 1969 (NSW); Limitation of Actions Act 1974 (Qld); Limitation of Actions Act 1936 (SA); Limitation Act 1974 (Tas); Limitation of Actions Act 1958 (Vic); Limitation Act 1935 (WA); Limitation Act 1985 (ACT); Limitation Act 1981 (NT).

21 Some examples of these earlier cases are: *In re Coomber* [1911] 1 Ch 723, 728-729 and *Ex parte Dale & Co* (1879) 11 Ch D 772, 778.

22 See for example the discussion in *Chan v Zacharia*, supra note 11 at 199.

23 Finn, supra note 1 at 28.

24 As an example see the comment of Fry J in *Re West of England & South Wales District Bank Ex parte Dale & Co* (1879) 11 Ch D 772, 778, "[w]hat is a fiduciary relationship? It is one in respect of which if a wrong arises, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust".

25 *Nocton v Lord Ashburton* [1914] AC 932 (HL).

26 Ibid 957.

come. Instead, equity's ability to award compensation appeared to be largely forgotten until 15 March 1994 when Mr Boswood QC, Mr Moriarty and Mr Smith argued before the House of Lords in *Henderson v Merrett Syndicates Ltd* that the appellants owed a common law duty of care and a parallel obligation in equity.[27]

In *Merrett Syndicates* Lord Goff of Chievelly reaffirmed that the governing principle for a common law duty of care in circumstances of financial loss was "one party having assumed or undertaken a responsibility toward the other".[28] The assumption of responsibility had previously been criticised as "the phrase does not help to determine in what circumstances the law will impose that liability or indeed, its scope",[29] and further for being "unlikely to be a helpful or realistic test in most cases".[30] This overlooks the role played by the assumption of responsibility in cases of economic loss. In such situations pure foreseeability would cast the scope of the tort too wide. The requirement of evidence of an assumed responsibility is invoked as a limiting device - it is the additional element needed to render a relationship "special".[31] The title further distinguishes the duty from the more general tort of an imposed duty of care. Like the fiduciary's, an assumption of responsibility or tort of negligent misstatement is an assumed obligation.

On the issue of a parallel duty of care in tort and equity their Lordships faced the following question:[32]

> Did Merretts [the defendants] as managing agents... owe Names [the plaintiffs] as fiduciary a duty to conduct the underwriting for the account of the Names with reasonable care and skill for the 1979 to 1985 years of account (inclusive) equivalent to the alleged duty of care in tort?

The question was answered by Lord Browne-Wilkinson. In his Honour's speech he stated:[33]

> The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty.

His conclusion is a logical one. While the potential to exact a duty of care in

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27 [1995] 2 AC 145, 163.

28 Ibid 180.

29 *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 628 per Lord Roskill.

30 *Smith v Eric S Bush* [1990] 1 AC 831, 864-865 per Lord Griffiths.

31 See *L Shaddock & Associates v Parramatta City Council* (No 1) (1981) 150 CLR 225, and the specific example in the syndicated loan area of *NatWest Australia Bank Ltd v Tricontinental Corp Ltd and Minter Ellison*, Supreme Court of Victoria, Australia, 26 July 1993, per McDonald J.

32 Supra note 27 at 173 per Lord Goff.

33 Ibid 205.

equity existed in *Nocton* on the facts of *Merrett Syndicates* there was no need for this additional cause of action following *Hedley Byrne*.[34] In *White v Jones* his Lordship elaborated on his earlier statement.[35] The case concerned "the much discussed question whether an intended beneficiary under a will is entitled to recover damages from the testator's solicitors by reason of whose negligence the testator's intention to benefit him under the will has failed to be carried into effect".[36] In determining the beneficiary was so entitled Lord Browne-Wilkinson noted:[37]

> The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B's affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, *including normally a duty of care*. Thus, a trustee assumes responsibility for the management of the property of the beneficiary, a company director for the affairs of the company and an agent for those of his principal. By so assuming to act in B's affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties [including duties of care] will vary from case to case some duties [including a duty of care] arise in each case.

That passage has since been applied and expanded on in a series of English decisions. Justice Ipp's comments in *Permanent Building Society (in liq) v Wheeler*[38] were recently endorsed by Millett LJ in *Bristol and West Building Society v Mothew*.[39]

From the English precedent it is clear that both equity and the common law contain duties of care, the content of which is essentially the same. Where the relationship is fiduciary it is natural that any careless action or inaction that causes loss will be dealt with via an equitable duty of care. Alternatively, in situations such as *Merrett Syndicates* where a similar common law duty is breached, there should be no advantage in advocating an equitable duty of care. Two observations flow from Lord Browne-Wilkinson's comments. First, if the same duty of care exists in equity and common law, the method and remedies should be similar. Secondly, it should be superfluous whether the terminology "fiduciary" is reserved for the trustee or fiduciary obligation of loyalty alone, or extends to an equitable duty of care. Despite these two logical conclusions, a cursory examination of jurisprudence in Australia and New Zealand demonstrates that both issues are controversial.

Preoccupation with the terminology "fiduciary" is no more evident than in the recent decision of the High Court of Australia in *Breen v Williams*.[40] The decision expressly rejected the potential for a prescriptive fiduciary content or equitable duty of care.[41] Justice Gummow, having found the doctor-patient relationship to be

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34 *Hedley Byrne & Co. Ltd v Heller and Partners Ltd* [1964] AC 465.
35 [1995] 2 WLR 187.
36 Ibid 191, per Lord Goff.
37 Ibid 209-210 (emphasis added).
38 (1994) 14 ACSR 109.
39 [1996] 4 All ER 698, 710.
40 [1995] 186 CLR 71.
41 This is in contrast to some of the earlier Australian decisions. See *Georgieff v Athans* (1981) 26 SASR 412, 430.

fiduciary, dismissed the argument that a doctor owed a fiduciary duty to grant access to a patient's medical records, on the basis that:[42]

> Equity requires that a person under a fiduciary obligation should not put himself or herself in a position where interest and duty can conflict or, if conflict is unavoidable, should resolve it in favour of duty and, except by application of that requirement is quite inappropriate in the treatment of a patient by a doctor or in the giving of associated advice. There the duty of the doctor is established both in contract and in tort and it is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest .... This leaves no need, or even room, for the imposition of fiduciary obligations.

Their Honours were clearly unwilling to extend the core fiduciary duty beyond that of loyalty, for fear of creating a supplementary tort law that provided a basis for creating new forms of civil wrongs.[43] Addressing a prescriptive fiduciary duty, Dawson and Toohey JJ noted:[44]

> It is, perhaps, reflective of a tendency, not found in this country, but to be seen in the United States and to a lesser extent Canada, to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong.

Maintaining that the core obligation of a fiduciary can only be proscriptive is consistent with the English reasoning. Further, to maintain on the facts that no prescriptive duty arose in that case is also understandable. This is especially the case where there was no need for a prescriptive duty to remedy the appellant. In *Breen* the appellant was able to gain access to her medical records through several alternative routes. Instead, as Dawson and Toohey JJ noted, "the applicant did not avail herself of these ... and commenced this action".[45] However, it is questionable whether it can be said that a fiduciary is never subject to prescriptive duties, such as the duty of reasonable care and skill. Their Honours reasoned that as prescriptive duties exist at common law there was "no need" to use an equitable duty of care. Such a stance appears backward, as it looks to the historical division of law and equity.[46] Where a duty of care has been assumed, if *Nocton* is followed there is no reason for the courts to have to revert to a common law view in order to address a breach. Neither does this dilute the core obligation of a fiduciary. Simply, "the equitable nature/genesis of a duty of care does not make it a fiduciary duty".[47]

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42 Supra note 40 at 135.

43 Ibid 113, per Gaudron J and McHugh J and see reference to Finn, supra note 1 at 25-26.

44 Ibid 95.

45 Ibid 84.

46 See also the comment of Thomas J in *MacLean v Arklow Investments Ltd,* infra note 52 at 724 and Millett CJ, in *Bristol and West Building Society v Mothew*, supra note 39 at 710.

47 Rickett & Goddard, "Developments in the Law of Obligations - Tort, Equitable Duties and the Effect of Contractual Relationships" NZLS Seminar (November 1996) 51.

Two recent New Zealand Court of Appeal decisions have in general confirmed this approach, with the exception, in both instances, of Thomas J. In the first, *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* Thomas J reasoned:[48]

> The firm's duty not to disclose information merges into a duty to take reasonable care to ensure that the risk of such a disclosure is eliminated or minimised.

He went on to say:[49]

> Such a duty can be perceived as being part of or arising out of the essential duty of loyalty, for true loyalty demands that the fiduciary should exercise care in discharging his or her responsibility for the property or affairs of the other. It would be an odd perception of loyalty to suggest that the fiduciary must subordinate his or her own interest to those of their charge, but that they can do so negligently.

Clearly his Honour not only endorses prescriptive duties in equity but perceives they "arise" out of the core duty of loyalty. This is at odds, not only with the remainder of the Court of Appeal, but also with the English jurisprudence. Such a view is understandable, however, if one assumes that the fiduciary obligation is imposed. This is consistent with Thomas J's comments; "[t]he public's confidence in the integrity and standards of the legal profession, *which the imposition of the fiduciary relationship between solicitors and clients* is designed to serve...",[50] and "[w]hile the scope of the fiduciary obligation is also to be determined by reference to the contract of retainer, *it is imposed as a matter of law*".[51]

Two months later, this reasoning puts Thomas J at odds with the majority of the Court of Appeal again in a second significant New Zealand case on fiduciaries. The case, *MacLean v Arklow Investments Ltd*,[52] concerned an investor who sought the assistance of a merchant bank to find finance for a development project. The bank subsequently declined to act for the investor and facilitated a development by a third party. Again the alleged breach was of a fiduciary duty of confidentiality. Justice Thomas placed emphasis on the notion of vulnerability in assessing when a fiduciary duty arises. His Honour considered that:[53]

> Underlying all the cases [on fiduciaries] is the notion that, inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him or her to place reliance upon the other and requires the protection of equity acting upon the conscience of the other.

Such reasoning leads naturally to the conclusion that fiduciary obligations are by

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48 [1998] 3 NZLR 641, 668.
49 Ibid.
50 Ibid (emphasis added).
51 Ibid 663 (emphasis added).
52 [1998] 3 NZLR 680 (CA).
53 Ibid 722.

nature imposed. Similarly, Thomas J's discussion of an arm's length transaction bears all the hallmarks of a test for tortious proximity.[54] With respect, it is the author's opinion that such a stance is misguided. If an underlying theme were to prevail in all fiduciary relationships, from the paradigm trustee to an ad hoc fiduciary, it would be the repose of confidence in one party by the other. This may naturally arise as a consequence of one party's vulnerability or may indeed cause vulnerability amongst otherwise equal parties. In both cases, however, the role must be assumed. Such a view is consistent with Gault J in the majority who held "the fact that confidential information is obtained and misused does not itself create a fiduciary relationship".[55] Consequently, where a party is rendered vulnerable by sharing information this alone will not be sufficient to establish a fiduciary. It may well create something less,[56] but for a relationship to be fiduciary an obligation of loyalty must be undertaken.

For the same duty to be owed in equity and at common law a claim in one should be no more advantageous than the other, but this has largely been the case. While the mercenary advantages, identified above, of establishing a fiduciary obligation remain in respect to the core obligation of loyalty, the more the wrong becomes a claim of lacking care or skill, the more equity ought to mitigate the strictness of its method and remedy. For example, the exact point at which the onus of causation is reversed or common law principles such as contributory negligence affect the remedy, remains contentious. The uncertainty may be a consequence of a general move toward a more substantive interest-based approach as law and equity merge into an "appropriateness of remedy principle" to remedy the parties.[57]

III: APPLICATION TO SYNDICATED LOANS

The two principal parties in a syndicated loan who may owe a duty outside of contract, whether fiduciary or at common law, are the lead and agent bank. To date, these entities have been analysed separately by commentators.[58] Such an analysis ignores a third candidate: a lead bank who goes on to assume the responsibility of the agent bank. Much confusion has arisen in that situation due to the artificial separation of the different roles performed by the same entity. Examining the legal implications

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54 Ibid 723.

55 Supra note 64 at 690.

56 Finn, supra note 1 at 24, comments that the lack of an appropriate doctrine governing the disclosure of information makes "the lure to fiduciary law almost irresistible".

57 See the dicta of Cooke P and Tipping J in *Lockwood Buildings Ltd v Trust Bank Canterbury* [1995] 1 NZLR 22, 26 and 34 respectively. Both Judges affirmed that the substance of the right claimed by a plaintiff is where the cause of action is to be found and then to be accurately articulated.

58 O'Sullivan, "The Role of Managers and Agents in Syndicated Loans" (1992) JBFLP "[t]he process may be divided into the 'pre-contract' stage and the 'post-contract' stage"; Colless, "Syndicated Loans - The Legal Relationship" (1984) 8 CLQ (No 1) 13, 17 concludes: "to understand the relationship, a distinction must be made between the role of the agent and the role of the manager...".

of this commercial practice explains some apparent anomalies in the courts' treatment of syndicated loans. Analysing this third candidate is also important for assessing when a duty is likely to be deemed to have arisen and therefore at what stage parties should seek to limit liability. The conclusions have implications for the current industry practice of loan syndication.

1. The Lead Bank

The role of a lead bank can be summarised as follows: the lead bank is authorised by a mandate letter from the borrower to instigate the loan. The lead bank will then assist the borrower in preparing an information memorandum to solicit investors' interest. Once sufficient interest has been received the lead bank will draft the final loan documentation in association with the borrower.[59]

There are two factors in the relationship between the lead bank and the borrower that point to a fiduciary relationship. First, a bank does not normally owe fiduciary duties to its customers.[60] Where it provides financial advice, however, the likelihood of it doing so increases, since the borrower is more likely to repose confidence in the bank and therefore be vulnerable to the advice.[61] In a syndicated loan it is normal for the lead bank to also act as general banker to the borrower.[62] It may even have provided financial advice to instigate the loan in the first place.

Second, even where the lead bank is independent and so the above does not occur, the mandate will usually require the lead bank to act as an agent for the borrower in two respects. First, in that it must use its "best endeavours" to procure the loan,[63] and second, it is the lead bank's responsibility that the specified terms of the mandate letter are instigated.[64]

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59 For more detail see Weerasoria, *Bank Lending and Securities in Australia* (1998) ch 14.

60 The seminal decision being that of *Foley v Hill* (1848) 2 HL cas 28. Neither will the receipt of confidential information as a general banker, or lead bank to the borrower, prima facie create a fiduciary relationship between the parties, see *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248.

61 In England see *National Westminster Bank v Morgan* [1985] AC 686 (HL) and related "adviser and client cases". In Canada see *Standard Investments Ltd*, supra note 20; Waters, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Can Bar Rev 37 and Ogilvie, "Banks, Advice-Giving and Fiduciary Obligation" (1985) 17 Ottawa L Rev 263. In the United States see Curtis, "The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationship" (1987) 20 Loyola L Rev 795.

62 Such was the case in: *NatWest Australia Bank Ltd v Tricontinental Corp Ltd* supra note 31; *Chemical Bank; National Westminster Bank, USA v Security Pacific National Bank* 20 F 3d 375 (9th Cir 1994); *NZI Securities Ltd and Ors v Bank of New Zealand* High Court, Auckland, New Zealand, 11 February 1992, CP 575/91 Wylie J; *UBAF Ltd v European American Banking Corp* [1984] 2 WLR 508. More generally see Penn, Shea, & Arora, *The Law and Practice of International Banking* (1987) 139.

63 This was the wording of the lead bank's mandate in *NatWest* supra note 31.

64 The strength of the commitment is disputable, see Wood, *Law and Practice of International Finance* (1986) 256 which indicates a strict commitment, whereas Gabriel, *Legal Aspects of Loan Syndication* (1986) 115 suggests "reasonable" efforts are sufficient.

In this relationship, the lead bank is clearly acting in the interest of the borrower. Applying the modern approach to fiduciary duties, this need not be "wholly" in the borrower's interest, so that the fact that the lead bank intends to go on to become the agent bank or a lender itself will not prima facie defeat a fiduciary duty. It is also clear that the lead bank has a degree of discretion, the extent of which will depend on the wording of the mandate form, and the power to affect the borrower in the effort it uses to procure the loan. This is likely to render the borrower vulnerable to the lead bank's actions. Finally, the borrower's vulnerability will depend on a wide range of facts, such as whether the lead bank is also a financial adviser, and the availability of alternative banks to manage the loan. These are all indicators of a fiduciary obligation. On the other hand, the terms of both the mandate and information memorandum may be strictly set out and both parties act at arm's length throughout the process. This would defeat a fiduciary duty. This is unlikely, as the lead bank's role is not particularly well documented.[65] While each situation will depend on its specific facts and the terms of the mandate letter, in most cases there will be a fiduciary duty owed by the lead bank to the borrower.[66]

The lead bank may also assume fiduciary obligations to prospective members of the syndicate. Looking solely at the function of the lead bank this would seem unlikely for two reasons. First, the lead bank is in the position of selling an investment to the syndicate members rather than acting in their interest.[67] Syndicate members in turn will have internal processes to analyse the credit risk and other relevant factors of the loan. The probability that the parties deal at arm's length, and therefore repose no loyalty or confidence in each other, increases. Second, the likelihood of the lead bank owing syndicate members a fiduciary duty seems even more implausible where the lead bank also owes a fiduciary duty to the borrowers. While the existence of multiple fiduciary engagements is not prohibited,[68] fully informed consent of both beneficiaries is necessary to enable a fiduciary to act for both parties in the same matter or transaction.[69] It therefore seems unlikely that the lead bank will owe a fiduciary duty to potential syndicate members.[70]

Nevertheless, as noted previously, looking solely at the lead bank's role ignores the wider reality of syndicate loans. It is where the lead bank is known at the information memorandum stage of the procedure to be both participating in the loan

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65 Colless, supra note 58 at 13.

66 Proponents of this view include: Bostock & Hambly, "Loans Syndication" (1983) Law Institute of Victoria Seminar 37; Lehane, "The Role of Managing and Agent Banks: Duties, Liabilities, Disclaimer Clauses" (1982) International Fin Law Rev 235.

67 Slater, "Syndicated Bank Loans" (1982) J Bus L 173, 175.

68 See *Russell McVeagh*, supra note 48 at 648; *Bristol and West Building Society v Mothew*, supra note 39 at 712 and *Marriott v Dowd Thomason Strachan & Moultrie* High Court, Tauranga, New Zealand, 19 March 1991, Tompkins J, 10.

69 In *Kelly v Cooper* [1993] AC 205, 214 Lord Browne-Wilkinson appears to have held that such consent may, where it is appropriate to do so, be derived from a term *implied* in an agency agreement. Lord Justice Millett in *Bristol and West Building Society*, supra note 47 at 712-713 gives a detailed discussion. See also *Farrington v Rowe McBride & Partners*, supra note 17.

70 See Clarke & Farrar, "Rights and Duties of Managing and Agent Banks in Syndicated Loans to Government Borrowers" [1982] U Ill LR 229.

and acting as the agent bank that a multiple fiduciary engagement is likely to occur *with* the informed consent of both parties. This is the industry practice.[71]

In such circumstances, the agent bank may find itself accountable in equity to syndicate members for actions taken during the period when it was acting as lead bank. Clearly, this analysis requires the agent bank to have assumed fiduciary obligations to syndicate members at the distribution of the information memorandum stage. That is, the fiduciary obligations between the agent bank and syndicate members may arise before the agency contract is signed. Equity will consider substance and not form - it is the actions of the parties and not their legal title that will determine when fiduciary obligations are assumed. The test is whether the requisite level of confidence and vulnerability are present and whether there has been an actual expectation of protection and advancement of the party's interest, such that a fiduciary relationship was assumed. These same factors are likely to give rise to a common law duty or assumption of responsibility. Therefore, depending on whether the wrong committed is a breach of a prescriptive or proscriptive duty, an appropriate cause of action can be chosen. The important realisation for syndicate members is that these duties will often arise before the agency contract is signed because of the industry practice of arranging a loan syndication. A fiduciary duty that arises before the agency contract is entered can only be of the "ad hoc" category. Therefore, the burden of proving that the relationship is fiduciary lies on the syndicate members. Further, a prima facie breach will be rebuttable.

Certain factors, it is argued, weigh against the likelihood of a fiduciary duty at this stage of the transaction. First, the relationship between lead bank and potential syndicate members is widely deemed to be an arm's length transaction.[72] Such an analysis however, overlooks the fact that in most cases the lead bank will be promoting the loan syndication by touting its participation as agent bank.[73] In such circumstances it is not unreasonable for syndicate members to repose confidence in the lead bank. This is particularly so in situations where the lead bank places itself in a position where it is able to affect the interests of the syndicate members, thus leaving them vulnerable. Where both confidence or loyalty and circumstances of vulnerability are present, a fiduciary obligation will be assumed by the lead bank who is known to be assuming the agent bank role.

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71 To date this has occurred in all syndicated loans that have resulted in litigation. See also the observations of Gabriel, supra note 64 at 115.

72 Supra note 70 at 234.

73 *The Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyds LR 487, 502; Justice Langley noted the evidence of the plaintiffs that "Mr Genma was also persuaded as London thought the loan would perform and the Eagle Star indemnity would pay if called upon, and as he knew BBL [the defendant] were to take £20m, and Sanwa £35m, other banks would also have to be involved if it was to go ahead and so they must think the loan commercially acceptable." In *NatWest* supra note 31 at 25, McDonald J noted "[i]n evidence [the plaintiff] said that he took into account the additional information furnished by Catterson and also took into consideration that Tricontinental was participating to the extent of $20 million or 40 percent of the total syndicated facility albeit that it was refinancing $13.1 million of its existing debt".

Second, it may seem improbable that a large financial institution could be vulnerable. Yet information provides a prime example of where, despite its size and resources, a bank may find itself vulnerable. Many syndicated loans are made to unlisted companies.[74] Unlisted companies are not subject to the same disclosure requirements as their listed counterparts.[75] Even where the company is listed, the lead bank will be in the position of knowing more than is publicly available, having carried out due diligence at an early stage. In addition, it will usually act in a general banking capacity. In both situations the lead bank has access to information which is not available to the other syndicate members. In such a situation the syndicate members are vulnerable to what the lead bank chooses to disclose, despite the factors used to argue against a fiduciary relationship, such as the relative financial size of the banks.[76] Vulnerability may also be created by the loan contract itself. In *The Sumitomo Bank Ltd v Banque Bruxelles Lambert SA*, "the wording of the [clause in question] was such that the banks were powerless to know or to discover whether or not [Banque Bruxelles Lambert, ("BBL")] had complied...".[77] While the vulnerability created by the disclosure of information is probative of a fiduciary relationship, it does not affect the likelihood of information itself being the subject matter of a proscriptive fiduciary obligation unless a breach of loyalty is also involved.[78]

Third, conflicts of interests could easily arise if the lead bank simultaneously owed fiduciary duties to both the borrower and potential syndicate members. This argument is, from the start, misconceived. Conflicts of interest will not alter the likelihood of a fiduciary duty arising, instead they affect the likelihood of breach. As noted, there is nothing to stop a fiduciary acting for two or more parties. However, when a fiduciary acts for two principals with potentially conflicting interests, and does so without the informed consent of both, it will be in breach of the obligation of loyalty.[79] That is, breach of this rule will automatically constitute a breach of fiduciary duty. This is unlikely to be the case as the industry practice makes the lead bank's dual role clear from the outset. The proposition of dual fiduciary obligations does not seem as disturbing when one remembers that the fiduciary duty may only arise with respect to aspects of the relationship. Further, areas of conflict can be limited or excluded by contract.[80] Again information provides a

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74 If the company is listed alternative options for raising capital exist.

75 For more detailed discussion see Roberts & Quinn, "Levelling the Playing Field: The Need for Investor Protection for Bank Sales of Loan Participations" [1995] 63 Fordham LR 2115.

76 As was the case in *UBAF* supra note 62, and *NatWest* supra note 31. In comparison see the participatory loan case of *Banque Arabe et Internationale D'Investissement v Maryland National Bank* 57 F 3d 146 (2nd Cir 1995) which rejected a duty of disclosure because the plaintiff had access to the allegedly withheld information.

77 Supra note 73 at 510. See also *Chemical Bank* supra note 62 at 377.

78 See infra note 81 and accompanying text.

79 See Millett LJ's discussion in *Bristol and West Building Society*, supra note 39 and *Clark Boyce v Mouat* [1994] 1 AC 428 and the cases there cited.

80 It is clear from the dicta of *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1986) 22 DLR 410, that the lead bank's obligation to both parties can be complied with by a statement to the effect that it cannot or will not verify information in a specified area and independent advice or direct contact with the borrower is recommended.

good example.[81] It is not uncommon for the lead bank to act as both agent to the syndicate and general banker to the borrower once the loan is entered. Clearly, there is potential for the two roles to conflict. As a consequence it is common for the agency agreement to contain a clause excluding the agent bank from a duty to pass on information of default unless it is formally notified by the borrower. There seems no reason, once parties acknowledge the potential for the lead bank to owe fiduciary obligations to both prospective syndicate members and the borrower, that these duties cannot be similarly constrained.

Fourth, counsel for the defendant in both *Sumitomo* and *NatWest Australia Bank Ltd v Tricontinental Corp Ltd*[82] argued that finding obligations between the lead bank and syndicate members was inconsistent with industry practice and did not reflect a syndicated loans fee structure.[83] Given that the expansion of the fiduciary principle into the commercial sphere is a comparatively recent phenomenon this may be correct. Nevertheless, in *Sumitomo* Langley J, in addressing this argument, held:[84]

> I cannot accept that there was any relevant market practice at all... I agree with [the plaintiffs] that it would be most surprising if any established practices had developed at all in those circumstances and not at all surprising that the circumstances of each loan would be both the starting and the finishing points for consideration of the obligations to which they might give rise.

His Lordship further stated that "the overall return on assets to BBL on the loan was between four and five times the return to the banks ... it can hardly be said by BBL that it was not to be rewarded for the role it played both as the arranger of the syndication and subsequently as agent bank".[85] Justice McDonald similarly dismissed an argument of industry practice in *NatWest*, holding "[t]here may be cases where a Court would be assisted by expert evidence as to some particular commercial practice. This is not such a case".[86]

Thus, whenever syndicate members are rendered vulnerable by their inability to verify independently information or an action performed by the lead bank, and the lead bank promotes its participation in the loan as the agent bank, the requisite degree of loyalty and repose of confidence are likely to be found to demonstrate an assumed fiduciary obligation.[87] This differs from the "shifting obligation" theory, which advocates that upon entering the contract for loan syndication the lead bank's fiduciary

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81 Yoong, "Liability of the Lead Bank for Erroneous or Inaccurate Information" (1992) VUWLR 285, 295 notes "[i]f the lead bank is a fiduciary to syndicate members, it will be entrapped in a proverbial Catch 22 situation. If it discloses the information, it could be liable for breach of confidence. Yet, if it refuses to disclose, it could be liable for breach of fiduciary duty".

82 Supra note 31.

83 See also Clarke & Farrar, supra note 70 at 234 "the syndicated loan market has developed and pricing is based, on the proposition that the Manager is not a fiduciary...".

84 Supra note 73 at 516.

85 Ibid 499.

86 *NatWest* supra note 31 at 83.

87 See Lehane, supra note 66 at 238; "undoubtedly acting on behalf of the banks".

duty to the borrower shifts to their new principal the loan participants, in that the obligation need not shift at all.[88] It is entirely consistent with the modern approach to fiduciary obligations that certain duties owed by the lead bank to the borrower and/or syndicate members are fiduciary.

Sumitomo supports such an analysis. The case concerned a syndicated loan to raise capital for a property purchase. An essential element of the transaction was that the loan was covered by both a mortgage and a mortgage indemnity guarantee ("MIG") to secure against any shortfall should the syndicate exercise its power of sale. BBL acted as both lead and agent bank. As part of its lead bank duties it organised a MIG with underwriters Eagle Star. When the mortgage was exercised, leaving considerable shortfall, Eagle Star refused to pay out, claiming BBL had failed to disclose essential factors. Sumitomo Bank, Sanwa Bank and Arab Bank, participants in the loan, sued BBL.

The three plaintiffs alleged, inter alia, that BBL, in its role as lead bank, should be held to either a tortious or fiduciary standard. Both pleas required proof of an obligation arising between BBL and prospective syndicate members. In holding this had in fact occurred, Langley J referred to the following passage of Lord Goff in *Henderson v Merrett*:[89]

> [A]n assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence unless his contract precludes him from doing so, the plaintiff who has available to him concurrent remedies in contract and tort may choose that remedy which appears to him to be the most advantageous.

Mr Justice Langley then concluded:[90]

> Those words must, in my judgement, apply a fortiori to circumstances where the relevant relationship and assumption of responsibility arises (if it arises) before the contract comes into existence and the relevant duty in tort should in partial terms have been performed at the time the contract was concluded. That was the position as regards the obligation of disclosure in this case and, moreover, as I have held, the relevant contract, namely the loan agreement, was not addressing that obligation nor inconsistent with it.

Similarly, in *NatWest Australia Bank Ltd v Tricontinental Corp Ltd* the Supreme Court of Victoria considered whether prior to entering the loan agreement the "necessary elements of proximity with respect to economic loss of the kind sustained by NatWest as to cause Tricontinental to owe NatWest a duty in the circumstances

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88 Lehane, "Role of Managing and Agent Banks', in Pierce et al (eds), *Current Problems in International Financial Law* (1985) 56; Tennekoon, *The Law and Regulation of International Finance* (1991) 56. See also Cranston, "Banking Networks" in Cranston (ed), *Making Commercial Law, Essays in Honour of Roy Goode* (1997) 350.

89 Supra note 73 at 512-513.

90 Ibid. Mr Justice Langley also relied on the decision of *Holt v Payne Skillington and De Groot Collis* unreported, 18 December 1995.

existed".[91] In answering this, McDonald J was not referred to the House of Lords' decision in *Henderson v Merrett*, but he nevertheless followed the decision in *Hawkins v Clayton* in which Deane J discussed the necessity of proximity in cases of pure economic loss.[92] Using this test, McDonald J held that the inquiry made by NatWest of Tricontinental, whether any contingent liabilities existed, and Tricontinental's reply that if there were any they were nominal, demonstrated that NatWest was relying on Tricontinental and that "Tricontinental accepted the responsibility to provide an answer".[93] While the facts in this decision were particularly strong, both the *NatWest* and *Sumitomo* decisions support the proposition that duties may be assumed by the *lead bank* to loan participants be they at common law or in equity.[94]

Finally, the obiter remarks of Ackner LJ in the English Court of Appeal case of *UBAF Ltd v European American Banking Corp* also supports the potential for a duty to be assumed between the lead bank and syndicate members:[95]

> The transaction into which the plaintiffs were invited to enter, and did enter, was that of contributing to a syndicate loan where, as it seems to us, quite clearly the defendants were acting in a fiduciary capacity for all the other participants.

That is, there was a fiduciary duty owed by the *lead bank* to syndicate members. They went on to justify this on the basis that:[96]

> It was the defendants who received the plaintiffs' money and it was the defendants who arranged for and held, on behalf of all the participants, the collateral security for the loan.

These are events that occurred after the loan contract, although they were most probably included as terms of the mandate. This comment has invoked much criticism.[97] Certainly the statement appears to have confused the different fiduciary obligation of agency (or fiduciary "at law") with that of an "ad hoc" fiduciary that may have arisen at the time the information was disclosed. However, their Lordships further noted that upon entering the loan agreement "their continuing failure to [inform] constituted a continuing breach of their fiduciary duty", which clearly supports an "ad hoc" fiduciary obligation owed to the syndicate members at the lead bank stage.[98]

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91 Supra note 31 at 111.
92 (1988) 164 CLR 539, 576.
93 Supra note 31 at 114.
94 See also Warren, supra note 5 at 187.
95 Supra note 62 at 520.
96 Ibid.
97 O'Sullivan, supra note 58 at 176, considered it "ill-considered and ... not supported by the facts". See also Warren, supra note 5.
98 Supra note 62 at 521.

2. The Agent Bank

The agent bank's role begins after the signing of the loan document. The role is created by election of the lending participants only. It is common for the lead bank to become the agent bank for two reasons. It is usually close to the borrower both by geographical location and by its already established working relationship, either through the lead bank stage or earlier. Second, as it usually makes up the largest share, and voting rights are allocated by share, in practice it assumes the responsibility of agent bank.

The agent bank is responsible for the running of the loan. This entails amongst other things: inspecting and certifying conditions precedent, calculating and notifying both parties of the relevant interest rates, co-ordaining rollovers, and taking appropriate action in default. In contrast to the position of a lead bank, where the mandate letter may include a wider discretion, an agent bank's duties will be carefully restricted to those specified in the loan documentation. The documentation will identify the agent bank as being agent to the syndicate.

As an agent, the bank clearly assumes a fiduciary duty to the syndicate members.[99] Further, as an agent is a fiduciary "at law", any breach of loyalty without the fully informed consent of all parties, or express exclusion in the terms of the agency contract, will be irrebuttable. The only two decisions to date on the relationship between the agent bank and the syndicate have affirmed this.

In *NZI Securities Ltd and Ors v Bank of New Zealand*,[100] the Bank of New Zealand ("BNZ"), who acted both as general banker for the borrower Unity Group Ltd and lead bank during the pre-contractual stage, was appointed agent of the syndicate under the terms of the loan agreement. When Unity Group and certain subsidiaries defaulted, BNZ reconstructed overdraft facilities which had been extended to Unity Group in its capacity as general banker. This was to the detriment of the syndicate.

The syndicate members applied for summary judgment alleging BNZ was in breach of an agreement between the parties and generally in breach of its fiduciary duty to co-syndicate members.[101] The second question, whether there was a fiduciary duty owed by the agent bank to the syndicate, was not contested. Justice Wylie stated:[102]

> Much argument was avoided by [counsel] having conceded, very properly in my view, that [the agent bank] was in a fiduciary relationship to the plaintiffs in respect of its function as a member of and agent for the syndicate.

In *Chemical Bank; National Westminster Bank, USA v Security Pacific National*

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99 This is accepted by many commentators, for example Lehane, supra note 66 at 239, "[i]t is misleading to speak of the possibility of a non-fiduciary agent".

100 Supra note 62.

101 The statement of claim included two additional causes of action, one on the basis of a contractual duty of care, and the other on the basis that the reconstruction was a violable preference, but neither of these causes of action were relied on in applying for summary judgment.

102 Supra note 62 at 19.

Bank both the District Court and the Court of Appeals considered the agent bank's relationship. The latter court noted "[t]he very meaning of being an agent is assuming fiduciary duties to one's principal".[103]

IV. CONTENT OF FIDUCIARY DUTIES AND THE EFFECTIVENESS OF EXCLUSION CLAUSES

1. Exclusion Clauses

Concluding that fiduciary duties cannot be contracted out of in a commercial context follows from viewing them as imposed obligations. Not surprisingly then, Thomas J in *Russell McVeagh* doubted that fiduciary obligations could be curtailed to suit the parties needs. He held:[104]

> While the scope of the fiduciary obligation is also to be determined by reference to the contract of retainer, it is imposed as a matter of law. The obligation of loyalty is not narrowed or limited simply because the contract of retainer may relate to a narrow or limited specialist instruction.

An alternative view, and that of the author, is that the fiduciary duties owed in agency are created and therefore defined by the contract.[105] In other commercial situations where a fiduciary relationship is not created by the contract, to the extent that the fiduciary duties are inconsistent with the contract, they will be limited by it.[106]

As aforementioned, where the courts follow the semantics of a duty of care action at common law, differentiating it from one in equity, it remains advantageous to seek the more "plaintiff-friendly" cause of action for a purely mercenary gain. *Bristol and West Building Society v Mothew* demonstrates this has largely been eliminated by courts taking substantive interest-based approach.[107]

2. Proscriptive Duty

Where a person is in a fiduciary relationship with another he or she will owe a

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103 Supra note 62 at 377.

104 Supra note 68 at 663.

105 See *DHL International (NZ) Ltd*, supra note 13, 23 where Richardson J observed "it is at least arguable that the contractually agreed exclusion of liability for consequential loss should continue to govern any relationship in equity".

106 For example see *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 (PC). This is also true in the United States and Canada.

107 Supra note 39.

duty of the utmost good faith and loyalty. The fiduciary must not profit from the relationship nor place itself in a position of conflict. In the two broadly accepted instances where fiduciary relationships arise, namely between lead bank and borrower and between agent bank and syndicate members, clauses excluding liability for profiting or acting in conflict with the syndicate are both common and effective.[108]

Such was the case in *NZI Securities*. Having held that a fiduciary relationship existed between the syndicate and its agent bank, Wylie J had little trouble in finding that the general duty of a fiduciary not to place itself in a position of conflict with the syndicate had been breached by the agent, in reconstructing private banking debts in its favour and to the detriment of the syndicate. He agreed with the applicant's argument that "BNZ [in] securing an advantage for itself at the expense of the other banks was [prima facie] in breach of its fiduciary duties".[109]

In his judgment Wylie J set out the wording of the loan agreement. It appointed BNZ "facility agent and security representative and trustee" for the banking syndicate.[110] Commentators have questioned whether in labelling BNZ a fiduciary undue emphasis was placed on the fact that the agreement held the agent bank to be a "trustee" for the syndicate banks.[111] If that was so, the court would have been less likely to allow the duties of a trustee to be excluded. Yet this was not the case. Justice Wylie referred to clause 31.10 of the loan contract:[112]

> (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.

He then held the clause "would on its face enable BNZ to act in its own interests without the need to subordinate those interests to the overall interests of the whole syndicate".[113] The fiduciary obligation of not placing oneself in a position of conflict had been successfully excluded by contract: BNZ had acted in "conformity with its rights under the very agreement which created, but at the same time confined, the fiduciary relationship".[114]

Similarly, agency agreements will expressly provide for a range of situations in which the agent can receive fees for services to the syndicate or borrower.[115]

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108 See also O'Sullivan, supra note 58.

109 Supra note 62 at 19.

110 Ibid 4.

111 Lehane, supra note 66 at 241.

112 Supra note 62 at 5.

113 Ibid 19.

114 Ibid 20.

115 See *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 477-478. The necessity to expressly contract out of any position of profit or conflict, however remote, has been entrenched by cases such as *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, *Boardman v Phipps* supra note 3 and *Keech v Sandford* supra note 3. However, as the fiduciary principle has expanded, allowing for concepts such as multiple fiduciary obligations, the strictness with which this test is applied may be wavering. See the comments of Deane J in *Chan v Zacharia* supra note 8 at 438.

3. Prescriptive Duty

More commonly in litigation to date the essence of a plaintiff's claim is that the information given was incorrect, or misleading, or that the loan security was incompetently arranged. In order to sanction these, the courts are in effect being asked to recognise a prescriptive duty, to provide factually accurate information that is not misleading or to arrange the loan security in a competent manner. Such claims will in most instances lie outside the domain of the fiduciary obligation of loyalty. This warrants emphasis. If no issue of disloyalty is involved, no matter how harmful the actions or inactions of the lead and agent bank are, they will not be brought within the core of the fiduciary obligation and will not benefit from full rigour of equity's remedies. Nevertheless, actions such as non-disclosure should constitute a breach of an equitable duty of care, contract, or possibly even deceit. Therein lies the challenge for litigants. If one is able to point to a strong enough conflict of loyalty then the full rigour of equity both in method and remedy will be brought to bear. In the alternative if the duty is merely prescriptive, establishing a fiduciary relationship may be advantageous in that it allows the court to consider the wrong from an equitable stance. Whether this results in a more plaintiff friendly approach, than if the wrong is approached from a common law stance is regrettably uncertain. The likelihood of a conflict of loyalty is increased by the lead bank's practice of acting as personal banker, lead banker, agent banker and syndicate participant.

There are two sources of information to which a duty (fiduciary or otherwise) may attach. First, the information statement itself. It is usual for participants to rely extensively, if not exclusively, on the information memorandum.[116] As noted, this is unlikely to be because banks have insufficient expertise or personnel to analyse the borrower's status independently, rather it is because the information itself will not be available through an alternative source. The memorandum is therefore highly causative of syndicate lender's participation. In *UBAF*, European American Banking Corp ("EAB") circulated a letter to interested participants claiming the loan represented "attractive financing of two companies in a sound and profitable group".[117] A detailed financial study supported this statement. UBAF claimed EAB was aware the information it provided was false. Lord Justice Ackner agreed and the interlocutory application succeeded on the ground that the lead bank had a duty to ensure that to the extent that it prepared the memorandum or similar document it exercised care as to its accuracy. This duty extends to an obligation to correct mistakes that are discovered after the preparation or distribution of the memorandum. This is clear from the language of Ackner LJ in *UBAF*:[118]

> If, therefore, it was within the defendants' knowledge at any time whilst they were carrying out their fiduciary duties that the security was, as the plaintiffs allege, inadequate, it must, we think, clearly have been their duty to inform the participants of that fact.

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116 Yoong, supra note 81 at 290.
117 Supra note 62 at 512.
118 Ibid 520.

The wrong identified here relates to the general competency with which a role is performed and although couched in fiduciary terms can have been no more than an equitable duty of care. While the decision was only an interlocutory appeal it does demonstrate the mercenary advantages of having the same duty articulated and dealt with under equity as opposed to the common law. Interestingly, finding a fiduciary obligation may well have been instrumental to the success of the action as the defendants sought to evoke s 2 of the Limitations Act 1980.

Where information is concerned there is likely to be only an equitable duty of care or assumption of responsibility. Such was the case in *NatWest*.[119] Tricontinental, acting as lead bank, approached NatWest with an information memorandum prepared by the borrower. NatWest asked specific oral questions of Tricontinental concerning the contingent liabilities of the borrower. The lead bank responded that these were "nominal". Soon after execution the borrower defaulted. The nominal contingent liabilities transpired to be $45.8m, $19.8m of which was a guarantee provided by the borrower to support previous borrowing between a subsidiary and the lead bank. Despite not having prepared the information memorandum, the fact that it was incorrect was within the defendants' knowledge at the time NatWest was induced to enter the loan. There is obiter that the court may have found this to be enough to constitute a breach of duty.[120] Justice McDonald found that:[121]

> The facts not disclosed were, of themselves, important facts and material facts to the consideration of NatWest as to whether it would accede to the invitation of Tricontinental and join the syndicate and provide a credit facility to Pro Image in the sum of $10 million. The existence of these material and important facts were known to Tricontinental. I am satisfied that in the circumstances of this case Tricontinental was under a [common law] duty to disclose the facts of the existence of the two guarantees to NatWest before it entered into the loan agreement, the management agreement and provided funds to Pro Image.

It would appear from this that the argument of merely being a conduit of information would not have been received favourably. On the facts, this defence was unavailable as Tricontinental's specific affirmation of the contingent liabilities reported in the information memorandum was a breach of a duty to take reasonable care as to the accuracy of information disclosed. As noted, this duty was found to have arisen before the agency contract was entered into.

As the borrower's general banker is usually the same entity that assumes the lead bank and agent bank roles, the likelihood that a failure to disclose information will also involve a conflict of loyalty is increased. The reason for this is two-fold. First, it has been argued that the lead bank may owe fiduciary obligations that were assumed at the stage when they were acting as the agent bank. At that time it is also likely they

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119 Supra note 31.

120 In *Nocton v Lord Ashburton* supra note 25 at 962 Viscount Haldane LC observed: "[no]one is entitled to make a statement which on the fact of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction".

121 Supra note 31 at 115.

held a fiduciary role vis-à-vis the borrower. As noted, dual fiduciary relationships are not prohibited, they merely increase the likelihood of a breach.

There is a further reason why a general banker who goes on to assume the role of lead/agent bank is at risk of breaching a duty of loyalty with what might otherwise only breach a duty of care. As general banker they will no doubt have outstanding loans with the borrower and these may constitute a breach of the profit or conflict rules. Arguably, such was the case in both *UBAF* and *NatWest*. In *UBAF*, while not discussed expressly in the judgment, the defendants, who had a history of dealing with the Colocotronis group of shipping companies, were under pressure to provide an additional loan facility and approached the plaintiff to diversify their exposure. If it was known from the start that the group was not "in a sound and profitable state" the exposure of UBAF to the Colocotronis group could not have been as easily diversified. It might, therefore, be argued that the information released was an inadequate disclosure of a conflicting interest and consequently breached a fiduciary obligation of loyalty.

Similarly in *NatWest* there was also potential to argue a fiduciary obligation as the contingent liabilities were loans between the fiduciary and the borrower and therefore represented a conflict of loyalty. In fact, a fiduciary duty was included in the plaintiff's statement of claim. Unlike *UBAF*, however, there was no advantage in invoking the fiduciary principle over a common law duty of care in that case.

As the initial causes of action were successful and remediable in both cases there was no need to pursue a breach of loyalty.[122] It is uncertain whether they would have been found to exist or not. In the author's opinion such an argument is unlikely to be successful. In both cases the lender, being NatWest and UBAF, knew all the facts relevant to its choice of lead and agent bank. Their decision to participate in the loan with the lead/agent bank and to instruct them to proceed was based on false information, but their earlier decision to enter a syndicate with the lead/agent bank, despite their potentially conflicting interest in the "nominal" loans and pre-existing relationship with the borrower, was a full informed decision.[123]

Because of the significance of the information memorandum, it commonly contains extensive exclusion clauses. These will exclude responsibility for the accuracy of the information and often state that the lead bank is merely a conduit of that information.

While the individual circumstances of each case will ultimately determine their success, exclusion clauses should, as discussed, be effective in excluding liability that might arise from the accuracy of information provided *in the memorandum*. There is however further obiter in McDonald J's judgment in *NatWest* that casts doubt on such an approach:[124]

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122 NatWest also succeeded under claim of misleading and deceptive conduct, s 52(1) Trade Practices Act 1974.

123 See also the similar facts and finding in *Bristol and West Building Society*, supra note 39 at 713.

124 Supra note 31 at 82. To the extent that this statement casts doubt on the ability for parties to limit their duties by contract it has been criticised. See Warren, supra note 5 at 194 who notes the court may have been influenced by the exceptionally strong facts.

> The fact that the information memorandum contained the form of a disclaimer as previously referred to and set out does not, to my mind, create a circumstance that would otherwise prevent Tricontinental being under a duty to disclose the existence of the subject guarantees or limit that duty in some way.

The ratio of the case was clearly that the oral statement of Tricontinental was in addition to its role as the mere conduit of information and therefore outside the scope of the exclusion clause, which was held to apply specifically to the information contained therein. Nevertheless, as can be seen from the passage, his Honour appears to imply that the duty could not have been limited by contract.[125] Assuming the scope of the duty can be limited by the parties' intent and in order to avoid disclaimer clauses being construed as only applying to the information memorandum, parties would be advised to define the scope of their relationship from inception. Information known or subsequently gained, other than by express and formal notification by the borrower, could be excluded. Structuring the relationship this way ought to be effective in minimising the likelihood of breaching a fiduciary duty of loyalty or a duty of care, equitable or otherwise.

Clauses to this effect are commonly used to protect the agent bank in the *second* period of information flow. This is where information is gleaned by the agent bank after the loan agreement has been signed. The presence of a fiduciary duty owed by the agent bank to the syndicate lenders is less controversial at this stage of the transaction. Consequently, the standard loan contract will limit the instances in which the agent bank is deemed to have knowledge of the borrower's financial status to situations where they receive formal notification from the borrower. This type of clause, known as an "ostrich clause", appears to have been effective in excluding liability to date.

The competency with which security for the loan is executed is also unlikely to be a fiduciary obligation. It is common for the loan agreement to contain either a condition precedent that security has been arranged by the lead bank, or a clause obliging the agent bank to arrange security before draw-down. This is consistent with the practicality of a syndicated loan which assigns the mechanical requirements to the arranger but diversifies the risk among co-syndicate members. Where the requirement to arrange security arises after entering the contract, an obligation is likely to be assumed as the arranging bank will be performing the role of agent. Where the organisation of security is a condition precedent to the agreement, the obligation is owed by the lead bank. As discussed, whether an assumption of responsibility or a fiduciary obligation can attach at this stage of the transaction will largely depend on whether the arranging bank intends to perform both lead and agent bank roles. Where it does, the repose of confidence and corresponding vulnerability are likely to be high enough that the lead bank will assume responsibility for the competency with which the security is arranged.

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125 The wording of the disclaimer clause as stated at page 19 of the judgment was: "The information herein has been obtained from the borrower and other sources considered reliable. No Representation or Warranty expressed or implied is made with respect to this information".

In the United States decision of *Chemical Bank,*[126] the agent bank expressly undertook various duties including the arrangement of a security agreement. The agent bank, Security Pacific, decided it was unnecessary to file a new financing statement listing the syndicate members as holders of a security interest as it had earlier listed itself as a secured party in acting as general banker to the borrower. The bankruptcy court treated only Security Pacific as a secured creditor and deemed the plaintiffs had failed to protect their security interest. Circuit Judge Noonan in the Court of Appeals found this to be a breach of both fiduciary responsibility and an act of negligence. However, while Security Pacific breached its obligation "[the case's] outcome is determined by fiduciary law as modified by the credit agreement entered by the banks".[127] This contained the term that the agent bank excluded all liability "except for their own gross negligence or wilful misconduct".[128] Despite not expressly excluding fiduciary liability the Court of Appeals held "[i]t was explicitly not required to 'be responsible in any manner' for the 'enforceability' of the credit agreement" and was therefore not accountable.[129] As noted, the finding of a fiduciary duty in this situation and treating it as having been effectively excluded by a "negligence" disclaimer clause, is consistent with the modern approach to fiduciary law taken by courts in the United States and Canada, where the fiduciary obligation has become a surrogate for the tortious duty of care.[130]

In *Chemical Bank*, because the obligation to secure the loan only arose upon entering the contract, the exclusion clause needed no retrospective component to be effective. This is not the case where the arrangement of security is a precondition to entering the contract. In *Sumitomo*, mortgage indemnity guarantees were required to be arranged by BBL acting as lead bank. The defendants argued that this obligation was the responsibility of BBL acting as agent bank and could therefore be brought under the carefully drafted contract of agency. Mr Justice Langley disagreed:[131]

> BBL was appointed agent by the agreement and expressly so "for the purpose of the Security Documents". BBL's task was one of the future management of the loans pursuant to those documents. They did not include the MIGs.

Mr Justice Langley had then to consider, without the aid of the agency contract, the standard to which the parties had agreed this obligation should conform. In finding the lead bank had undertaken Lord Goff's assumption of responsibility, his Lordship emphasised the representation to potential participants that there would be a MIG and the evidence of Mr Leatherdale from Sumitomo Bank that BBL were themselves participating in the loan and "were a well known and respectable bank upon which he

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126 Supra note 62.
127 Ibid 376.
128 Ibid.
129 Ibid 378.
130 *Banque Arabe et Internationale D'Investissement v Maryland National Bank* supra note 76 at 155. More generally see Roberts & Quinn, supra note 75.
131 Supra note 73 at 492.

felt Sumitomo could rely".[132]

While the agent bank's contract contained the standard exclusion clauses, these were deemed to be forward-looking. Mr Justice Langley noted, "I cannot read the clause as an exclusion of liability for ... conduct which antedated the Agreement".[133] One clause was retrospective, however, but it was of no help as it did not deal with the MIG specifically. His Lordship was not asked to rule on whether or not the duty had been breached.

V. CONCLUSION

It is apparent that syndicated loans will increasingly become the domain of fiduciary duties. Existing precedent, although sparse, demonstrates this. Fiduciary duties are likely to arise between the lead bank and borrower and between the agent bank and syndicate members. Further, the liability of the agent bank may extend to events that took place while it was acting in a strict sense as lead bank only. The implication for syndicate loan participants is that banks will want to draft disclaimers against fiduciary liability at *both* stages of the transaction. Exclusion and indemnity clauses may go some way towards protecting the lead bank from responsibility. However, as demonstrated in *NatWest*, uncertainty still surrounds this area and subsequent statements or acts may be interpreted to fall outside the ambit of the clause. As the fiduciary is an assumed role, banks may wish to consider an educational programme followed by strict internal procedures for syndicating loans. Evidence of such a programme, and the rigour with which the bank enforces the relevant proactive measures, are likely to be particularly important to a court.[134]

Does this spell the end for syndicated loans? Certainly the increasing frequency with which fiduciary duties now arise may well constitute a threat to the commercial viability of syndicating loans. Nevertheless, prudential requirements of a single bank's exposure to one corporate group are likely to continue to necessitate combined lending of some form. The most immediate alternative, the club loan, has increased in popularity of late.[135] However, in addition to its own legal disadvantages, primarily in default, it requires the corporate to arrange and co-ordinate the facility which necessitates in-house expertise. These functions are effectively outsourced in a syndicated loan. As fiduciary obligations are of no detriment to participants, more risk-averse bankers may now want to consider whether their expertise and resources are better utilised by merely participating in a syndication rather than seeking the

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132 Ibid 500.

133 Ibid 513.

134 See *Russell McVeagh*, supra note 48. For overseas examples see *Canada Southern Petroleum v Amoco Canada Petroleum Co Ltd* (1997) 144 DLR (4th) 30 and *Schiessle v Stephens* 717 F 2d 417 (7th Cir, 1983).

135 See Weerasoria, supra note 59 at ch 14 for a comparison of the club loan with the syndicated loan and surveys of their respective popularity.

extra margin of arranging and supervising the loan.

What of the roles of lead and agent banker? They must be comfortable with both the assumption of fiduciary and tortious obligations and their ability to exclude unwanted aspects. Further, they must be capable of performing their role in a manner consistent with those terms. Where a fiduciary obligation is assumed the most likely breach will be of a prescriptive rather than proscriptive duty. To comply with the former is not as onerous a task as many defendants have portrayed - to use Langley J's words, "the obligation was not an exceptional or onerous one ... it was not greater than the obligation the [banker] in effect owed to itself in its own interests to establish the efficacy of the policy".[136] The banker's fee most probably already reflects these additional responsibilities.

Where a fiduciary relationship exists, meeting one's proscriptive duties may be more problematic. This is especially so where banks follow the industry practice of acting as lead and agent banker. The requirement to act in good faith in the interests of each is not of itself onerous, further it is only conduct that is intentional that will breach the obligation of loyalty. Thus, a breach is most likely to stem from circumstances where there is an actual conflict of duty arising from the bank placing itself in a dual fiduciary rule where it cannot fulfil its obligations to one principal without failing in its obligations to the other. This is further increased where a banker acts in a general banking capacity to the borrower as well. This may be seized upon in the event of default to unlock the stricter methods and remedies of equity. Further, the likelihood of fiduciary relationship increases where bankers follow this industry practice, so the risks associated with default also arise. This may not be adequately reflected in fee schedules.

Consequently, it is recommended that where a banker acts in a general banking capacity to the borrower it may be preferable to act solely as lead bank. The agent bank's role could be contracted out to a third party: one who was not in a position of potential conflict with the borrower and had not in any way induced parties to initially enter the loan. Where the role is performed by a true third party, the transaction will be at arm's length and therefore the likelihood of a duty of care will be minimised while the potential for a fiduciary relationship will be excluded. The third party agent banking role could even be performed by an independent subsidiary of the same commercial entity which would allow the parent company to extract the full banking fee.[137] This may be the most attractive option in an environment of increasing price competition and declining interest rates in which both lending and deposit margins remain under pressure.

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136 *Sumitomo* supra note 73 at 514.

137 This structure is commonly used by banks to minimise potential conflicts of interest. For example, the same parent company that arranges and underwrites a corporate listing may well use their subsidiary equity research and broking firm to recommend the corporate as an investment for institutional and retail clients. The recent endorsement of Chinese walls in *Russell McVeagh*, supra note 48 at 654, is an internal control measure that in some circumstances may be appropriate and sufficient to ensure protection of confidential information.