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Liability of the lead bank for erroneous or inaccurate information

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In international markets it is common for a borrower to authorise a lead bank to arrange a loan syndication on its behalf. In this article the author examines, from a New Zealand perspective, the potential sources of liability which a lead bank may incur for disseminating inaccurate or incomplete information. The author submits that it is generally inappropriate to impose fiduciary obligations on a lead bank involved in a loan syndication.

I INTRODUCTION

Often, a borrower will request more funds than a single commercial lender is willing to lend. The bank may not have the financial capacity to provide the loan, or it may wish to spread the credit risk associated with such huge loans. Thus, a loan syndication may be initiated to facilitate the borrower's needs.[1] Here, a group of banks each commit to contribute a proportion of the loan under the terms of a single loan agreement between the lending syndicate and the borrower.[2]

The objective of this paper is to examine the potential causes of action the syndicate members may have against the lead bank. For convenience, this liability will be analysed from two aspects:

1) Lead bank liability for erroneous information, and
2) Lead bank liability for incomplete or undisclosed information.

This paper will first briefly outline the features of a loan syndication and the process of securing participation in such an arrangement. Secondly, it will examine the potential sources of liability which a lead bank may incur for disseminating inaccurate or incomplete information. This liability will be investigated from a New Zealand perspective. Finally, this paper will summarise the measures available to a lead bank to minimise its potential liabilities.

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1 Banks participate in loan syndications for various reasons, eg to obtain publicity and prestige, to diversify their loan portfolios and client base, and to create working relationships with other banks for future deals, see David N Zirenberg "International Loan Syndications: The Next Security" [1984] Col J Trans'tl Law 155.

2 P R Wood *Law and Practice of International Finance* (Sweet & Maxwell, London, 1986) 256.

II THE LOAN SYNDICATION

A *The Nature of A Loan Syndication*

In a true loan sydication, a group of banks lend directly to the borrower under a single loan agreement.[3] The syndication is generally perceived as simply a collection of individual loan contracts conveniently condensed into one single agreement.[4] Hence, there is privity of contract between each of the syndicate members and the borrower.

The borrower will also have to appoint an "agent" bank, which will be responsible for the flow of funds and information to and from the borrower, after the execution of the documents. The "agent" may, but need not be, the "lead bank".[5]

B *Syndicating the Loan*

1 *The borrower's mandate*

In international markets, a common technique in arranging a loan syndication is for the borrower to authorise a single bank to arrange the loan on its behalf. This bank is called the "lead" or "managing" bank.[6] Thus, the loan syndication effectively commences when the lead bank obtains the borrower's "mandate", which sets out the terms of the loan and authorises the manager to arrange the loan.[7]

The role of the lead bank includes advising and negotiating with the borrower over the terms of the syndication, soliciting participation from other lending instituitions and finally negotiating the loan documentation with the parties.[8] The functions of the lead bank usually end at the execution of the loan agreement.[9]

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3 This may be contrasted with a loan participation, where one bank lends or agrees to lend directly to the borrower and then subsequently sells part of its interest to other banks; see P Gabriel *Legal Aspects of Loan Syndications* (Butterworths, London, 1986) 115.

4 G A Penn, A M Shea, A Arora *The Law and Practice of International Banking* (Sweet & Maxwell, London, 1987) 118.

5 L Clarke and S F Farrar "Managing and Agent Banks in Syndicated Loans to Government Borrowers" (1982) U Ill LR 229.

6 A bank may wish to lead for a variety of reasons: a client may require more funds than the bank is willing to lend, the bank can earn attractive managing fees, it earns prestige as a lead bank; see M A L "International Loan Syndications, the Securities Acts and the Duties of a Lead Bank" (1978) 64 Va LR 897.

7 There is a legal issue as to whether the mandate is legally binding or merely binding in honour; see above n 3, 116.

8 Above n 4, 120.

9 R H Ryan "International Bank Loan Syndications and Participations" in R S Rendell (ed) *International Financial Law* (Euromoney, London, 1980) 32.

2 The information memorandum

When selling the loan to other banks, the lead bank will normally target potential participants and send out telex "term sheets" which contain initial information about the syndication. Interested parties will then be sent an Information Memorandum, containing information about the borrower's financial, political and economic circumstances.[10] This is basically a selling document, with the purpose of inducing participation in the loan syndication.[11] The memorandum is often prepared by the lead bank in conjunction with the borrower, from information supplied by the borrower.

It is generally accepted that the information memorandum is a very controversial document as it is a potential source of liability for the lead bank.[12] Although liability primarily attaches to the borrower for erroneous information, the prospect of lead bank liability can be significant. This is especially when the borrower becomes insolvent and the aggrieved investors look to another pocket. This is demonstrated in the case of *In Re Colocotronis Tanker Securities Litigation*[13] where syndicate members brought an action against the lead bank, alleging that the latter communicated to the members untrue statements and omitted certain facts as well. This case was ultimately settled extra-judicially. Nevertheless, the risk of liability can be substantial, particularly as loan syndications often involve numerous participants.

III LEAD BANK LIABILITY FOR THE INFORMATION MEMORANDUM

A Liability to Syndicate Members for Inaccurate Information

The lead bank in a loan syndication may incur liability for the information memorandum on various grounds.

1 Statutory misrepresentation under the Fair Trading Act 1986[14]

If the information memorandum contains information that is inaccurate and misleading, syndicate members may have a potential cause of action under section 9 of the Fair Trading Act 1986. Section 9 of the Act provides - "No person, shall in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". The Act does not require any intention to mislead on the part of the person engaged in the misleading conduct.[15] Thus, even if the bank inadvertently releases misleading or deceptive information, it could still be liable.

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10 Above n 6, 899.
11 R Slater "Syndicated Bank Loans" (1982) J B L 173.
12 It has been commented that "no other syndicate document is more controversial, or has less utility, than the information (or placement) memorandum"; see above n 4, 120, citing McDonald *International Syndicated Loans*, 125.
13 420 F Supp 998 (1976).
14 The Fair Trading Act 1986, no 121.
15 *Hornsby Center* v *Sydney Building Centre* (1978) ATPR 40-067.

There will often be a disclaimer in the memorandum itself, purporting to exclude liability on the part of the lead bank. However, it is unlikely that such a clause will oust the application of the Act, since it is generally considered that parties cannot contract out of the Act's provisions.[16]

Thus, given the broad operation of Section 9 of the Act, the lead bank will probably be liable to syndicate members for publishing misleading information in the information memorandum.

2 *Statutory misrepresentation under the Contractual Remedies Act 1979*[17]

Section 6 of the Contractual Remedies Act provides another avenue of imposing liability on the lead bank for inaccurate information in the information memorandum. The Contractual Remedies Act reformed the law of misrepresentation in New Zealand. Under section 6 of the Act, where a party to a contract has been induced to enter into it by a misrepresentation, *whether innocent or fraudulent*, made to him or her by or on behalf of another party, he or she is entitled to damages as if the representation were a term of the contract. Thus, the distinctions between an innocent and fraudulent misrepresentation, and between a representation and a term of the contract, are no longer relevant under section 6 of the Act. Furthermore, the aggrieved party cannot claim separate damages for the common law torts of deceit and negligence.[18]

According to Dawson and McLauchlan,[19] there are three main requirements for establishing liability under section 6 of the Act. First, the injured party must establish the existence of a misrepresentation. Secondly, he or she must establish that the misrepresentation was made to him or her "by or on behalf of another party to the contract". Finally, the injured party must have relied on the representations made by the representor. If the syndicate members can fulfil all these requirements, then an action for damages may lie against the lead bank.

The more contentious issues in a loan syndication relate to the factors of misrepresentation and reliance.

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16 J F Burrows *Cheshire and Fifoot's Law of Contract* (7 ed, Butterworths, Wellington, 1988) 188; see *Petera Proprietary Ltd* v *E A J Ltd* (1985) ATPR 40-605, where Wilcox J held that an exemption clause should not defeat a claim under s 52 of the Australian Trade Practices Act (the Australian counterpart to the Fair Trading Act).

17 The Contractual Remedies Act 1979.

18 Under s 6(1)(b) of the Contractual Remedies Act 1979.

19 F Dawson and D W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, New Zealand, 1981).

(a) Misrepresentation

"Misrepresentation" is not defined in the Act: it is assumed that it bears the old common law meaning.[20] One requirement is that the representation must relate to a present or existing fact or event.[21] Conversely, an expression of opinion, that is, a statement of belief which is held on grounds incapable of proof, would not amount to a misrepresentation.[22] If the information contained in the memorandum amounts to mere statements of opinion, the lead bank may nevertheless not be liable under section 6, even if it turns out that the information is erroneous.

However, a statement of opinion may inherently imply a statement of fact. This would be the case if it is proved that the opinion was not actually held[23] or if the representor had "special facts" or "special knowledge" at his or her disposal.[24] Also, if an opinion is *asserted* as a fact, this could very well amount to a representation.[25] Thus, although an information memorandum prima facie only contains opinions, those statements could still be potentially held to be representations.

In practice,[26] the lead bank usually has the borrower as its own client. Therefore, it is likely that it is in a position to possess "special facts" about the borrower which are not available to other syndicate members. In many situations, the syndicate members themselves may lack the necessary resources or expertise to undertake independent evaluations of the borrower. These scenarios may result in liability being imposed on the lead bank.

The lead bank should also be wary of the way opinions in the memorandum are prefaced. If they are asserted as concrete facts, liability may attach for misrepresentation. Hence, it is advisable that statements of opinion be clearly labelled as such.

In certain circumstances, the lead bank may argue that it is merely a "conduit pipe" facilitating the flow of information from the borrower to the lending syndicate. Therefore, it should not be held responsible for any inaccuracies in the information memorandum. The lead manager will often reinforce this notion by expressly providing that the memorandum is merely a basis for the syndicate members to undertake

20 See *Ware* v *Johnson* [1984] 2 NZLR 518, 537 and *New Zealand Motor Bodies Ltd* v *Emslie* [1985] 2 NZLR 569, 593.

21 Above n 16, 266.

22 Above n 16, 268.

23 Above n 16, 267-268.

24 *Smith* v *Land and House Property Corporation* (1884) 28 Ch D 7, 15. "...if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he[or she] impliedly states that he[or she] knows facts which justify his[or her] opinion".

25 *Reese River Silver Mining Co Ltd* v *Smith* (1869) LR 4 HL 64. Company promoters tried to magnify the potential capacity of a mine and published some forecasts as if they were facts. This constituted a misrepresentation.

26 Above n 3, 132.

individual analyses of the borrower.[27] Here, the lead bank could argue that it is not expressing any opinion but is simply passing on information received or the opinion of the borrower.[28]

The success of such an argument would depend on the degree of assistance rendered by the lead bank in preparing the information memorandum and how much the lead is associated with the document itself. It would also depend on how much use the lead bank makes of the memorandum in soliciting participation from other banks. The greater the level of association with and use of the memorandum, the more difficult it will be to utilise the "conduit pipe" argument.[29] Essentially, if the information within the information memorandum constitutes statements of existing facts, this will probably amount to "representations" for the purposes of the Act.

(b) Reliance

The aspect of "reliance" by syndicate members may also be contentious. There will not be any reliance for the purposes of section 6 of the Contractual Remedies Act if the injured parties did not know of the existence of the misrepresentation, if they did not allow it to affect their judgement or if they were aware of its untruth.[30] Thus, if information regarding the borrower is widely available to the participating banks (such as in the case of some Government borrowers),[31] and the participants have equal access to information, it will be difficult to establish 'reliance'. However, commonly, the participants do tend to rely exclusively on the information memorandum. The lending banks may have insufficient personnel or resources to gather information, or else, in the case of corporate credits (especially project financing) the information itself is not easily available.[32]

An interesting question could arise where a relatively new bank approaches a well entrenched institution to solicit the latter's participation in a loan syndication. Could the larger bank, which had more resources and reasonable opportunity to investigate, be presumed to have relied on the smaller bank's information? The answer appears to be "Yes", for "[no]one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself [or herself] on the ground that the person to whom he [or she] made it had available the means of correction".[33] Similarly, where a larger institution solicits a smaller bank's participation in a syndicate. The essential question is whether there has actually been reliance. The greater the accessibility of

27 Above n 4, 124.

28 Above n 16, 18. In the *Reese River* case, above n 25, Lord Cairns LJ stated that if the directors had said "We ourselves knew nothing about the state of the mine, but we have been told that it is a very valuable mine" then no one could have complained.

29 Above n 2, 144.

30 Above n 16, 274.

31 Above n 5.

32 Above n 6.

33 *Nocton* v *Lord Ashburton* [1914] AC 932, 962.

information, the more difficult it will be to prove that the syndicate members relied on the information memorandum, and vice versa.

(c) Exclusion clauses

The information memorandum often contains exclusion clauses purporting to exclude responsibility for the accuracy of information disseminated. The effect of these exclusion clauses would have to be examined in light of section 4 of the Contractual Remedies Act 1979.[34]

Under section 4, a court can enquire into a clause which tries to negative the *existence* of a misrepresentation (under section 6 of the Contractual Remedies Act). The court has to determine whether it is "fair and reasonable" that the clause is conclusive between the parties, "having regard to all the circumstances of the case".[35] Thus, if the lead bank inserts a provision which either denies that there was a representation or that the syndicate members relied on their individual judgements, a court could nevertheless deem such a clause "unfair" and hold it ineffective. The circumstances which a court would look at include the subject matter of the case, the respective bargaining strengths of the parties and the relative value of the transaction.[36] Where the banks involved in a loan syndication are of comparable bargaining strength, it would be difficult for a court to find exemption clauses "unfair".

There is some ambiguity as to the legal position where the exclusion clause simply excludes liability altogether (for example, "There shall be no responsibility whatsoever for inaccurate information"). This is subject to some ambiguity as the Act does not specifically allow or disallow contracting out of its provisions. However, the writer submits that a broad interpretation should be given, in line with Parliament's intention that the Act preserves the freedom of contract.[37] Thus, exclusion clauses that purport to exclude liability for misrepresentation should be given effect.

The above discussions relate only to when a misrepresentation under section 6 applies. If there is no misrepresentation, for example, if there is a clear statement of opinion, the Contractual Remedies Act is irrelevant. However, the lead bank could still incur liability for common law fraud and negligence.

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34 Above n 17.

35 Above n 17.

36 Section 4 of the Contractual Remedies Act 1979, above n 17. For an application of the section, see *Herbison* v *Papakura* [1987] 2 NZLR 527 and *Bird* v *Bicknell* [1987] 2 NZLR 542, 550.

37 C I Patterson "The Contractual Remedies Act 1979" [1980] NZLJ 307, introductory remarks by Mr C I Patterson, Chairman, Contracts and Commercial Law Reform Committee, for a series of seminars conducted by the New Zealand Law Society. According to Patterson, one of the themes running through the act was "that in considering the legal rights and obligations of the parties to the contract, the main line of inquiry is to identify, interpret and apply whatsoever the parties have agreed".

4 Fraud

The lead bank could be liable for fraud if it makes a statement with knowledge of its falsity, without belief in its truth, or recklessly, not caring whether it is true or false.[38] An action exists even if the statement was made without improper motive and without intention to cause loss.[39] However, it is probably unlikely that the lead bank will release information when it knows of its falsity.

5 Negligent misstatement

The tort of negligence, as epitomised in the famous *Hedley Byrne & Co Ltd* v *Heller & Partners*,[40] may be another source of liability for the lead bank. A duty of care arises in "special relationships", where one party reasonably relies on the other, and the other has knowledge of this reliance.[41] The *Hedley Byrne* case has been applied in New Zealand in numerous cases.[42] The imposition of a duty of care on the lead bank would often hinge on whether the syndicate members "reasonably relied" on it for information. In turn, this would depend on factors like the sophistication of other banks and their access to information. The greater the degree of sophistication and the level of access to information, the more difficult it will be to establish the existence of "reasonable reliance", and consequently, a duty of care.

B Liability to Syndicate Members for Incomplete or Undisclosed Information

Where incomplete information is released in the information memorandum, the lead bank may be liable on the following grounds.

1 The duty of due diligence

There are no statutory requirements for the lead bank to disclose any information whatsoever. However, if information is provided, there is a duty that such information should be complete and correct.[43] Failure to disclose other information which makes the existing statements incomplete or misleading will constitute misrepresentation. In

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38 *Derry* v *Peek* (1889) 14 App Cas 337.

39 G H Treitel *The Law of Contract* (7 ed, Stevens, London, 1987). The lead bank may also incur liability for statutory fraud, eg under s 250 of the Crimes Act 1961, or s 58 of the Securities Act 1978.

40 [1964] AC 465.

41 In this case, Lord Reid said that a duty of care arises where it is "plain that the party seeking the information was trusting the other to exercise such a degree of care, as the circumstances required, when it was reasonable for him [or her] to do that and where the other gave the information or advice when he [or she] knew or ought to have known that the inquirer was relying on him [or her]".

42 For example, in *Brown* v *Heathcote County Council* [1987] 1 NZLR 720, *Meates* v *Attorney General* [1983] NZLR 308 and *Allied Finance and Investments Ltd* v *Haddow & Co* [1983] NZLR 22.

43 M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (11 ed Butterworths, London, 1986) 260-262.

TSC Industries Inc v *Northway Inc*,[44] the court held that liability would occur where "there was a substantial likelihood that the disclosure of the ommitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available". In *Peek* v *Gurney*,[45] Lord Cairns LJ held that there must "be some active misstatement of fact, as that the withholding of that which is not stated that makes that which is stated absolutely false".

If information is released, the lead bank should take care to ensure the accuracy of the information and that there is no omission which renders existing statements inaccurate. Statements should be verified, and independent analysts and experts should be consulted. This is the so called "due diligence" process, the doctrinal formulation of which is still developing. What constitutes due diligence will vary according to factors such as the sophistication of the syndicate members and the accessibility of information.[46] It has been noted that meeting the standard of due diligence will probably release the lead bank from common law liability for disclosure.[47]

2 *Fiduciary obligations*

A lead bank may often find itself in circumstances where, in the interests of prudence, certain disclosures ought to be made to syndicate members. The lead bank may possess insider information about the borrower (for example, a default on an earlier loan), especially since the borrower is frequently its client.[48]

Another disclosure problem arises with confidential information acquired about the borrower. On one hand, the lead bank would be reluctant to divulge such information to participating members. On the other hand, the information may be of great importance to syndicate members. Generally, if the information is material, the lead bank is well advised to request that the borrower makes disclosure. If the borrower refuses, the participants ought to be notified that certain disclosures have not been made. In extreme situations, the lead bank may even have to relinquish its role in the arrangement.[49]

Conflicts of interest could also arise. The lead bank may be acting for the borrower in other transactions.[50] Hence, the borrower may look to the lead bank for advice regarding the terms of the loan. At the same time, syndicate members may rely on the lead to structure the loan in their favour. It is advisable that the lead bank protect itself by disclosing any conflicts of interest that it faces.

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44 426 US 438, 48 L Ed 2d 757, 96 S Ct 2126 (1976).

45 (1873) LR 6 HL 377, 386.

46 Above n 2, 261-262.

47 Eg for negligence, see B Semkow "Syndicating and Rescheduling International Financial Transactions: A Survey of the Legal Issues Encountered by the Commercial Banks" [1984] Int Law 869, 882.

48 Above n 2, 262.

49 Above n 2, 262.

50 Eg the lead bank could be a private lender to the borrower, it could be the borrower's agent bank or trustee of other loans; see above n 2, 262.

Generally, the lead bank should endeavour to disclose insider information, confidential information and conflicts of interest. However, detailed disclosures of this sort are rare in practice,[51] as lead banks normally assume that participants are or should be aware that it has a special relationship with the borrower. The volume of information involved is another hurdle to absolute openness.

The question arises: should there be a legal duty on the part of lead banks to disclose? Should there be a fiduciary obligation between the lead and participating banks?

A fiduciary relationship is the "relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefit of the latter".[52] There has been considerable development of fiduciary theory in the Commonwealth and New Zealand. Fiduciary obligations are no longer restricted to their traditional categories but can arise in purely commercial relationships.[53] Cases[54] have established two routes by which a fiduciary relationship may be imposed. First there is the presumptive category, where traditionally, fiduciary obligations have been imposed.[55] Secondly, a fiduciary relationship could arise out of the specific circumstances of the case or conduct of the parties. In this second category, the threshold test for establishing fiduciary obligations appears to be the reposition of trust and confidence by one party in another.[56] Other relevant considerations include the industry practice and the existence of vulnerability.[57]

Thus, although prima facie the relationship between the lead bank and other members is a purely commercial one, this does not necessarily preclude fiduciary obligations. If there is the requisite element of trust and confidence, a fiduciary obligation could arise.

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51 Above n 2, 262.

52 R Bird (ed) *Osborn's Concise Law Dictionary* (7 ed, Sweet & Maxwell, London, 1983) 147.

53 In *LAC Minerals Ltd* v *International Corona Resources* (1989) 61 DLR (4 ed) 14, the parties were both mining companies, yet the minority of the Supreme Court of Canada found a fiduciary relationship. Also, in the New Zealand Court of Appeal case of *Elders Pastoral Ltd* v *Bank of New Zealand* [1989] 2 NZLR 180, Somers J stated:

> That a contract or arrangement is of a commercial nature has often been held a good reason for concluding that no fiduciary obligations existed ... All that need be said now is that the fact that a transaction is of a commercial nature is not decisive.

54 Above n 53, *LAC Minerals* case, per La Forest J, 29, and Wilson J, 16.

55 Eg director-corporation, solicitor-client, agent-principal etc.

56 Above n 53, *LAC Minerals* case, per La Forest J, 35. Also, in the New Zealand Court of Appeal case of *Day* v *Mead* [1987] 2 NZLR 448, 458, Somers J stated, "[the] foundation of the obligation lies in the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other".

57 Above n 53, *LAC Minerals*, 35.

The scope of fiduciary duties can be onerous - encompassing a duty to act in absolute "fairness and openness".[58] The fiduciary is prohibited from making personal benefits,[59] and may be required to make disclosures of conflicts of interest and other information.[60] He or she may also have to advise the other party to obtain independent advice.[61]

Therefore, if the lead bank is held as a fiduciary, conflicts of interest,[62] insider information and confidential information may have to be disclosed as a matter of law.

The writer submits that it is generally inappropriate to impose fiduciary obligations on the lead bank in loan syndications. First, the precontractual relations between syndicate members and the lead are normally arm's length transactions, where the elements of "trust and confidence" are absent.[63]

Secondly, industry practice is premised on the assumption that the lead owes no duties of fidelity or loyalty to syndicate members. "The syndicated loan market has developed and pricing is based, on the proposition that the Manager is not a fiduciary..."[64]

Thirdly, regarding the element of vulnerability, this becomes an issue only when new and relatively unsophisticated banks enter the market. There could possibly be the existence of unequal bargaining strength, whereupon fiduciary obligations may be imposed. As a matter of policy, no bank should be given special protection for entering into an unprofitable deal. A bank would hardly collapse if it decided not to participate in a loan syndication.

Fourthly, the purpose of disclosing information is to facilitate effective decision making by prospective participants. The imposition of fiduciary duties of "absolute openness" may result in lead banks inundating other banks with voluminous information. This would hardly be conducive to proper decision making processes.

Finally, the writer submits that imposing fiduciary obligations on the lead bank would subject them to inescapable situations. Assume that the borrower is a client of the lead bank and discloses confidential information to the latter. If 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.

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58 *Farrington* v *Rowe McBride & Partners* [1985] 1 NZLR 83, 89.

59 Above n 58, 90.

60 Above n 56, *Day* v *Mead*, 460.

61 Above n 56, 460.

62 In practice, conflicts of interest have been accepted on the part of the lead bank.

63 Above n 5, 234. The relationship is similar to that of a seller [that is the lead bank] marketing a product to interested customers [that is the syndicate members].

64 Above n 5, 234.

On the whole, the writer submits that it is generally inappropriate to impose fiduciary obligations on the lead bank. Indeed, if such a duty were applied to the "investment banking and dealing activities of [a] London financial conglomerate, it would be impossible to do business".

IV CONCLUSION

The lead bank faces numerous possible causes of action for inaccurate or incomplete information - statutory misrepresentation, negligence, fraud, breach of fiduciary duty. To a large extent, the bank's liability would turn upon a multitude of factors, such as the extent and visibility of its assistance with the information memorandum, the experience and sophistication of the other syndicate members, and the general availability of information. Exclusion clauses and indemnity clauses may go some way towards protecting the lead bank from responsibility. However, it is also advisable that the lead bank ensure the accuracy of information as far as possible; and that it discloses conflicts of interest, and insiaer information concerning the borrower. Nevertheless, the writer submits that the lead bank should not be held to a fiduciary standard, as such a duty is inappropriate in a loan syndication.