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Arranger Fees in Syndicated Loans—A Duty to Account to Participant Banks?

Gavin R. Skene*

Abstract

Syndicated loans, while often considered arm's length commercial transactions, may create a fiduciary relationship between the arranger and the participant banks.

A court's possible invocation of a fiduciary relationship may not only give rise to potential adverse legal and commercial issues for an arranger, but may also have wider adverse implications for the efficient operation of the loan syndication markets themselves. For example, an arranger considered to be the fiduciary of the participant banks under a syndicated loan may be required to account to the participant banks for any arranger fees it receives from the borrower or to make a full disclosure to the participant banks of all information known to the arranger as to the affairs of the borrower.

The purpose of this article is to evaluate whether or not a common law court is likely to, first, conclude that an arranger is a fiduciary of the participant banks under a syndicated loan and, second, require the arranger to disgorge and account for any arranger fees it receives from the borrower in favor of the participant banks under a syndicated loan. Finally, this article examines whether commercial techniques are available to an arranger to mitigate legal consequences in respect of arranger fees that may flow from a court's characterization of the arranger as a fiduciary of the participant banks under a syndicated loan.

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I. Introduction

The relationship between international and domestic loan syndication markets, banks, and financial institutions is symbiotic. While banks and financial institutions are required to provide the size and volume of funding commitments necessary to sustain the efficient operation of loan syndication markets,¹ they are equally reliant upon the fees they generate as a result of their participation in these markets to ensure their own commercial viability.²

Syndicated loans, while often considered arm's length commercial transactions, may create a fiduciary relationship between the arranger and the participant banks.

A court's possible invocation of a fiduciary relationship may not only give rise to potential adverse legal and commercial issues for an arranger, but may also have wider adverse implications for the efficient operation of the loan syndication markets themselves. For example, an arranger considered to be the fiduciary of the participant banks under a syndicated loan may be required to account to the participant banks for any arranger fees it receives from the borrower or to make a full disclosure to the participant banks of all information known to the arranger as to the affairs of the borrower.³

Naturally, an arranger would view the mere possibility that it is legally obligated to pay any arranger fees it receives from the borrower

1. For example, as a representation of the Asia Pacific loan syndications market, as of April 15, 2005, the top five lead arrangers for the year to date were as follows: (1) Mizuho Financial Group Inc, US \$41,295.43 million, 261 participations; (2) Sumitomo Mitsui Banking Corp, US \$31,050.44 million, 336 participations; (3) Mitsubishi Tokyo Financial Group Inc, US \$21,683.70 million, 173 participations; (4) Citigroup Inc, US \$12,804.11 million, 89 participations; and (5) HSBC, US \$6,833.92 million, 97 participations. Asia-Pacific Loan Market Association, *Syndicated Loans: Arranger League Table, Asia Pacific* (2005), at <http://www.aplma.com> (last visited May 30, 2005).

2. For example, in 1997, it was reported that Australian arrangers were paid more than \$750 million in fees. See Press Release, AXISS Australia, *Asia-Pacific Loan Market Association* (June 2, 1999), available at <http://www.axiss.com.au/content/media/releases/1999-06-02.asp> (last visited May 30, 2005). However, as a result of aggressive syndicated loan market conditions, some commentators contend that the quantum of arranger fees may be adversely affected by current downward trend in relation to the pricing of investment grade loans. For example, Mr. Atiq Ur Rehman, head of European and Asian loans at Citigroup, commented that "[i]t is very much a borrower's market at the moment. Loan pricing fell in the US, Europe and Asia last year and has the potential to reduce further." See *Borrowers are Still in the Driving Seat of Loan Pricing*, THE BANKER, Feb. 3, 2004, at 49, available at http://www.thebanker.com/news/fullstory.php/aid/1167/Borrowers_are_still_in_the_driving_seat_of_loan_pricing.html (last visited May 30, 2005).

3. These equitable duties are derived from the central concept of "loyalty" owed by a person to his or her beneficiary. See generally G. DAL PONT & D. CHALMERS, *EQUITY AND TRUSTS IN AUSTRALIA AND NEW ZEALAND* 4.05-4.25 (3d ed. 2004).

to the participant banks under a syndicated loan as nothing short of disastrous.

The purpose of this article is threefold. First, this article evaluates whether a common law court is likely to conclude that an arranger is a fiduciary of the participant banks under a syndicated loan. Second, this article considers whether an arranger, as a fiduciary of the participant banks, must disgorge and account for any arranger fees it receives from the borrower in favor of the participant banks. Finally, this article examines whether commercial techniques are available to the arranger to, first, reduce the possibility that a common law court will hold that an arranger is a fiduciary of the participant banks and, second, mitigate an arranger's legal obligation to account for any arranger fees in favor of the participant banks generally.

Given that it is impractical to undertake a sufficiently detailed examination of each relevant common law jurisdiction, this article conducts, by way of illustrative example, an assessment of the stated purpose with respect to the laws of Australia because these laws are largely representative of the laws of other common law jurisdictions.

II. The Mechanics of a Syndicated Loan

Given that the focus of this article is largely to evaluate the possible fiduciary relationship that may exist between an arranger and participant banks under a syndicated loan, it is useful to first briefly examine the nature and mechanics of a syndicated loan and, second, to consider the role undertaken by an arranger of a syndicated loan.

A. *Syndicated Loans—A Quick Primer*

Multi-lender financings, such as syndicated loans, provide a preferred mechanism for financial institutions to loan large amounts of money to borrowers. Multi-lender financings allow financial institutions to, among other things, efficiently allocate risk, manage borrower relationships and ensure their ongoing compliance with capital adequacy standards.⁴

Generally, there are two types of multi-lender financings, syndicated loans and syndicated participations.⁵ A syndicated loan⁶ is an

4. See MALLESONS STEPHEN JAQUES, AUSTRALIAN FINANCE LAW 219-20 (5th ed. 2003), for a discussion of the advantages lenders enjoy by participating in multi-lender financings.

5. K. DeMarte, *Foreign Lead Bank Liability: Inter-creditor Liability Arising Under Information Memoranda and its Consequences for Australian Banks in International Loan Syndications*, 14 J. BANKING & FIN. L. & PRAC. 5, 6 (2003). However, arguably "club financings" may constitute a third type of multi-lender financing whereby several lenders act in parallel to each other and lend to the borrower on the same terms. See

agreement by a number of financial institutions to severally lend money or provide other financial facilities⁷ to a borrower.⁸ By contrast, a syndicated participation is one or more agreements, each a “participation agreement,” entered into by a lead financial institution, who has already agreed to lend money or provide other financial facilities to a borrower, and another financial institution, known as a “participant,” under which the lead financial institution sells a part or all of the loan to the participant.⁹

The primary distinction between a syndicated loan and a syndicated participation is that a syndicated loan is documented within one loan agreement to which the borrower and all other participant banks are a party, whereas a syndicated participation is only documented in a participation agreement between the lead financial institution and the participant.

Accordingly, under a syndicated participation, no privity of contract exists between the participant and the borrower.¹⁰ For instance, under a syndicated participation, the loan documentation has already been agreed to between the borrower and lead financial institution prior to any sale of an interest in the loan to the participant. Hence the participant remains wholly reliant upon the lead financial institution pursuant to the terms of its participation agreement, in order to protect and advance its interests in respect to the syndicated participation.¹¹ Conversely, under a syndicated loan, privity of contract exists between the borrower and each participant bank. However, it remains an important feature of a syndicated loan that the liability of each participant bank be “several,” and not “joint and several,” so as to ensure that each participant bank is not liable to the borrower for the obligations of other participant banks under the loan documentation, such as for funding commitments.

MALLESONS, *supra* note 4, at 244.

6. The term “syndicated loan” is used interchangeably with the term “syndicated facility.”

7. Other financial facilities include bill facilities or letters of credit, neither of which is a “loan” per se. *See, e.g.,* K.D. Morris & Sons Pty Ltd. v. Bank of Queensl. Ltd. (1980) 146 C.L.R. 165.

8. J. O’Sullivan, *The Role of Managers and Agents in Syndicated Loans*, 3 J. BANKING & FIN. L. & PRAC. 162, 163 (1992). *See also* MALLESONS, *supra* note 4, at 221.

9. A loan participation can be conducted on a “funded” or “risk” basis. M. Jones, *Bankers Beware: The Risk of Syndicated Credits*, 3 N.C. BANKING INST. 169, 172 (1999).

10. The common law privity of contract doctrine provides that only a party to a contract may sue under it or be subject to the obligations created by it. *See, e.g.,* Coulls v. Bagot’s Ex’ and Tr. Co. Ltd. (1967) 119 C.L.R. 460. While Australia has no comparative legislation, the strict doctrine of privity of contract is capable of modification in the United Kingdom under the Contracts (Rights of Third Parties) Act, 1999 (U.K.).

11. *See generally* ASSET BASED FINANCING: A TRANSACTIONAL GUIDE 10.02[1] (Howard Ruda ed., 1994).

Given that a syndicated participation is defined by the four corners of the participation agreement between the lead financial institution and a participant without the involvement of an arranger or agent bank, this article concerns syndicated loans and the possible rights and obligations that flow between an arranger and the participant banks thereunder.

Therefore, by way of background, Mallesons Stephen Jaques suggests that the syndication process for a syndicated loan generally consists of six stages, as set out below.¹²

1. The intending borrower approaches one or more banks to negotiate the key terms of the loan facility. Depending upon the bargaining position of the borrower, a borrower may document the indicative terms of the loan in a “term sheet” prior to approaching prospective arranger banks. Negotiation or modification of the key terms by the arranger must be balanced against the expectations of the borrower and the acceptability of the proposed terms in the loan syndications marketplace. A failure by the arranger to balance these competing interests may result in it either not being appointed as arranger for the syndicated loan or later being unable to obtain funding commitments from prospective participant banks.
2. Upon agreement of the key terms of the loan facility, the borrower appoints the bank as “arranger,” under which the bank is given a mandate to arrange the loan facility on behalf of the borrower. The arranger may also agree to underwrite a part or all of the funding commitments of the loan facility should it be unable to obtain sufficient commitments from participants in the loan syndications market.
3. The arranger, on behalf of the borrower, commences the process of marketing the loan facility to prospective participant banks. As part of the marketing process, the arranger, in conjunction with the borrower, customarily prepares an “information memorandum,” which furnishes key information about the borrower relevant to a prospective participant bank, including its business, financial position and future prospects, and distributes both the information memorandum and term sheet to the prospective participant banks. The marketing process may

12. MALLESONS, *supra* note 4, at 221-22. *But see* O’Sullivan, *supra* note 8, at 163. O’Sullivan asserts that the syndication process may be more meaningfully delineated as comprising both “pre-contract” and “post-contract” stages. *Id.*

also include an information “road-show” where key officers of the borrower conduct a presentation with respect to the material set out in the information memorandum and the general attractiveness of a bank’s participation in the syndicated loan.

4. Interested participant banks agree to the terms of the term sheet and thus agree to provide funding commitments to the borrower subject to approval of the loan documentation. It is customary that a first draft of the loan documentation will be distributed for comment by the participant banks upon their formal commitment to fund the syndicated loan.
5. Participant banks provide comments on and negotiate the loan documentation. It is customary that the arranger acts as a conduit between the borrower and the participant bank for the purpose of facilitating the negotiation of the loan documentation. In practice, the participant banks, including the arranger, who is also usually a participant bank in its own right, collectively negotiate the loan documentation with the borrower, rather than each participant bank negotiating separately. To facilitate this process, the participant banks usually agree to appoint the same legal counsel to represent all the interests of the participant banks in the syndicate. The extent and depth of negotiation is largely determinative upon the arranger’s success in balancing the borrower’s expectations against the market acceptability of the loan facility and reflecting the same in the term sheet.¹³
6. Once collective agreement exists as to the terms of the loan documentation, the loan documentation will be signed and the funding commitments by the participant banks formalized. Importantly, contemporaneous with the signing of the loan documentation, the arranger’s role will automatically terminate and the role of agent bank will commence. A participant bank, quite often the arranger or a related corporate body, is appointed as agent bank under the loan documentation whose principal function is to administer the syndicated loan on behalf of the participant banks.¹⁴

13. *See supra* stage 1 of the syndication process for a discussion of this point.

14. *See* MALLESONS, *supra* note 4, at 228, for a discussion of the role of an agent bank and its relationship with other parties under a syndicated loan.

B. *The Role of an Arranger under a Syndicated Loan*

Fundamental to the operation of a syndicated loan are the roles of arranger and agent bank. Unlike a bilateral loan between a borrower and lender *inter se*, a syndicated loan comprises an array of various parties, each of whom have different and often competing interests.

A participant bank may severally undertake the roles of arranger, agent bank, security agent and lender under a syndicated loan. In practice, it is common that a participant bank or one of its related corporate bodies will undertake both roles of arranger and agent bank.

Given the purpose of this article, it is important to have a brief understanding of the nature and scope of the role of arranger because this will necessarily affect the scope of rights and obligations owed by the arranger to the borrower and the participant banks under a syndicated loan.

1. Functions of an Arranger

As considered earlier,¹⁵ a syndicated loan transaction commences upon the initial negotiation between the borrower and a bank, later to be appointed as arranger, in respect to the key terms of the syndicated loan facility. The role of arranger will automatically terminate contemporaneously with the signing of the loan documentation.

Mallesons Stephen Jaques considers the arranger's primary functions under a syndicated loan include:¹⁶

- a) co-ordination of the loan facility and arrangement of the syndication, including obtaining funding commitments from prospective participant banks;
- b) assisting the borrower with the preparation of the information memorandum, including limited due diligence and financial modeling of relevant data; and
- c) documentation, including preparation of the term sheet and the appointment of and liaising with the participant bank syndicate's legal counsel.

Depending upon the quantum of the funding commitments sought under a syndicated loan, it is common for two or more banks to be given a mandate by the borrower to arranger the loan. In practice, multiple arrangers use various titles to designate their seniority and role under the syndicated loan and for the purpose of establishing prestige in the loan syndication marketplace.¹⁷ While the exact title ascribed to an

15. See *supra* Part II(A).

16. MALLESONS, *supra* note 4, at 223.

17. The seniority of a bank in a syndicated loan is usually determined by the

“arranger” usually depends upon the financial institution involved and the relevant syndications market, common titles may include “lead arranger,” “lead arranger and underwriter,” “joint mandated lead arranger,” “co-arranger” or any other combination thereof.

2. Remuneration of an Arranger

Participant banks that undertake the role of arranger under a syndicated loan are remunerated by the borrower by way of payment of “arranger fees.” Calculation of arranger fees may be referable to the underlying funding commitment of that participant bank in the syndicated loan, such as a specified number of basis points payable by reference to the drawn commitment under the loan facility, or it may be a fixed amount.

The legal obligation of the borrower to pay arranger fees may arise:

- a) upon acceptance by the arranger of the borrower’s mandate to arrange the loan facility, where the relevant mandate letter or term sheet prepared by the borrower:
 - (i) expressly provides for the quantum or method of calculation of arranger fees; or
 - (ii) only provides a primary obligation to pay arranger fees, leaving the quantum or method of calculation of the fee to be agreed between the borrower and arranger in a separate “side” or “fee” letter; or
- b) after the acceptance by the arranger of the borrower’s mandate to arrange the loan facility, where the borrower and the arranger enter into a separate “side” or “fee” letter in relation to the quantum or method of calculation of arranger fees that is not referable to the relevant mandate letter or term sheet prepared by the borrower.

The payment of arranger fees by the borrower, at the request of the arranger, by way of a “side” or “fee” letter is becoming an increasingly common theme of industry practice. The rationale of this practice is a product of the highly competitive nature of the loan syndication markets and is used to deny the participant banks knowledge of the specific quantum of arranger fees paid to the arranger under the syndicated loan. To achieve this purpose, the specific terms of the relevant mandate letter or term sheet prepared by the borrower are left silent or incorporate by reference the “side” or “fee” letter on the understanding that the arranger will document payment of arranger fees at a later date. Comfort of full payment of the arranger fees is afforded to the arranger through the

quantum of that bank’s funding commitment.

designation of the “side” or “fee” letter as a “transaction” or “finance” document under the loan facility, thereby granting the arranger the benefit of the covenants under the loan agreement and any security provided by the borrower under the syndicated loan in the event of non-payment.

3. Potential Legal Risks for an Arranger under a Syndicated Loan

The complex relationships formed between the arranger, the borrower and the participant banks under a syndicated loan exposes the arranger to considerable legal risk. The nature of the role assumed by the arranger under these relationships is often competing and adverse to the interests of each other party, including the arranger’s own self interests, under the syndicated loan.

This position is especially true where an arranger has also been appointed as agent bank under a syndicated loan because its duties and obligations will “shift” primarily from the borrower and possibly the participant banks to just the participant banks when one role ceases and the other commences. Accordingly, there may be circumstances where it is unclear as to whom the arranger owes certain duties, the length of time that the duties are owed, or whether such duties have merged.¹⁸

Broadly, an arranger’s involvement in a syndicated loan will have the potential to expose it to the following legal risks:¹⁹

- a) advising the borrower in relation to the syndications market, especially as to the marketability of the key terms of the loan facility;
- b) accepting arranger fees from the borrower in its own right, including any failure to hold on account such fees in favour of the participant banks;
- c) assisting the borrower with the preparation of the information memorandum, including conducting limited due diligence on the borrower. This may be especially problematic where the arranger has a prior or existing commercial banking relationship with the borrower;

18. While it is beyond the scope of this article to consider the duties and obligations of an agent bank under a syndicated loan in detail, the mere designation of an agent bank immediately raises questions of agency and the *prima facie* existence of a fiduciary relationship between the agent bank and participant banks. For example, in *Chem. Bank v. Sec. Pac. Nat’l Bank*, 20 F.3d 375 (9th Cir. 1994), the court held that as a general principle, the agent bank, by virtue of its designation as the agent bank, owed a fiduciary duty to the participant banks. *But see* the comments of Gibbs CJ in *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 71-72 (stating that not every agent was a fiduciary of its principal).

19. MALLESONS, *supra* note 4, at 224.

- d) negotiating the terms of the loan facility on behalf of the borrower with the participant banks, including ensuring that the loan documentation is materially consistent to that of the term sheet as agreed between, among others, the borrower and arranger; and
- e) acting as a participant bank in the syndicated loan in its own right.

While it is evident that an arranger may be exposed to a wide array of legal risks due to its role as an arranger of a syndicated loan, particularly with regard to its involvement in the preparation of the information memorandum,²⁰ this article concerns the possible invocation of fiduciary status between an arranger and the participant banks and, in the event that such relationship exists, the extent to which the arranger must account and disgorge any arranger fees received from the borrower in favor of the participant banks.

III. The Arranger as a Fiduciary of Participant Banks²¹

Requiring an arranger to account for any arranger fees it receives from a borrower under a syndicated loan is largely predicated upon a determination that an arranger is a fiduciary of the participant banks.²²

Therefore, this part first overviews the trend of common law courts to intervene in modern day commercial transactions and impose a fiduciary relationship in a commercial environment, second, this part examines in detail the merits of the four judicial approaches to arranger and participant bank fiduciary theory and, finally, provides this author's observations on which academic view should be preferred by Australian courts when confronted with the question of determining whether an arranger is a fiduciary of the participant banks under a syndicated loan, having regard to any current judicial trends.

A. The Imposition of a Fiduciary Relationship in a Commercial Environment

During the late twentieth century, common law courts increasingly reformulated and applied traditional private law principles to modern day commerce.²³ While courts perhaps once drew sharp distinctions between

20. See, e.g., *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993).

21. This part is based substantially upon a prior work of the author; G. Skene, *Syndicated Loans: Arranger and Participant Bank Fiduciary Theory*, 6 J. INT'L BANK. L. & REG. 269 (2005).

22. But see *infra* Part IV(B), in relation to the possible application of Australian secret commissions legislation.

23. See, e.g., *Breen v. Williams*, (1994) 35 N.S.W.L.R. 52 (Meagher J criticizes the

the contractual interests of one party against the contractual interests of another, jurisprudential overtones of fairness, morality and altruism have aided in the normalization of the rules of private law as applied by these courts.²⁴

The wider acceptance by common law courts of the jurisprudential canon of “anti-formalism”²⁵ fostered a dramatic evolution to the body of law known as “equity.”²⁶ By contrast to strict doctrines of private law, justice in an equitable jurisdiction can be thought more to inhere in outcomes reached than in any principle for social action that decisions may imply.²⁷

The principles of equity are incapable of precise definition and will, of course, vary depending upon the social and religious context in which they are applied. A person may be said to have acted equitably if they were to act fairly and justly, thus having undertaken conduct that is balanced and proportionate in the circumstances. Conversely, a person may be said to have acted inequitably if they were to have undertaken conduct that was not balanced and proportionate in the circumstances and where such conduct could be described as being either immoral or unethical.²⁸

The body of equitable canons is fast growing, and its application to modern day commerce is far reaching. Writing extra-curially, Sir Anthony Mason remarked that distinctive concepts, doctrines, principles and remedies developed by the old Courts of Chancery have “extended beyond old boundaries into new territory where no Lord Chancellor’s foot has previously left its imprint. . . . Equitable doctrines and relief have penetrated the citadels of business and commerce, long thought, at least by common lawyers, to be immune from the intrusion of such principles.”²⁹

The imposition of equity into a commercial environment is no less evident than in the case of the “fiduciary relationship.” A fiduciary

tendency of Canadian Courts to discover fiduciary obligations in situations where traditional jurisprudence would have ordinarily denied them). *See also* T. Carlin, *Fiduciary Obligations in Non-Traditional Settings—An Update*, 29 AUSTL. BUS. L. REV. 65 (2001).

24. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-17, 1776-77 (1976).

25. *Id.*

26. The word “equity” is derived from the Latin word “*aequum*” to mean physical equality or evenness. *See, e.g.*, J. HEYDON et al., *CASES AND MATERIALS ON EQUITY AND TRUSTS* (4th ed. 1993).

27. J. GLOVER, *COMMERCIAL EQUITY: FIDUCIARY RELATIONSHIPS* 1.1 (1995).

28. *See, e.g.*, SALMOND ON JURISPRUDENCE 672-73 (J. Parker ed., 9th ed. 1937).

29. A. Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 L. Q. REV. 238, 238 (1994). *See also* GLOVER, *supra* note 27, at 1.3.

relationship exists in certain types of relationships that exhibit particular pre-existing “fiduciary” qualities, such as recognized relationships of trust and confidence,³⁰ relationships of influence³¹ and relationships concerning confidential information.³² While there is no comprehensive definition of what mode of relationship constitutes a fiduciary relationship, an influential description of fiduciary status was provided by the High Court of Australia in *Hospital Products Ltd. v. United States Surgical Corp.*³³ (hereinafter “*Hospital Products*”):

The critical feature of [accepted fiduciary relationships] is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.³⁴

Consistent with the dichotomy espoused by Mason J in *Hospital Products*, the Supreme Court of Canada in *LAC Minerals Ltd. v. International Corona Resources Ltd.*³⁵ considered that:

[r]elationships in which fiduciary obligations have been imposed seem to possess three general characteristics: (a) the fiduciary has scope for the exercise of some discretion or power; (b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and (c) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.³⁶

The ability of an injured party to establish a fiduciary relationship in a commercial environment is extremely advantageous. Dal Pont and Chalmers consider that it may be desirable for an injured party to raise a cause of action based on a breach of duties owed under a fiduciary relationship because:

30. Examples include, relationships between partners, agent and principal, trustee and beneficiary, company and director, employer and employee, and solicitor and client. See *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 96.

31. Examples of “relationships of influence” include, relationships between parent and child, priest and parishioner, and solicitor and client. See e.g., W. Winder, *Undue Influence and Coercion*, 3 MELB. U. L. REV. 97, 100 (1939).

32. Examples include, relationships where confidential information may be received such as between employer and employee or manufacture and inventor. See, e.g., GLOVER, *supra* note 27, at 1.15.

33. *Hosp. Prods. Ltd.*, 156 C.L.R. 41.

34. *Id.* at 96.

35. *LAC Minerals Ltd. v. Int’l Corona Res. Ltd.*, [1989] 2 S.C.R. 574, 596.

36. *Id.*

- a) the injured party may have a weak or no cause of action at common law in tort or contract;
- b) establishing a breach of an equitable duty allows the plaintiff to seek equitable remedies, including proprietary relief; and
- c) equitable relief may be available in circumstances where other available common law relief may be excluded, such as under limitation of actions legislation.³⁷

Clearly, an injured party's successful characterization of a commercial relationship as fiduciary is extremely beneficial because it affords the injured party an alternative equitable cause of action and equitable relief against the offending party. Given the superiority of equitable relief, such equitable compensation³⁸ or the creation of an equitable trust over profits,³⁹ vis-à-vis common law relief, such as damages, courts should be cautious about characterizing any commercial relationship as fiduciary.⁴⁰

B. Arranger and Participant Bank Fiduciary Theory

Modern courts of common law jurisdictions have wrangled generally with the expansion of the law of equity into the province of commerce.⁴¹ The inherent incompatibility between equity, which promotes fairness and justice on the one hand, and commerce, which protects self-advancement and self-promotion on the other, can be clearly illustrated in the case of the invocation by a court of a fiduciary relationship between an arranger and the participant banks under a syndicated loan.

It is generally accepted that the relationship between an arranger and a participant bank falls outside the boundaries of the established fiduciary relationship categories.⁴² Therefore, an Australian court must have regard to the relevant jurisprudence relating to the intrusion of the fiduciary relationship into commercial transactions when considering whether or not the character of the relationship between an arranger and participant bank is one that exhibits the necessary characteristics present in a fiduciary relationship.⁴³

37. DAL PONT & CHALMERS, *supra* note 3, at 4.05.

38. *See, e.g.,* Nocton v. Lord Ashburton, [1914] A.C. 932, 946. *See also* Davidson, *The Equitable Remedy of Compensation*, 13 MELB. U. REV. 349 (1982).

39. *See, e.g.,* Boardman v. Phipps [1965] Ch 992, *aff'd* [1967] 2 A.C. 46.

40. *See, e.g.,* Hosp. Prods. Ltd. v. U.S. Surgical Corp. (1984) 156 C.L.R. 41, 149.

41. *See supra* Part III(A).

42. *See supra* notes 30-32 and accompanying text for established relationships considered by courts to be *prima facie* fiduciary in character.

43. *See, e.g.,* Hosp. Prods. Ltd., 156 C.L.R. 41. *See also* DAL PONT & CHALMERS, *supra* note 3, at 4.200.

Given the size and volume of syndicated loans made in the global marketplace each year,⁴⁴ it is surprising that there is little authoritative case law in common law jurisdictions that examines the set of legal relationships between the actors of a syndicated loan generally and the legal rights and obligations that flow between an arranger and the participant banks specifically.⁴⁵ Therefore, in the absence of any decisive common law judicial position, four academic schools of thought have emerged in respect to the proper characterization of the relationship between an arranger and the participant banks under a syndicated loan.

1. "Arm's Length" Academic View

Dal Pont and Chalmers state, as a general proposition of Australian law, that where parties to a commercial transaction have dealt with each other at arm's length in circumstances where no special reliance or trust has been placed by one party in the other, or where no special vulnerability exists, there is no justification for a court to impose upon one of the parties fiduciary duties in favor of the other.⁴⁶

Commentators within the banking and finance industry have supported this position and strenuously deny the proposition that an arranger assumes fiduciary obligations in favor of participant banks when performing its role as arranger of a syndicated loan.⁴⁷ For instance, in a well known statement, Clarke and Farrar opine that:

Fiduciary obligations should not be imposed on the [arranger]. The members of a syndicate are "buying" a product developed, marketed and serviced by the [arranger]/agent. While the members undoubtedly rely on the reputation and experience of the [arranger], the relationship is not fundamentally different from the relationship between IBM and the purchaser of a large computer system . . . the better view is that the syndication process represents a classic arm's length transaction and, therefore, fiduciary obligations should not be imposed on the [arranger].⁴⁸

44. See, e.g., Asia-Pacific Loan Market Association, *supra* note 1, for an example of the Asia Pacific syndicated loan marketplace.

45. The three leading common law cases that consider the role of arranger under a syndicated loan include: *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993); *UBAF Ltd. v. European Am. Banking Corp.*, 2 W.L.R. 508 (Q.B. 1984); *Sumitomo Bank Ltd. v. Banque Bruxelles Lambert SA*, 1 Lloyd's Rep. 487 (1997).

46. DAL PONT & CHALMERS, *supra* note 3, at 4.200.

47. See, e.g., O'Sullivan, *supra* note 8, at 162. See also L. Clarke & S. Farrar *Rights and Duties of Managing and Agent Banks in Syndicated Loans to Government Borrowers*, 1 U. ILL. L. REV. 229 (1982).

48. Clarke & Farrar, *supra* note 47, at 234.

Accordingly, the arm's length commercial party dichotomy is based on the arranger and the participant banks being highly sophisticated, usually receiving specialized financial and legal advice, and transacting with one another pursuant to their own self interest and desire for commercial gain. Moreover, pursuant to the arm's length academic view, the notion of fiduciary status can be rebuked because an arranger and the participant banks have access to materially the same quality of information prior to entering into the syndicated loan, namely by conducting their own independent due diligence of the borrower,⁴⁹ thus disclaiming the existence of any special disadvantage on the part of one party as a result of any undue reliance on the part of another.⁵⁰

The justification of a common law court to intervene in a *prima facie* arm's length commercial relationship and superimpose fiduciary duties over contractual ones must be convincing and paramount. In *Hospital Products*, the most authoritative case in Australia with respect to the extension of the fiduciary relationship to a commercial environment, the High Court of Australia cautioned against the construction of a fiduciary relationship in an arm's length commercial transaction. Gibbs CJ, who wrote for the majority and with whom Wilson and Dawson JJ concurred, stated that "the fact that the arrangement between the parties was of a purely commercial kind and that they 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."⁵¹ Moreover, Dawson J emphasized "[t]he undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where parties are at arm's length from one another. . . ."⁵²

The views of the majority of the High Court of Australia in *Hospital Products* have also been largely endorsed by other common law jurisdictions. For example, in *Westdeutsche Landesbank Girozentrale v. Council of the London Borough of Islington*,⁵³ the English House of Lords cautioned against a "wholesale importation" of principles into

49. For example, a prospective borrower may provide participant banks with raw financial data capable of being modeled by the participant banks according to their own industry variables, forecasts and risk tolerances.

50. *But see Natwest Austl. Bank Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993) (the Supreme Court of Victoria held that there was an imbalance of information between the arranger and the participant banks because the arranger failed to disclose certain pre-existing securities granted to it by the borrower). *See also Sumitomo Bank Ltd.*, 1 Lloyd's Rep. 487 (1997).

51. *Hosp. Prods. Ltd v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 70. *See also Keith Henry & Co. Pty Ltd. v Stuart Walker & Co. Pty Ltd.* (1958) 100 C.L.R. 342.

52. *Hosp. Prods. Ltd.*, 156 C.L.R. at 149.

53. *Westdeutsche Landesbank Girozentrale v. Council of the London Borough of Islington*, [1996] A.C. 669.

commercial dealings which are “inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs.”⁵⁴ In *Bowkett v. Action Finance Ltd.*,⁵⁵ the High Court of New Zealand stated that “equity must tread carefully when intervening in commercial relationships. There is no room for such intervention on a tender moralistic basis. The circumstances must be such as to call loudly for equitable relief . . . the circumstances must shock the conscious of the Court.”⁵⁶ Furthermore, in *LAC Minerals Ltd. v. International Corona Resources Ltd.*,⁵⁷ the majority of the Supreme Court of Canada found that fiduciary obligations “must be reserved for situations that are truly in need of the special protection that equity affords.”⁵⁸

Therefore, while difficult to synthesize an exact principle, it is submitted that an Australian court will be very reluctant to find the existence of a fiduciary relationship in a commercial arrangement that was entered into by parties on equal footing at arm’s length to one another, such as the *prima facie* relationship between an arranger and the participant banks under a syndicated loan.⁵⁹

2. “Fiduciary” Academic View

The “fiduciary” academic view considers that an arranger will, at all relevant times, owe fiduciary duties to the participant banks under a syndicated loan. Two bases support this view.

First, the fiduciary academic view finds primary support in the English Court of Appeal’s decision in *UBAF Ltd. v. European American Banking Corporation*⁶⁰ (hereinafter *UBAF*). In *UBAF*, the plaintiff, an English bank, was invited by the defendant, a United States bank, to participate in two loans that the defendant intended to make to two companies that formed part of the same shipping group. The defendant was also the intended agent bank under the syndicated loan. The defendant provided the plaintiff with a term sheet that set out key information about each intended loan, a business study of the shipping group and a valuation of the two ships owned by the borrower companies, which were intended to be given as security for the loans. The information provided by the defendant represented, among other things, that the loans were “attractive financing of two companies in a

54. *Id.*

55. *Bowkett v. Action Fin. Ltd.* (1992) 1 N.Z.L.R. 449.

56. *Id.* at 462.

57. *LAC Minerals Ltd. v. Int’l Corona Res. Ltd.*, [1989] 2 S.C.R. 574.

58. *Id.* at 596.

59. See *ESSAYS IN EQUITY—FIDUCIARIES IN A COMMERCIAL CONTEXT* (P. Finn ed., 1985).

60. *UBAF Ltd. v. European Am. Banking Corp.*, 2 W.L.R. 508 (Q.B. 1984).

sound and profitable group.”⁶¹ The plaintiff agreed to participate in the loans in reliance upon these representations. Unfortunately, some time thereafter, each borrower company defaulted under its respective loan. The plaintiff brought a claim against the defendant for payments due in connection with the loans alleging, among other things, deceit, negligent misrepresentation and breach of section 2(1) of the *Misrepresentation Act, 1967* (U.K.).

In *UBAF*, the English Court of Appeal did not consider the substantive merits of the plaintiff’s causes of action. However, in an interlocutory appeal against a decision to set aside *ex juris* service, Ackner and Oliver LJ said in *obiter dicta*:

The transaction into which the plaintiffs were invited to enter, and did enter, was that of contributing to a syndicate loan where, as seems to us, quite clearly *the defendants were acting in a fiduciary capacity for all the other participants*. It was the defendants who received the plaintiffs’ money and it was the defendants who arranged for and held, on behalf of all of the participants, the collateral security for the loan. If, therefore 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 and their continued failure to do so would constitute a continuing breach of their fiduciary duty (emphasis added).⁶²

The statements made by Ackner and Oliver LJ in *UBAF* tend to indicate that, at least from an English law perspective, an invitation made by an arranger to a participant bank to participate in a syndicated loan may give rise to a fiduciary relationship between the parties. However, this position is far from settled, with many English legal commentators suggesting that the comments made by their Lordships in *UBAF* do not create a wider principle that would *prima facie* impose a fiduciary relationship between an arranger and participant bank under a syndicated loan.⁶³

Therefore, the extent to which the comments made by their Lordships in *UBAF* are sufficiently authoritative so as to bind, or at least to persuade an Australian court remains inconclusive and should be moderated against the following:

- a) the convention that the High Court of Australia and State

61. *Id.*

62. *Id.*

63. See, e.g., R. Davies & D. Halliday, *Risks and Responsibilities of the Agent Bank and the Arranging Bank in Syndicated Credit Facilities*, 5 J. INT’L BANKING L. 182, 183 (1997); G. Bhattacharyya, *The Duties and Liabilities of Lead Managers in Syndicated Loans*, 16 COMPANY LAW. 261 (1995).

- and Territory Supreme Courts acquiesce to decisions of the English Court of Appeal is no longer considered good law in Australia;⁶⁴
- b) the statements made by Ackner and Oliver LJJ were clearly *obiter dicta* and made in the context of an interlocutory appeal relating to the reinstatement of an order for *ex juris* service and not otherwise in respect of a deliberate determination as to whether or not a fiduciary relationship existed between the plaintiff and defendant. Therefore, the context in which such statements were rendered by the Court should necessarily affect their persuasiveness;
 - c) the decision in *UBAF* could be distinguished on the facts surrounding the refinancing of the defendant's pre-existing loans made to each borrower company, which had the effect of reducing the defendant's total exposure under the financing package to the shipping group. Therefore, their Lordships could have reached their view as to fiduciary status on two bases:
 - (i) that the defendant, due to its past dealings, had a higher degree of knowledge about the financial condition of the shipping group in which the borrowers resided and, therefore, was placed by implication into a higher position of knowledge vis-à-vis the plaintiff; and
 - (ii) that the defendant had abused its position of trust in the financial community by inviting the plaintiff, a smaller bank than that of the defendant, to participate in a loan for the purpose of apportioning its own financial burden on to the plaintiff;⁶⁵
 - d) it is arguable that Ackner and Oliver LJJ made their comments based on a merged analysis of the defendant's roles as both arranger and agent bank under the syndicated loan and did not properly demarcate the duties attributed to the defendant under each role;⁶⁶ and
 - e) the Court, in reaching its decision, neglected to consider whether there was any term in the facility agreement or related loan documentation that may have the effect of

64. *See, e.g.,* Cook v. Cook (1986) 162 C.L.R. 376 (the High Court of Australia rejected the antecedent approach taken by the Court in *Waghorn v. Waghorn* (1942) 65 C.L.R. 289 to follow the decision of the English Court of Appeal).

65. *See, e.g.,* GLOVER, *supra* note 27, at 3.45 (agrees on this point).

66. *See* MALLESONS, *supra* note 4, at 228, for a discussion on the role of an agent bank and its relationship with other parties under a syndicated loan.

negating the existence of a fiduciary relationship between the parties.⁶⁷

Second, the fiduciary academic view finds secondary support in the dissenting judgment of Mason J in *Hospital Products*. Mason J, while acknowledging the “understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust,”⁶⁸ considered that it was “too simplistic, if not superficial, to suggest that commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another.”⁶⁹ Therefore, according to Mason J, a court should not refuse to characterize a relationship as fiduciary solely because the relationship appears *prima facie* arm’s length.

In conclusion, absent any relevant Australian judicial consideration of *UBAF*,⁷⁰ the weight of academic opinion⁷¹ indicates that *UBAF* does not presently represent good law in Australia, and consequently, would not be followed by an Australian court. Moreover, it is unclear what weight, if any, would be afforded by an Australian court to the dissenting *obiter dicta* of Mason J in *Hospital Products*.

3. “Constructive Trustee” Academic View

As an adjunct to the fiduciary academic view, the dissenting judgment delivered by Deane J in *Hospital Products* suggests that an alternative formulation of equitable relief, namely the use of the constructive trust, may be available to plaintiffs in a commercial setting, such as the participant banks under a syndicated loan.⁷²

Deane J opined that a plaintiff should not necessarily be barred from obtaining equitable relief in certain commercial circumstances solely because a court is unable to establish the existence of a fiduciary relationship and a corresponding breach of fiduciary duty:

67. See *infra* Part V(A) for a brief discussion on the efficacy of excluding fiduciary duties.

68. The constructive trust is a form of equitable relief available to an injured party upon it establishing a breach of fiduciary duty. *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 99.

69. *Id.* at 100.

70. To this author’s knowledge, the only judicial consideration undertaken by an Australian court of the decision in *UBAF Ltd. v. European Am. Banking Corp.*, 2 W.L.R. 508 (Q.B. 1984) was by the High Court of Australia in *Wardley Austl. Ltd. v. W. Austl.* (1992) 175 C.L.R. 514, 527-28, and the New South Wales Court of Appeal in *Mcrae v. Coulton* (1986) 7 N.S.W.L.R. 644, 664-65, where each Court only considered the *UBAF Ltd.* decision with respect to issues pertaining to negligence and signed representations and not in the context of syndicated loans generally.

71. See *supra* note 63. See also O’Sullivan, *supra* note 8, at 176; G. Colless, *Syndicated Loans—The Legal Relationship*, 8(1) COM. L. Q. 13, 14 (1994).

72. *Hosp. Prods. Ltd.*, 156 C.L.R. at 122-25.

In my view the constructive trust pursuant to which the [defendant] is liable to account for the profits . . . should properly be seen as imposed as equitable relief appropriate to the particular circumstances of the case *rather than arising from a breach of some fiduciary duty flowing from an identified fiduciary relationship*.⁷³

Applying his alternative formulation of equitable relief to the facts in *Hospital Products*, Deane J reached the following conclusion:

[The plaintiff] was entitled to a declaration that the [defendant] was liable to account as a constructive trustee for the profits of that Australian business in accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain himself a benefit, or the proceeds of a benefit, which he has apportioned to himself in breach of his contractual or other legal or equitable obligations to another.⁷⁴

However, while Deane J reasoned that it was appropriate to impose a constructive trust over the defendant's profits in *Hospital Products*, he failed to clearly articulate the circumstances in which a constructive trust will be awarded to a plaintiff, commenting that:

[s]ince this particular aspect of the matter was not explored in argument and a majority of the Court is of the view that there is no basis for any finding of constructive trust however, it is preferable that I defer until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances.⁷⁵

With respect, Deane J's judgment in *Hospital Products* is quite controversial given traditional equitable canons.⁷⁶ Under Deane J's formulation, a court could grant equitable relief to a plaintiff, in the form of a constructive trust, in circumstances where the defendant was merely in breach of its contractual, not its fiduciary obligations. This approach would have the effect of availing a plaintiff to superior equitable remedies outside the sphere of a fiduciary relationship for a breach of contract. Therefore, in the context of a syndicated loan, an Australian court could hold an arranger as constructive trustee of participant banks in respect to arranger fees in certain circumstances notwithstanding that the arranger may not be characterized as a fiduciary of the participant

73. *Id.* at 124 (emphasis added).

74. *Id.* at 125.

75. *Id.*

76. See, e.g., GLOVER, *supra* note 27, at 2.29 (considers Deane's approach to "be a species of fiduciary instrumentalism . . . [where] a constructive trust was clearly the desired outcome"). *Id.*

banks.

In conclusion, while it is unclear what weight, if any, would be afforded by an Australian court to the *obiter dicta* of Deane J in *Hospital Products*, it is submitted that Deane J's alternative formulation of equitable relief does not presently represent good law in Australia and consequently would not be followed by an Australian court.

4. "Shifting" Academic View

(a) Scope of Theory

The "shifting" academic view was formulated as a result of the perceived chameleon-like role adopted by an arranger of a syndicated loan. Lehane⁷⁷ and Bostock and Hambly,⁷⁸ each of whom are proponents of the shifting academic view, submit that an arranger of a syndicated loan will act as an agent of the borrower for some purposes but, for other purposes, will act as an agent of the participant banks.

Specifically, the learned authors articulate the "shifting" role of an arranger of a syndicated loan as follows:

- a) The arranger first owes certain contractual obligations, as well as equitable obligations that arise by operation of the agency relationship, to the borrower upon it receiving a mandate from the borrower to procure the syndicated loan. These duties may include, for example, that the arranger use its best efforts to procure full participation of the syndicated loan and to ensure that the loan documentation is drafted in such a manner so as to reflect, and not be inconsistent with, the terms of the mandate letter; and
- b) The obligations first owed by the arranger to the borrower will effectively "shift" from the borrower to the participant banks during the negotiation of the syndicated loan by the arranger, for and on behalf of the participant banks, with the borrower. These duties may include, for example, negotiating the loan documentation with the borrower in accordance with the participant banks' instructions and in a manner that is not contrary to their several interests.

The cohesiveness of Lehane and Bostock and Hambly's shifting dichotomy hinges greatly upon a determination of when, if at all, the

77. J. Lehane, *The Role of Managing and Agents Banks: Duties, Liabilities, Disclaimer Clauses*, INT'L FIN. L. REV. 235 (June 1982).

78. T. Bostock & J. Hambly, *Loan Syndication*, Seminar, Law Institute of Victoria, July 1983.

“shifting event” occurs and an analysis of the precise, and possibly continuing, obligations owed by the arranger to the borrower pursuant to the terms of the mandate letter. These separate, but related, issues are examined in further detail below.

First, the learned authors submit that the “shifting event” occurs at the moment that the arranger commences negotiation of the loan documentation for and on behalf of the participant banks.⁷⁹ This point is reinforced by Lehane who states that “the manager negotiates and settles the loan documentation on [the participant banks’] behalf, and not as the occupant of some neutral middle ground.”⁸⁰

However, it is perhaps a little too simplistic to suggest that there is one defining moment when an arranger ceases to be the agent of the borrower and becomes the agent of the participant banks. Instead, a more flexible approach should be adopted in order to establish when a “shifting event” occurs pursuant to the shifting dichotomy. This may be achieved, for example, by assessing the scope of the role undertaken by the arranger during the negotiation process. By adopting a flexible approach, an Australian court may seek to resolve the following questions:

- a) Does the shifting event occur when the relevant banks agree to participate in the loan or at a later time, such as when the arranger engages in the negotiation process? or,
- b) If the arranger merely acts as a conduit for the participant banks during the negotiation process and does not act for and on their behalf, do these circumstances suggest that the arranger’s duties have not shifted to the participant banks and remain with the borrower?

Second, the learned authors apparently either disregard the express or implied obligations owed by the arranger to the borrower pursuant to the mandate letter or otherwise incorrectly assume that these obligations will merge upon the occurrence of a “shifting event.”⁸¹ It is understandable why these assumptions are made, for without them, there is a real possibility that an arranger could be acting as agent for both the borrower and the participant banks which, without the fully informed consent of both principals, is impermissible because the arranger, as agent for both the borrower and participant banks, would be placed in

79. The arranger may also negotiate the loan documentation in its own right should it also be a participant in the syndicated loan.

80. Lehane, *supra* note 77.

81. See O’Sullivan, *supra* note 8, at 174 (agrees on this point).

conflict with those duties owed to each principal.⁸²

Unfortunately, reliance upon these assumptions necessarily affects the merits of the shifting dichotomy, for the following reasons:

- a) The mandate letter usually requires the arranger to ensure that the loan documentation is drafted in such a manner so as to reflect and not be inconsistent with its terms and the terms of the applicable term sheet. Accordingly, depending upon the exact wording of the mandate letter, the arranger could owe contractual duties, including possible equitable duties of fidelity, to the borrower so as to ensure that the loan documentation has been appropriately drafted; and
- b) It is again a little too simplistic, albeit convenient, to suggest that obligations owed by the arranger to the borrower immediately cease upon the occurrence of the shifting event. Even if certain contractual obligations are discharged by performance, the arranger may continue to owe a duty of care to the borrower with respect to the proper exercise of its duties and functions as arranger⁸³ or a continuing duty of loyalty.⁸⁴ Moreover, save for an effective disclaimer,⁸⁵ the existence of any fiduciary obligations on the part of the arranger will be incapable of extinguishment or merger.

Lehane and Bostock and Hambly's shifting dichotomy is perhaps an illustration of one method capable of rationalizing a seemingly incompatible and conflicting set of commercial relationships formed between an arranger and other parties under a syndicated loan. However, the learned authors approach is not without fault, a problem only exacerbated by the often lack of documentation addressing the rights and obligations of an arranger under a syndicated loan.

In conclusion, absent any judicial guidance or endorsement of the

82. *See, e.g., N. & S. Trust Co. v. Berkley*, [1971] 1 W.L.R. 470 (Eng. Q.B.D. (Comm.)). *But see Kelly v. Cooper*, [1992] 3 W.L.R. 936 (the Privy Council held that the requisite consent required by an agent, whom acts for two or more principals, may be implicitly obtained from each principal by having regard to the terms of the agency agreement, such as the mandate letter in the case of the borrower and the term sheet in the case of the participant banks).

83. An agent must act with reasonable care, skill and intelligence when performing their duties as agent. *See, e.g., Commonwealth Portland Cement Co. Ltd. v. Weber, Lohmann & Co. Ltd.* [1905] A.C. 66, 77.

84. *But see Attorney-Gen. v. Blake*, [1998] 1 All E.R. 833, 841 (Eng. C.A. (Civ. Div.)) (Lord Woolf MR rejected the "concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it").

85. *See infra* Part V(A) for a discussion on the efficacy of excluding fiduciary duties.

shifting dichotomy, coupled with academic criticisms,⁸⁶ it is submitted that Lehane and Bostock and Hambly's shifting dichotomy does not fully describe the set of relationships between parties to a syndicated loan nor does it explain a pattern of general relationships between such parties. As a consequence, an Australian court should not be constrained by the logic adopted under the shifting dichotomy.

(b) Arranger's Role When Accruing Arranger Fees

This article largely assumes that an arranger of a syndicated loan will accrue the legal right to arranger fees in its capacity as arranger.⁸⁷ However, this assumption may not always be satisfactory in cases where a participant bank assumes both roles as arranger and agent bank under a syndicated loan.

As a corollary to the "shifting" academic view, it is conceivable that an arranger, who also assumes the role of agent bank under a syndicated loan, may enjoy the benefit of arranger fees upon or after the assumption of its new role as agent bank, provided that the legal right to arranger fees has not already been discharged by performance. For example, this situation could arise where any service or function provided to the borrower by the arranger in consideration of arranger fees is continuing or where the arranger, who is now the agent bank, receives the arranger fees after it has ceased its role as arranger. Therefore, the concern is that should an arranger receive the benefit of arranger fees in its capacity as agent bank and not as arranger of the syndicated loan, there is a possibility that the arranger will do so as agent for the participant banks and that, subject to any contractual modifications,⁸⁸ the agent bank may be required to account to the participant banks for arranger fees.⁸⁹

While it is beyond the scope of this article to consider the fiduciary status of an agent bank under a syndication loan in any detail, it is generally accepted that, subject to any contractual modification, an agent bank will be a fiduciary of the participant banks.⁹⁰ This position was supported in *Chemical Bank v. Security Pacific National Bank*,⁹¹ where the United States Ninth Circuit Court of Appeals held that the agent

86. See generally O'Sullivan, *supra* note 8.

87. See *supra* Part II(B)(2).

88. See, e.g., *NZI Sec. Ltd. v. Unity Group Ltd.* (Unreported, High Court of New Zealand, Wylie J, Feb. 11, 1992). See also *infra* Part V(A).

89. See *infra* Part IV.

90. It is a settled matter of law that the relationship of agency is of a fiduciary nature. See, e.g., *Parker v. McKenna*, (1874) L.R. 10 Ch. App. 96, 199 (Eng. L.C.); *Keith Henry & Co. Pty Ltd. v. Stuart Walker & Co. Pty Ltd.* (1958) 100 C.L.R. 342, 350. See A. Mugasha, *The Agent Bank's Possible Fiduciary Liability to Syndicate Banks*, 27 CAN. BUS. L. J. 403 (1996).

91. *Chem. Bank v. Sec. Pac. Nat'l Bank*, 20 F.3d 375 (9th Cir. 1994).

bank's mere designation as "agent" was sufficient enough to give rise to a fiduciary relationship.⁹² In addition, in *NZI Securities Ltd. v. Unity Group Ltd.*,⁹³ the High Court of New Zealand held 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."⁹⁴

Therefore, where an arranger also assumes the role of agent bank under a syndicated loan, careful consideration should be made of the relevant factual circumstances so as to ensure that:

- a) the right to the arranger fees does not accrue in consideration of any service or function performed by the arranger to the participant banks in its capacity as agent bank;
- b) as a temporal matter, any service or function performed by the arranger in that capacity has not merged with its separate role as agent bank or is otherwise continuing when the arranger assumes its role as agent bank;
- c) where possible, the arranger is paid any arranger fees prior to it becoming the agent bank under a syndicated loan; and
- d) appropriate contractual disclaimers are used to refute the existence of any fiduciary relationship between the parties.⁹⁵

In conclusion, this article assumes that an arranger whom also acts as the agent bank under a syndicated loan will not derive the benefit of the arranger fees in its capacity as agent bank. However, arrangers of syndicated loans should be mindful that if it is determined that the benefit to any arranger fees was enjoyed by an arranger in its capacity as agent bank and not as arranger of a syndicated loan, there is a risk that the said arranger will owe equitable duties to account to the participant banks for the receipt of such arranger fees procured in its capacity as agent for the participant banks.⁹⁶

92. *But see* Kennedy v. De Trafford, [1897] A.C. 180, 188 (Eng. H.L.) (Herschell LJ said "[a] person may be spoken of as an 'agent' . . . although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency, that use of the word is only misleading").

93. *NZI Sec. Ltd. v. Unity Group Ltd.* (Unreported, High Court of New Zealand, Wylie J, Feb. 11, 1992).

94. *Id.* at 19.

95. *See infra* Part V(A).

96. *See infra* Part IV(A).

C. *Observations on Arranger-Participant Bank Fiduciary Theory*

Given the reluctance on the part of common law courts to meaningfully describe the application of a fiduciary relationship to a commercial environment, it is decidedly difficult to describe the circumstances in which an arranger will be a fiduciary of the participant banks under a syndicated loan. Perhaps, as a starting point, the comments of Mason J in *Hospital Products* should be digested:

The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable [the Court] to make a generalisation that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.⁹⁷

This part provides this author's observations on which academic view should be preferred by Australian courts when confronted with the question of determining whether an arranger is a fiduciary of the participant banks under a syndicated loan, given current judicial trends.

1. "Arm's Length" Academic View—A Preferred Approach

It is generally accepted that a determination made by an Australian court of the nature of the relationship between an arranger and the participant banks will necessarily determine the existence and scope of any fiduciary relationship.⁹⁸ However, finding an established rule utilized by Australian courts to characterize the precise scope of the contractual, and possible equitable relationship between the relevant parties is far less certain.

Dal Pont and Chalmers suggest that a contractual relationship, such as the relationship between an arranger and the participant banks, could be examined by an Australian court with respect to whether or not the relationship exhibits any intrinsic fiduciary characteristics according to the following three-tiered approach:⁹⁹

- a) the contractual relationship between an arranger and the participant banks may in itself dictate that fiduciary duties should be superimposed on the pre-existing contractual duties under the syndicated loan in order to secure the requisite loyalty demanded by equity;¹⁰⁰

97. *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 156 C.L.R. 41, 100.

98. *See, e.g., News Ltd. v. Austl. Rugby Football League Ltd.* (1996) 139 A.L.R. 193, 312. *See also DAL PONT & CHALMERS, supra* note 3, at 4.25.

99. *DAL PONT & CHALMERS, supra* note 3, at 4.25-4.26.

100. *See, e.g., Hosp. Prods. Ltd., 156 C.L.R. at 99-100.*

- b) a contractual term may be so precise in its regulation of what an arranger can or cannot do vis-à-vis the participant banks that there is no scope for imposing any fiduciary duties;¹⁰¹ or
- c) the contractual relationship between an arranger and the participant banks may be capable of delineation where, with respect to some areas of conduct the arranger will owe fiduciary obligations to the participant banks but in respect to others, the arranger retains its inherent *laissez-faire* economic liberty.¹⁰²

As a general proposition, the existence and scope of fiduciary duties owed by an arranger to the participant banks will usually be determined by reference to the contract, whether express or implied, between the parties.¹⁰³ However, an Australian court must also take into consideration all of the circumstances that form the relevant relationship *inter se*.¹⁰⁴ Moreover, a court may choose to disregard the contractual covenants made between the parties in circumstances where the parties act in a manner that is contrary to such covenants, such as in the case of an estoppel.¹⁰⁵

While the High Court of Australia has imparted some guidance upon inferior courts as to the appropriateness of invoking a fiduciary relationship in a commercial environment,¹⁰⁶ the analysis undertaken by an Australian court as to the nature of the relationship between an arranger and the participant banks will necessarily vary on a case-by-case basis. Accordingly, subject to the existence of any special inequitable circumstances between the arranger and the participant banks,¹⁰⁷ the arm's length academic view should be preferred by an Australian court for at least the following reasons:

- a) it is generally accepted that participant banks are sophisticated and will enter into the syndicated loan and related relationships on the basis of their own skill

101. *Id.* at 98.

102. *See, e.g.*, *Breen v. Williams* (1996) 186 C.L.R. 71 (the High Court of Australia concluded that while the doctor-patient relationship has not traditionally been characterized as a fiduciary relationship, insofar as issues of loyalty are concerned, the doctor should not enter into an engagement that places his or her own interest, or a duty to a third party, in conflict with his or her duty to the patient).

103. *See, e.g.*, *Henderson v. Merrett Syndicates Ltd.*, [1994] 3 W.L.R. 761, 799 (Eng. H.L.).

104. *See, e.g.*, *Kelly v. C A & L Bell Commodities Corp.* (1989) 18 N.S.W.L.R. 248, 256.

105. *See, e.g.*, *Walton Stores (Interstate) Ltd. v. Maher* (1988) 164 C.L.R. 387.

106. *See, e.g.*, *Hosp. Prods. Ltd.* 156 C.L.R. 41; *Breen v. Williams* (1996) 186 C.L.R. 71.

107. *See infra* Part III(C)(2).

- and independent and carefully considered judgment. Participant banks enter into contracts at their own risk;
- b) as correctly articulated by O'Sullivan:

Whilst it is true that [participant banks] will frequently not have the same amount or quality of information as [an arranger], this is not because of the lack of availability of such information. In the usual case, participant banks not only have the means of acquiring knowledge but also are positively encouraged (by warnings in the information memorandum) to do so.¹⁰⁸

Accordingly, participant banks are usually encouraged by the arranger to undertake their own independent inquiries of the borrower and assessment of the relevant risks prior to entering into a syndicated loan, and do not otherwise rely solely upon the data set out in the information memorandum;¹⁰⁹

- c) as it is customary for the borrower to pay a fee to the arranger in consideration of it arranging the syndicated loan, it is arguable that participant banks will have knowledge of, or further will expect, the payment of such fees. This factor may serve to negative the existence of any possible fiduciary relationship;
- d) the arm's length academic view has been preferred in other common law jurisdictions, perhaps with the exception of the *UBAF* Court¹¹⁰ and the propensity of Canadian courts to expand the fiduciary principle in some cases,¹¹¹ whose judgments may be persuasive upon Australian courts.¹¹²

For example, in the United States, the relationship between an arranger and the participant banks under a

108. O'Sullivan, *supra* note 8, at 177.

109. This position may be strengthened if the participant banks contractually agree and acknowledge to the arranger that they are entering into the syndicated loan solely on the basis of their own skill and carefully considered judgment and not upon any representation, whether express or implied, made by the arranger.

110. *But see supra* Part III(B)(2), where it is argued that the decision in *UBAF* is unlikely to be binding or otherwise highly persuasive upon an Australian court.

111. *See, e.g.,* Standard Invs. Ltd. v. Can. Imperial Bank of Commerce, (1985) 52 O.R.2d 473 (the Ontario Court of Appeal held that a bank was a fiduciary of one of its customer by reason that it had provided some assistance and advice to the customer in respect to the customer's personal financial plans.) *But see* Breen v. Williams (1996) 186 C.L.R. 71; Carlin, *supra* note 23.

112. *See, e.g.,* Waghorn v. Waghorn (1942) 65 C.L.R. 289.

syndicated loan is not considered to be fiduciary in nature because the parties are sophisticated and contract at arm's length to one another.¹¹³ This approach was endorsed in *In re Colocotronis Tanker Securities Litigation*,¹¹⁴ where the New York Supreme Court held that, albeit in the context of a syndicated participation and not a syndicated loan,¹¹⁵ “[syndicated participation] agreements are arm's-length contracts between relatively sophisticated financial institutions and do not establish fiduciary relationships such as exist between the management of a corporation and the corporation's shareholders or even its debenture holders;”¹¹⁶

- e) participant banks generally understand that arrangers often have an existing relationship with the borrower, such as pre-existing loan facilities or a commercial day-to-day banking relationship, and expect the arranger to protect its interests so as to ensure that its rights are not subordinated to the participant banks to any greater extent than is required under the terms of the mandate letter.¹¹⁷ These pre-existing relationships may serve to negate the existence of any possible fiduciary relationship between the arranger and bank participants; and
- f) outside of any legal arguments, the practical effect of imposing a fiduciary relationship between an arranger and participant bank would be to place the arranger in a difficult, if not untenable, position with the borrower.¹¹⁸ Therefore, from a commercial perspective, if an arranger owed fiduciary duties to the participant banks under a syndicated loan, it is possible that the arranger may be unable to fully meet its

113. See, e.g., *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 819 F. Supp. 1282, 1296 (S.D.N.Y. 1993), aff'd, 57 F.3d 146 (2d Cir. 1995); *Banco Espanol de Credito v. Sec. Pac. Nat'l Bank*, 763 F. Supp. 36, 45 (S.D.N.Y. 1991), aff'd, 973 F.2d 51 (2d Cir. 1992). See also A. Mugasha, *Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts*, 45 WAYNE L. REV. 1789, 1807-13 (2000).

114. *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. 828 (S.D.N.Y. 1978).

115. See *supra* Part II(A).

116. *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. at 833.

117. O'Sullivan, *supra* note 8, at 177.

118. For example, the arranger could possibly owe fiduciary duties contemporaneously to the borrower and the participant banks which is impermissible at law. See *supra* note 82.

contractual, equitable or other ethical duties owed to the borrower and participant banks concurrently, including the preservation of the arranger's own commercial self interest, because of the inherent commercial and adversarial relationships formed by virtue of the syndicated loan.

2. Special Inequitable Circumstances

While this article contends that the arm's length academic view is to be preferred, Australian courts may be influenced by any underlying inequality, reliance, vulnerability or dependency¹¹⁹ that a participant bank may have upon the arranger prior to it entering into the syndicated loan. Accordingly, it is instructive to consider two cases on this point.

In *Natwest Australia Bank Ltd. v. Tricontinental Corporation Ltd.*¹²⁰ (hereinafter *Natwest*), the Supreme Court of Victoria was asked to consider where it was alleged that the participant bank was unfairly induced by the arranger into participating in the relevant syndicated loan on the false representation that the financial statements as set out in the information memorandum and provided by the arranger gave a true and fair value of the borrower at all material times.¹²¹ It was further alleged that the information memorandum provided by the arranger had failed to disclose certain pre-existing contingent liabilities of the borrower, including a guarantee granted by the borrower in favor of the arranger, and that disclosure of this information would have been important for the bank participant to know at the time of its assessment as to whether or not it should participate in the syndicated loan.¹²² The participant bank claimed that the representations made in relation to the financial statements and the failure to disclose the contingent liabilities as created by the guarantees amounted to conduct on the part of the arranger that was negligent at common law as well as misleading and deceptive, contrary to section 52 of the *Trade Practices Act, 1974* (Austl.) and section 11 of the *Fair Trading Act, 1974* (Vict.). Further, and in the alternative, the bank participant claimed that the arranger owed a

119. See, e.g., *LAC Minerals Ltd. v. Int'l Corona Res. Ltd.*, [1989] 2 S.C.R. 574 (the Court examined the "vulnerability" or "dependency" of the plaintiff).

120. *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993). Note that there is a parallel reported citation of the judgment in *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (1993) A.T.P.R. (Digest) 46-109. However, the unreported citation is preferred in this Article because it contains the substantive judgment of McDonald J and is not otherwise expressed in digest form. Moreover, there is no reference to the fiduciary argument in the reported judgment.

121. *Id.* at 7.

122. *Id.* at 8.

fiduciary duty to disclose all known facts relating to the affairs of the borrower that a prudent banker would regard as being relevant to the participant bank in making a decision whether or not to participate in the syndicated loan.¹²³ The arranger lodged a defense to these claims and also sought to rely upon the terms of an exclusion clause contained in the information memorandum.

The Court in *Natwest* found in favor of the participant bank on the grounds of negligence and statutory misleading and deceptive conduct on the part of the arranger. In addition, the Court refused to uphold the terms of the arranger's exclusion clause.¹²⁴ However, having made this finding, the Court declined to consider the alternative argument concerning the question of fiduciary status.

In another case, *Sumitomo Bank Ltd. v. Banque Bruxelles Lambert SA* (hereinafter *Sumitomo*),¹²⁵ the High Court of England and Wales held that an arranger had assumed responsibility for making certain disclosures under mortgage indemnity guarantee insurance policies obtained for the benefit of the participant bank, and that the arranger's failure to make such disclosures constituted a breach of its duty of care owed to the participant bank.¹²⁶ This finding was also contrary to the terms of an exclusion clause contained in the loan agreement.¹²⁷ However, again, the Court, in finding in favor of the participant bank directed its attention to establishing a breach of duty of care on the part of the arranger, and not the existence of a fiduciary relationship between the arranger and participant bank.

In conclusion, while the *Natwest* and *Sumitomo* Courts did not expressly address the question of relief in the context of a breach of fiduciary duty, it seems apparent that these Courts were influenced by the totality of the perceived inequitable circumstances surrounding the loss sustained by the relevant participant bank. For example, some commentators submit that the *Sumitomo* Court was influenced in its decision to find a breach of duty of care because the arranger, who was also the agent, obtained substantial arranger fees even though it only assumed minimal risk in the syndicated loan due to its limited participation.¹²⁸

Therefore, what may be discerned from these judgments, and

123. *Id.*

124. *See infra* Part V(A) (for an examination of the *Natwest* Court's finding in respect of the exclusion clause).

125. *Sumitomo Bank Ltd. v. Banque Bruxelles Lambert SA*, [1997] 1 Lloyd's Rep. 487 (Eng. Q.B.D. (Comm.)).

126. *See, e.g.*, Davies, *supra* note 63, at 185-86.

127. *See infra* Part V(A) (for an examination of the *Sumitomo* court's finding in respect of the exclusion clause).

128. *Id.*

possibly from the decision in *UABF*, is that a common law court may be willing to invoke fiduciary status in circumstances where a participant bank has entered into a syndicated loan solely or predominately on an inducement or representation made by the arranger, including on account of silence by the arranger, where that inducement or representation:

- a) constitutes a misrepresentation, is misleading or deceptive, or is caused by the arranger in breach of its duty of care to the participant bank; and
- b) causes the participant bank to be vulnerable to or at the mercy of the arranger or otherwise creates an inequitable set of circumstances, such as a gross apportionment of risk from the arranger to the participant banks, which may only be satisfactorily cured in equity.

IV. A Duty to Account Arranger Fees to the Participant Banks

The application of this part is largely predicated upon a determination by a court that an arranger is a fiduciary of the participant banks in connection with its receipt of arranger fees under a syndicated loan.¹²⁹ If the relationship between an arranger and the participant banks is characterized as fiduciary in nature, it is axiomatic that an arranger will owe certain equitable obligations to the participant banks with respect to its receipt of any arranger fees. However, even where an arranger is not characterized as a fiduciary of the participant banks, it is still possible that the arranger may be subject to criminal liability under Australian secret commissions legislation.

Therefore, assuming that a relevant court considers the arranger to be a fiduciary of the participant banks, this part examines the possible extent and impact that any equitable obligations or secret commission legislation may have upon an arranger with respect to its receipt of arranger fees under a syndicated loan.

A. Equitable Obligations of an Arranger

The equitable obligations of a fiduciary can be underscored by the classic statement of Lord Chelmsford in *Tate v. Williamson*.¹³⁰

Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the

129. See *supra* Part III.

130. *Tate v. Williamson*, (1866) L.R. 2 Ch. App. 55 (Eng. L.C.).

person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.¹³¹

The concerns propounded by the courts of equity with respect to one party's inherent vulnerability, dependency or reliance upon another person in circumstances that give rise to a fiduciary relationship has led to the development of two fundamental proscriptive equitable duties:

1. a fiduciary must not place its duty as a fiduciary in conflict with its own self interest unless the fiduciary has made full disclosure to its principal as to the exact nature and extent of such interest, and the principal has given its fully informed consent; and
2. a fiduciary must not make a profit out of its relationship with its principal unless the fiduciary has made full disclosure to its principal as to the exact nature and extent of such profit, and the principal has given its fully informed consent.¹³²

Based on these overarching equitable duties, two specific rules of equity have evolved that may affect the lawfulness of an arranger's receipt of arranger fees in circumstances where the arranger is a fiduciary of the participant banks under a syndicated loan. The possible application of these rules to an arranger of a syndicated loan are examined in detail, below.

1. Duty to Account for Unauthorized Profit

It is an equitable proscription of a fiduciary not to make "an unauthorized profit from the property over which the fiduciary has control or title or from knowledge acquired in the course of acting as a fiduciary."¹³³ In *Boardman v. Phipps*,¹³⁴ Lord Denning MR provided a classic treatise of this duty.

It is quite clear that if an agent uses *property*, with which he has been entrusted by his principal, so as to make a profit for himself out of it, without his principal's consent, then he is accountable for it to his principal. . . . So, also, if he uses a *position of authority*, to which he has been appointed by his principal, so as to gain money by means of

131. *Id.* at 61.

132. LexisNexis Butterworths OnLine, *Halsbury's Laws of Australia*, [15-175], available at www.Lexisnexis.com/au.

133. G. DAL PONT, LAW OF AGENCY 12.2 (2001). See also *Boardman v. Phipps*, [1965] Ch. 992, 1030-31 (Eng. C.A.) *aff'd* [1967] 2 A.C. 46; *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K.B. 11, 21 (Eng. C.A.).

134. *Boardman*, [1965] Ch 992.

it for himself, then also he is accountable to his principal for it. . . . Likewise with *information or knowledge* which he has been employed by his principal to collect or discover, or *which he has otherwise acquired*, for the use of his principal, the agent if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable . . . for such information or knowledge is the property of his principal, just as much as an invention is. . . .¹³⁵

Where a court has held that an agent unlawfully derived a profit from its principal without the knowledge or consent of its principal, a court must then assess the quantum of the unlawful profit so derived by having regard to all of the circumstances surrounding the agent's breach of fiduciary duties, including to what extent, if any, the unlawful profit was derived as a result of the agent's own skill, efforts and resources. This analysis was conducted in *Warman International Ltd. v. Dwyer*,¹³⁶ where the Full Court of the High Court of Australia held that it was appropriate for an agent to retain a proportion of the unlawful profits in issue because these profits had been largely generated by the skill, efforts and resources of the agent. Therefore, in some circumstances, an agent will not be required to hold on account of its principal all profits that flow its egregious action.¹³⁷

However, in the case of arranger fees, it would seem unlikely that a court would agree to only disgorge a portion of any arranger fees in favor of the participant banks because an arranger would have difficulty demonstrating that it had generated the arranger fees predominately as a result of its own skill, efforts and resources, and not solely by reason of the fact that it was agent of the participant banks. In an analogous example, the House of Lords in *Regal (Hastings) Ltd. v. Gulliver*¹³⁸ reasoned that:

the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and *only by reason of the fact* that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which have been made out of them.¹³⁹

Therefore, provided that an arranger is held to be a fiduciary of the participant banks at all relevant times, upon application of the strict unauthorized profit rule, it is likely that an arranger will be required to account to the participant banks for the entirety of any arranger fees it

135. *Id.* at 1018-19.

136. *Warman Int'l Ltd. v. Dwyer* (1995) 182 C.L.R. 544.

137. *See id.*

138. *Regal (Hastings) Ltd. v. Gulliver*, [1967] 2 A.C. 134 (Eng. H.L.).

139. *Id.* at 149 (emphasis added).

receives from a borrower under a syndicated loan, unless the participant banks have otherwise given their fully informed consent.¹⁴⁰

2. Duty Not to Be in Receipt of a Secret Commission

It is an equitable proscription of an agent not to secretly gain a financial or other advantage, otherwise known as a “secret commission,” for itself or a third party as a result of its exercise of authority as agent.¹⁴¹ The term “secret commission,” used interchangeably with the term “bribe” under English law,¹⁴² has been characterized as “a gift accepted by a fiduciary as an inducement to him to betray his trust.”¹⁴³

In *Peninsular and Oriental Steam Navigation Co. v. Johnson*,¹⁴⁴ Latham CJ clearly articulated the specific nature of the rule against the receipt of a secret commission by an agent.

If A is dealing with B through A’s agent C, that agent cannot, without disclosure to A, take an retain a commission received by him from B in respect of that dealing. It is immaterial that he takes it as agent for B. But, if A knows that the agent is obtaining a commission from B and consents, the position is then different.¹⁴⁵

The receipt of a secret commission by an agent is a *prima facie* breach of the agent’s fiduciary duties owed to its principal, regardless of whether or not the principal suffered harm,¹⁴⁶ unless the receipt of the commission was made with the fully informed consent of the principal. The strict nature of this rule is grounded in the fact that the receipt of a secret commission by an agent is deemed to adversely affect the agent’s loyalty owed to its principal; the fundamental hallmark of the agency relationship.¹⁴⁷ For example, in *Boston Deep Sea Fishing & Ice Co. v. Ansell*,¹⁴⁸ Bowen LJ characterized the receipt of a secret commission by an agent as:

a wrongful act, inconsistent with his duty towards his master and the

140. See, e.g., *Morison v. Thompson*, (1874) L.R. 9 Q.B. 480. See also *infra* Part V(B), in relation to obtaining the fully informed consent of the participant banks.

141. See, e.g., G. FRIDMAN, *LAW OF AGENCY* 181 (7th ed. 1996).

142. See, e.g., *Indus. & Gen. Mortgage Co. Ltd. v. Lewis*, [1949] 2 All E.R. 573, 575 (Eng. K.B.).

143. *Attorney Gen. for Hong Kong v. Reid*, [1994] 1 A.C. 324, 331 (P.C.N.Z.).

144. *Peninsular & Oriental Steam Navigation Co. v. Johnson* (1937) 60 C.L.R. 189.

145. *Id.* at 215.

146. See, e.g., *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch. D. 339, 365.

147. A fiduciary is “irrebuttably” presumed to be influenced away from his or her duties upon the receipt of a secret commission. See, e.g., *Hovenden & Sons v. Millhof* (1900) 83 L.T. 41, 43.

148. *Boston Deep Sea Fishing*, 39 Ch. D. 339.

continuance of confidence between them . . . whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all.¹⁴⁹

Therefore, provided that an arranger is held to be a fiduciary of the participant banks at all relevant times, it is also likely that an arranger will be required to account to the participant banks for the entirety of any arranger fees it receives from a borrower under a syndicated loan, unless the participant banks have given their fully informed consent.¹⁵⁰

B. *Secret Commissions Legislation*

Most Australian legislatures, excluding the Commonwealth¹⁵¹ and the Australian Capital Territory,¹⁵² consider that the receipt of a secret commission by an agent to be so repugnant that it is necessary to codify into the body of criminal law the equitable proscription that an agent not be in receipt of a commission lawfully due to its principal.¹⁵³

This part analyzes the scope of Australian legislation designed to criminalize the receipt or solicitation of a secret commission by an agent in certain circumstances and examines whether such legislation may affect the lawfulness of an arranger's receipt or solicitation of arranger fees from the borrower under a syndicated loan.

1. Regulatory Background

Broadly, the object of Australian secret commissions legislation remains largely consistent across all of the relevant jurisdictions and is aimed to prevent an agent from being placed into a position of

149. *Id.* at 363.

150. *See* *Regal (Hastings) Ltd. v. Gulliver*, [1967] 2 A.C. 134 (Eng. H.L.).

151. On May 24, 2001, the former Secret Commissions Act, 1905 (Austl.) was repealed by the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act, 2000 (Austl.), which also had the effect of amending the Criminal Code (Austl.) (promulgated under the Criminal Code Act, 1995 (Austl.)) by inserting new offenses in relation to unlawful benefits received by public officials and false or misleading statements or accounts made by an agent with the intent to defraud its principal). *See* Criminal Code (Austl.) §§ 142.1, 145.4-145.5.

152. Pursuant to the *Seat of Government (Administration) Act, 1910* (Austl.), any Commonwealth secret commissions legislation existing from time to time will apply to the Australian Capital Territory.

153. *See* Crimes Act, 1958 (Vict.); Crimes Act, 1900 (N.S.W.); Secret Commissions Prohibition Act, 1920 (S. Austl.); Criminal Code (Queensl.) (promulgated under the Criminal Code Act, 1899 (Queensl.)); Criminal Code (Tas.) (promulgated under the Criminal Code Act, 1924 (Tas.)); Criminal Code (W. Austl.) (promulgated under the Criminal Code Act Compilation Act, 1913 (W. Austl.)); Criminal Code (N. Terr.) (promulgated under the Criminal Code Act, 1983 (N. Terr.)).

temptation¹⁵⁴ by prohibiting the receipt or solicitation of a secret commission from persons who have business relations with its principal.¹⁵⁵

However, the regulatory dichotomy of secret commissions legislation in Australia does vary from jurisdiction to jurisdiction. With the exception of South Australia which has adopted its own *sui generis* legislation, Australian State and Territory secret commissions legislation is incorporated into the general criminal law legislation of each relevant jurisdiction.¹⁵⁶ The secret commissions legislation of Victoria,¹⁵⁷ Queensland,¹⁵⁸ South Australia¹⁵⁹ and Western Australia¹⁶⁰ tends to follow the same basic legislative schema. By contrast, while adopting a different legislative approach to that of the foregoing jurisdictions, the secret commissions legislation of New South Wales¹⁶¹ and Tasmania¹⁶² remains substantially similar in its structure. However, the Northern Territory¹⁶³ has couched its secret commissions legislation in simpler terms to that under the abovementioned jurisdictions.¹⁶⁴

Given that it is impractical to undertake an individual analysis of each piece of Australian secret commissions legislation, this article examines the secret commissions legislation promulgated under the *Crimes Act, 1958* (Vict.) (hereinafter *Crimes Act*) as being largely representative of the Australian statutory position in relation to the receipt of secret commissions by agents.

2. The Offense

Section 176(1) of the *Crimes Act* sets out the offense relating to the unlawful receipt by an agent of certain benefits on account of its principal's business, as follows.

Whosoever being an *agent corruptly* receives or solicits from any person for himself or for any other person any *valuable consideration*:

154. See, e.g., *R v. Wellburn, Nurdin & Randel* (1979) 69 Crim. App. R. 254, 265.

155. See, e.g., *R v. Keane* (1920) 30 N.S.W. St. R. 63, 64. See generally DAL PONT, *supra* note 133, at 14.1.

156. See *supra* note 151.

157. *Crimes Act, 1958* (Vict.) § 176.

158. *Criminal Code* (Queensl.) § 442A.

159. *Secret Commissions Prohibition Act 1920* (S. Austl.) § 5

160. *Criminal Code* (W. Austl.) § 546.

161. *Crimes Act, 1900* (N.S.W.) § 249B.

162. *Criminal Code* (Tas.) § 266.

163. *Criminal Code* (N. Terr.) § 236.

164. See DAL PONT, *supra* note 133, at 14.2.

- a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his *principal's affairs or business*; or
- b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his *principal's affairs or business*;

shall be guilty of an indictable offence (emphasis added).

A successful prosecution under section 176(1) of the *Crimes Act* must satisfy certain inclusive indicia. These indicia are considered in detail in this part with respect to their possible application to an arranger on account of its receipt of arranger fees under a syndicated loan.

(a) Arranger as an "Agent"

Section 175(1) of the *Crimes Act* defines "agent" inclusively to include, as is relevant to this article, "any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any corporation or other person whether as . . . banker . . . or in any other capacity."

The definition of agent set out in the *Crimes Act* is significantly broader in its scope than any common law construction of the same term.¹⁶⁵ In addition, the statutory extension of the definition of "agent" to a person "*having been acting . . . or intending to act . . . for or on behalf of any corporation . . .*" (emphasis added) circumvents any argument that an agent had only received its secret commission before the relevant agent commenced or after the relevant agency was terminated.¹⁶⁶ Accordingly, in the context of arranger fees, this may have the effect of capturing any arranger fees received by an arranger after it had ceased its role as arranger under a syndicated loan, such as by assuming a role as agent bank.¹⁶⁷

However, despite the broad statutory construction of the term "agent" under the *Crimes Act*, a relevant court, when confronted with a question of determining whether or not an arranger is an "agent" for the purposes of the *Crimes Act*, must have regard to the complete circumstances surrounding the arranger's relationship to the participant banks, including any factual circumstances that suggest:

165. See, e.g., *R v. Gallagher* [1986] V.R. 210, 224.

166. See, e.g., *The King v. Brewer* (1942) 66 C.L.R. 535.

167. See *supra* Part III(B)(4)(b).

- a) the arranger may not have been acting on behalf of the participant banks at the time that it solicited funding commitments from the participant banks; or
- b) the arranger procured the funding commitments from the participant banks in its capacity as common law agent of the borrower.

In conclusion, while it can be argued that an arranger is not the agent of the participant banks under a syndicated loan at common law, it is still possible that an arranger could be the statutory “agent” of the participant banks for the purposes of section 175(1) of the *Crimes Act*.

(b) Meaning of “Corruptly”

The requirement that the agent acts “corruptly” when it receives or solicits the relevant secret commission is the core indicia necessary to establish the offense created under section 176(1) of the *Crimes Act*.

Unfortunately, Australian and English case law has not clearly articulated the precise meaning of the term “corruptly” for the purposes of secret commissions legislation. Early case authority suggested that the term “corruptly” is equivalent to the term “dishonestly.”¹⁶⁸ However, this analysis created academic disagreement as to whether the terms are in fact legally synonymous or whether the term “dishonestly” imports a higher standard.¹⁶⁹ Fortunately, modern authority has overcome these difficulties by adopting a more flexible approach. Australian and Canadian courts have determined that an act undertaken “corruptly” is analogous to an act undertaken in a manner that is prohibited by statute where the actor has a wrongful intention,¹⁷⁰ an evil mind¹⁷¹ or *mala fides*.¹⁷² For example, in *R v. Dillon and Riach*,¹⁷³ the Supreme Court of Victoria held that “an agent does act corruptly if he receives a benefit in the belief that the giver intends that it should influence him to show favour in relation to the principal’s affairs.”¹⁷⁴ Moreover, in *R v. Gallagher*,¹⁷⁵ the Full Court of the Victorian Supreme Court stated that “it is the intention of the person either giving or receiving, as the case may be, at the time of the passing of the consideration which is relevant to whether the behavior charged was corrupt within the meaning of the

168. See, e.g., *C v. Johnson* (1967) S.A. St. R. 279; *R v. Calland* [1967] Crim. L.R. 236.

169. See, e.g., DAL PONT, *supra* note 133, at 14.12-14.13.

170. See, e.g., *R v. Jamieson* (1988) V.R. 879, 833.

171. See, e.g., *R v. Worthington* (1921) V.L.R. 660, 673, 682-84.

172. See, e.g., *R v. Goss* (1946) O.R. 1, 9.

173. *R v. Dillon & Riach* (1982) V.R. 434.

174. *Id.* at 436 (emphasis added).

175. *R v. Gallagher* (1987) 29 A. Crim. R. 220.

section.”¹⁷⁶

As postured by Dal Pont, “it is the intention, or perhaps more accurately the belief,¹⁷⁷ of the person either giving or receiving, as the case may be, at the time of the passing of consideration which is relevant to whether or not the behavior charged is corrupt.”¹⁷⁸ Therefore, according to Dal Pont, it is not necessary that the prohibited act “actually” corrupts the intended party; what is important is that the relevant actor held the “belief” that benefit would corrupt the intended party.

The difficulties associated with a determination of what constitutes “corruptly” had been overcome in the Commonwealth and Australian Capital Territory¹⁷⁹ under the former *Secret Commissions Act, 1905* (Austl.). By contrast, the *Secret Commissions Act, 1905* (Austl.) replaced the onus of a court to determine whether or not a bargain was made “corruptly” with a determination of whether or not the commission was procured without the full knowledge or consent of the principal. However, even though the *Crimes Act* does not expressly require a court to consider whether an agent obtained the fully informed consent of its principal prior to its receipt of a commission, it would seem apparent that an agent could not be acting in a “corrupt” manner for the purposes of the *Crimes Act* if it received a commission for its own account with the fully informed consent of its principal.¹⁸⁰

On balance, this approach seems to be consistent with that taken by the Victorian Supreme Court in *R v. Jamieson*,¹⁸¹ where Young CJ stated that a person acts corruptly:

If he made a payment to a person intending that its receipt should influence the person being an agent of the requisite character, to show favour to the giver in relation to the affairs of his principal. It is not possible to import into that element a requirement that it be established in addition that the giver intended to conceal the nature of the payment from the agent’s principal, although it is difficult to imagine a case in which the maker of a payment to an agent could be found to have acted corruptly if he had *informed* the agent’s principal

176. *Id.* at 230.

177. In *R v. Gallagher* (1987) 29 A. Crim. R. 33, 35, the Victorian Court of Criminal Appeal determined that the formulation of the meaning of “corruptly,” so far as the recipients of a secret commission are concerned, “refers to belief and it is not to be thought that the formulation was intended to require knowledge.”

178. DAL PONT, *supra* note 133, at 14.13.

179. *See supra* note 151.

180. *Contra R. v. Scott* [1907] V.L.R. 471 (authority for the principle that the mere fact that a secret commission has been given raises the presumption it was given corruptly).

181. *R. v. Jamieson* [1988] V.R. 879.

of the payment.¹⁸²

In conclusion, a court's assessment of whether a person held a requisite belief at a particular point of time is factual in nature.¹⁸³ In circumstances where the alleged offender is a corporation, it is the intention of the corporation's officers that determines whether the corporation acted corruptly.¹⁸⁴ Therefore, in the context of a receipt of arranger fees by an arranger, a court must inquire as to whether or not the relevant corporate officer of the arranger held a "belief" at the time of its receipt of the arranger fees that such fees were given by the borrower as a reward for or on account of doing an act by the arranger in relation to the participant bank's affairs or business, such as the arrangement of the syndicated loan. The merits of this later point are considered in further detail in Part V(C)(2)(d) below.

(c) Meaning of "Valuable Consideration"

Section 175(1) of the *Crimes Act* broadly defines the receipt of "valuable consideration" by a person as "any acceptance of any agreement, promise or offer to give and of any holding out of any expectation of *valuable consideration*" (emphasis added). The term "valuable consideration" is broadly defined to include, among other things, "money."

Therefore, it would appear evident that the acceptance by an arranger of arranger fees in the form of money would constitute valuable consideration for the purposes of section 175(1) of the *Crimes Act*. This position remains unaffected notwithstanding that it may be customary in any relevant trade or calling that valuable consideration be paid to the arranger.¹⁸⁵ For example, even though it is industry practice that an arranger be paid arranger fees by the borrower, a fact of which the participant banks would be aware, an arranger cannot rely upon this custom as a valid defense in respect to its receipt of valuable consideration.

(d) A "Reward for Doing Any Act in Relation to His Principal's Affairs or Business"

Section 176(1)(a) of the *Crimes Act* requires, as is relevant to this article, that the secret commission in issue be received by the agent "as an inducement or reward for or otherwise on account of doing . . . or

182. *Id.* at 883 (emphasis added).

183. *See, e.g.*, *R v. Gallagher* (1987) 29 A. Crim. R. 33.

184. *See, e.g.*, *Morgan v. Babcock & Wilcox Ltd.* (1929) 43 C.L.R. 163, 173-74.

185. *Crimes Act*, 1958 (Vict.) § 186(1).

having done . . . any act in relation to his principal's affairs or business." The term "principal" is defined in section 175(1) of the *Crimes Act* as including "a corporation or other person for or on behalf of whom the agent acts, has acted, or is desirous or intending to act." The meaning of "for or on behalf of" becomes important in determining whether or not the participant banks are severally the arranger's principal. This phrase was considered by the High Court of Australia in *re Ross ex parte A-G for the Northern Territory*,¹⁸⁶ where the Court stated that:

the phrase "on behalf of" is as Latham CJ observed in *R v. Portus ex parte Federal Clerks Union of Australia* (1949) 79 C.L.R. 428 at 435 "not an expression that has a strict legal meaning," it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or a representative of another person or thing.¹⁸⁷

Therefore, in the context of the receipt of arranger fees by an arranger, a court must determine whether or not:

1. The arranger has the requisite connection with the participant banks so as to constitute a relationship under the *Crimes Act* that will result in criminal liability; and
2. The acts undertaken by the arranger in connection with its procurement of arranger fees, such as the solicitation of funding commitments from the participant banks, were made in relation to the affairs or business of the participants banks.

On the assumption that an arranger is the agent of the participant banks for the purposes of the *Crimes Act*, two contrary arguments can be raised in respect to whether or not the arranger fees received by the arranger constitute a reward from the borrower for arranging the syndicated loan (being the relevant task undertaken in relation to the participant banks' affairs or business):

1. Depending upon the nature of business ordinarily undertaken by the participant bank in question, it may be arguable, on a broad construction, that the business of arranging syndicated loans also constitutes the business of the relevant participant bank; or conversely
2. It may be arguable that a court should take into account the fact that at the time the arranger performed the relevant "act" for the purposes of the *Crimes Act*, being the

186. *Re Ross ex parte A-G for Northern Territory* (1980) 54 A.L.J.R. 145.

187. *Id.* at 149.

solicitation of funding commitments from the participant banks, none of the participant banks had a mandate from the borrower to perform this function, and thus, on a narrow construction, the relevant “act” did not constitute or form part of the participant banks’ affairs or business.

Unfortunately, the merits of these arguments have not been tested by an Australian court and remain subject to a factual determination on a case by case basis.

3. Possible Application of Secret Commissions Legislation to Arrangers of Syndicated Loans

The possible application of secret commissions legislation to the receipt by an arranger of arranger fees from a borrower under a syndicated loan has caused great concern to a number of commentators.¹⁸⁸ The possible impost of Australian secret commissions legislation to the receipt of arranger fees gives rise to two primary concerns.

First, there is a concern that the language of the relevant secret commissions legislation is sufficiently broad to characterize an arranger as agent of the participant banks under a syndicated loan and, therefore, render any arranger fees received by the arranger as an unlawful secret commission. It would appear upon a literal interpretation of section 176(1) of the *Crimes Act*, as analyzed in Part V(C)(2) above, that this concern may *prima facie* be justified.

Second, as a corollary to the first concern, arranger fees held to be a secret commission by a court will not only result in an arranger having to account for such fees in favor of the participant banks, but will result in the arranger sustaining criminal liability.¹⁸⁹ It is possible for an arranger to mitigate against any prospective criminal liability by obtaining the fully informed consent of the participant banks.¹⁹⁰ However, this eventuality is likely to be commercially unrealistic because an arranger will be loath to disclose in any way to the participant banks the full amount and details of its arranger fees.¹⁹¹

As a matter of procedure, it is important to note that where it has been “proved that any valuable consideration has been receive[d] . . . by the agent from . . . any person having business relations with the

188. See, e.g., Bostock, *supra* note 78, at 44-7; O’Sullivan, *supra* note 8, at 181.

189. The pecuniary penalty for a corporation guilty of an offense under section 176 of the *Crimes Act*, 1958 (Vict.) is 1,200 penalty units (equivalent to A\$122,700). See *Crimes Act*, 1958 (Vict.) § 176.

190. See *supra* Part IV(B)(2)(b).

191. See *infra* Part V(B) for a discussion on the disclosure defense to the receipt of a secret commission by an arranger.

principal without the assent of the principal” the agent has the burden of proving that the receipt of the relevant commission was not unlawful.¹⁹² This rule not only modifies the general law position which requires the Crown to prove every element of an offense, but it absolves the Crown from its burden to prove that the accused had the requisite *mens rea* provided that the other necessary indicia of the offense are proven.¹⁹³ Therefore, an arranger which is the subject of a prosecution under section 176(1) of the *Crimes Act* will have the burden of proving that its receipt of arranger fees was not unlawful.

While a court’s analysis will vary on a case by case basis, it is submitted that the better view is that the procurement and receipt of arranger fees by an arranger under a syndicated loan should not, in ordinary circumstances, be considered as a proscribed secret commission under Australian secret commissions legislation for at least the following reasons:

- a) the arranger should not be characterized as the agent of the participant banks for the purposes of Australian secret commissions legislation because either:
 - (i) the terms, whether express or implied, of the mandate letter or term sheet, as the case may be, should be broad enough to create an agency relationship between the borrower and the arranger and not as between the arranger and the participant banks; or
 - (ii) the conduct of the arranger when procuring the funding commitments from the syndicate should otherwise indicate that the arranger is acting as agent for the borrower and not the participant banks; and
- b) the arranger’s mandate by the borrower to solicit funding commitments from the participant banks is an isolated business transaction that should not constitute or otherwise form part of the participant banks’ affairs or business generally. In other words, on a narrow construction, it is not the affairs or business of the participant banks to procure the borrower’s mandate in issue because this mandate has already been conferred upon the arranger.

192. Crimes Act, 1958 (Vict.) § 186(2).

193. The rationale for this rule was expressed in *R v. Jamieson* (1988) V.R. 879, where Young CJ stated “it was seen as fair to require an agent who received a payment to satisfy the jury that he received it with an honest purpose as to require a person found in possession of stolen property to prove that he had come by it honestly.”

In conclusion, given that these questions have not been tested by an Australian court, it is not entirely clear as to whether or not the receipt of arranger fees by an arranger, in circumstances where such fees are not fully disclosed to the participant banks, will amount to the solicitation or receipt of an unlawful secret commission. Therefore, to the extent that it is commercially palatable, a prudent arranger should appropriately document the relevant relationships and adequately disclose its receipt of arranger fees to the participant banks so as to mitigate any prospective criminal liability.¹⁹⁴

V. Mitigating the Risk of a Fiduciary Relationship and the Duty to Account for Arranger Fees

While this article contends that an arranger should not, in ordinary circumstances, be characterized as a fiduciary of the participant banks under a syndicated loan,¹⁹⁵ the risk that an Australian court, being largely representative of other common law jurisdictions, will not consider an arranger to be the fiduciary of the participant banks under a syndicated loan cannot altogether be ruled out. Therefore, to the extent that it is commercially acceptable, a prudent arranger should endeavor to mitigate the risk of an adverse characterization that the arranger is a fiduciary of the participant banks specifically or potential legal exposure to account for any arranger fees it may receive from the borrower in favor of the participant banks generally. This part examines certain commercial techniques that may be available to an arranger in order for it achieve these goals.

A. Exclusion Clauses

A prudent arranger may mitigate the risk of an adverse construction that the arranger is a fiduciary of the participant banks through the utilization of an appropriate contractual disclaimer.¹⁹⁶ Halsbury's Laws of Australia states the general principal of Australian law in relation to the contractual exclusion or modification of fiduciary obligations as follows.

194. See *infra* Part V.

195. See *supra* Part III(C).

196. For example, the standard loan documentation of the Asia-Pacific Loan Market Association provides for the following contractual disclaimer:

No Fiduciary Duties: (a) Nothing in this Agreement constitutes the Agent or the Arranger as a trustee or fiduciary of any other person. (b) Neither the Agent nor the Arranger shall be bound to account to any Lender for any sum or the profit element of any sum received by it for its own account.

Asia-Pacific Loan Market Association at <http://www.aplma.com> (last visited May 30, 2005).

Where the fiduciary duties arise in whole or in part from a contract . . . the instrument which is the source of fiduciary obligation may relieve a fiduciary from liability for what would otherwise be a breach of duty or provide a mechanism whereby the fiduciary may satisfy the requirements of informed consent in some pre-agreed way.¹⁹⁷

Under Australian law, the efficacy of an arranger's reliance upon an exclusion clause would appear to be consistent with the *obiter dicta* of Mason J in *Hospital Products* where he said that the "fiduciary relationship must accommodate itself to the terms of the contract so that it is consistent with and conforms to them," and that "a fiduciary relationship cannot be superimposed on the contract in such a way as to alter the operation which the contract was intended to have according to its own true construction."¹⁹⁸

Therefore, subject to ordinary contractual principles, provided that an arranger can demonstrate that at the time of acceptance of the exclusion clause the relevant participant bank had sufficient knowledge of the existence and scope of the exclusion clause and otherwise accepted it on the basis of informed consent, the arranger may *prima facie* rely upon the disclaimer or waiver of liability conferred thereunder, subject to the following qualifications:¹⁹⁹

- a) an exclusion clause will be interpreted *contra proferentem* by a court against the person seeking to rely upon it, such as the arranger.²⁰⁰ However, unlike the *Unfair Contract Terms Act, 1977* (U.K.), Australia does not have any equivalent legislation granting relief in favor of a corporation, such as a participant bank, that allows a court to read down an exclusion clause on the grounds that it is harsh or unjust;²⁰¹

197. LexisNexis Butterworths OnLine, *Halsbury's Laws of Australia*, [185-804], available at www.Lexisnexis.com/au. See also, e.g., *Queensl. Mines Ltd. v. Hudson* (1978) 18 A.L.R. 1.

198. *Hosp. Prods. Ltd. v. U.S. Surgical Corp.* (1984) 58 A.L.J.R. 587, 609. See also *Queensl. Mines Ltd.* 18 A.L.R. 1.

199. *But see* GLOVER, *supra* note 27, at 3.30 (cautions that "courts would be slow to give [exclusion clauses] the effect that a fiduciary might intend for them" and "[d]rafting an [exclusion clause] to cover more than the simplest breaches of fiduciary duty would be difficult").

200. See, e.g., *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73; *Darling Future Ltd. v. Delco Austl. Pty Ltd.* (1986) 161 C.L.R. 500.

201. The *Contracts Review Act, 1980* (N.S.W.) is similar in operation to that of the *Unfair Contract Terms Act, 1997* (U.K.) but does not grant relief in favor of a corporation, such as a participant bank. See Bhattacharyya, *supra* note 63, at 261-62, for a discussion of the efficacy of an exclusion clause under the *Unfair Contract Terms Act, 1977* (U.K.) to exclude an arranger's liability for negligence under an information

- b) not all fiduciary obligations are capable of exclusion by agreement, such as in the case of fraud²⁰² or possibly negligence.²⁰³ For example, the Supreme Court of Victoria in *Natwest* refused to give effect to an exclusion clause for the benefit of the arranger in the case of negligence under an information memorandum. The Supreme Court of Victoria in *Natwest* stated that “the fact that the information memorandum contained . . . a disclaimer . . . does not, to my mind, create a circumstance that would otherwise prevent [the arranger] being under a duty to disclose the existence of the subject guarantees or limit that duty in some way.”²⁰⁴ Similarly, the High Court of England and Wales in *Sumitomo* held that, despite the existence of an exclusion clause, an arranger had assumed responsibility for making certain disclosures under mortgage indemnity guarantee insurance policies obtained for the benefit of the participant banks in its capacity as arranger and that its failure to make such disclosures constituted a breach of its duty of care owed to the participant banks which could not be excluded under the terms of the exclusion clause relating to its capacity as agent bank. Of relevance, the *Sumitomo* Court stated that “[t]he [exclusion clause] looks to the future role of the agent, not to the past relationship of the parties;”²⁰⁵ (such as its former capacity as arranger); and
- c) certain liability arising under statute, such as misleading or deceptive conduct under section 52 of the *Trade Practices Act 1974* (Austl.)²⁰⁶ or criminal conduct under Australian secret commissions legislation.²⁰⁷

While in a different context to the receipt by an arranger of arranger

memorandum.

202. See, e.g., *Boyd & Forrest v. Glasgow & S. W. Ry. Co.* [1915] S.C. 20, 35-6.

203. See, e.g., *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993). But see *Re City Equitable Fire Ins. Co. Ltd.* [1925] Ch. 407.

204. *Natwest Austl. Bank Ltd. v. Tricontinental Corp. Ltd.* (Unreported, Supreme Court of Victoria, McDonald J, July 26, 1993) at 82.

205. *Sumitomo Bank Ltd. v. Banque Bruxelles Lambert SA*, [1997] 1 Lloyd's Rep. 487, 493.

206. Provides for a similar cause of action to that of common law negligence.

207. See, e.g., *Crimes Act, 1958* (Vict.) § 176.

fees, common law and United States courts have upheld the efficacy of exclusion clauses that purport to exclude fiduciary obligations under a syndicated loan transaction. For example, in *NZI Securities Ltd. v. Unity Group Ltd.*,²⁰⁸ the High Court of New Zealand held that the fiduciary obligations created under the transaction documents to a syndicated loan were capable of contractual modification and confinement. In another case, *UniCredito Italiano SPA v. JPMorgan Chase Bank*,²⁰⁹ the United States District Court for the Southern District of New York held that the agent bank was entitled to rely upon the exclusion clause under the transaction documents, which excluded it from liability arising from a failure by the agent bank to disclose certain information to the participant banks.²¹⁰

In conclusion, while not free from doubt, it is arguable that an arranger may contractually exclude its fiduciary obligations with respect to its receipt of arranger fees provided that it appropriately obtains the informed consent and acceptance of the terms of the relevant exclusion from each participant bank. An arranger may obtain the requisite consent and acceptance from each participant bank by inserting a suitable contractual provision into the term sheet or the mandate letter to which the other participant banks are a party.²¹¹

B. Disclosure Defense

It may also be possible for a prudent arranger to mitigate its legal exposure, whether arising in equity or under Australian secret commissions legislation, to account for any arranger fees in favor of the participant bank by making an appropriate disclosure to the participant banks of its receipt of arranger fees.

As a general principle, the equitable and statutory proscription against an agent's receipt of unauthorized profits or secret commissions²¹² can be negated provided that the agent obtained the benefit of the commission with the fully informed consent of its principal. This rule was clearly articulated by Lord Hodson in the seminal case *Boardman v. Phipps*.²¹³

Nothing short of fully informed consent which the learned judge

208. *NZI Sec. Ltd. v. Unity Group Ltd.* (Unreported, High Court of New Zealand, Wylie J, Feb. 11, 1992).

209. *UniCredito Italiano SPA v. JP Morgan Chase Bank*, 288 F. Supp. 2d 485 (S.D.N.Y. 2003).

210. See, e.g., B. Taylor, *Fiduciary Duties of Security Trustees and Agents*, 20 AUSTL. BANKING & FIN. L. BULL. 2, 22-3 (2004).

211. See *Re Ross ex parte A-G for Northern Territory* (1980) 54 A.L.J.R. 145.

212. See *supra* Part IV.

213. *Boardman v. Phipps*, [1967] 2 A.C. 46.

found not to have been obtained could enable the appellants in the position which they occupied having taken the opportunity provided by that position to make a profit for themselves.²¹⁴

The rationale for this rule is that once a principal has full knowledge of the receipt by its agent of a relevant commission, the principal will subsequently act with knowledge of that commission's possible influence upon its agent. Accordingly, in these circumstances, a principal is afforded the opportunity to, among other things, instruct its agent to cease dealing with the payer of the commission or to seek independent advice on the matter in issue.²¹⁵

Under current Australian and English law, the strict disclosure obligations of a fiduciary are considered "proscriptive" and not "prescriptive" in nature.²¹⁶ In *Breen v. Williams*, Gaudron and McHugh JJ stated "the law of [Australia] does not . . . impose positive legal duties on the fiduciary to act in the interests of the person to who the duty is owed."²¹⁷ These sentiments were also expressed by Woolf MR in *Attorney-General v. Blake*, who said "[fiduciary obligations] tells the fiduciary what he must not do. It does not tell him what he ought to do."²¹⁸

Accordingly, while Australian courts have denied the imposition of prescriptive duties via the fiduciary principle on the basis that to do so would cause equity to encroach upon the domain of contract and tort law, it is suggested that the duty is in practice an adjunct to the prescriptive rule couched in negative terms. For example, in *Fitzwood Pty. Ltd. v. Unique Goal Pty. Ltd. (in liq)*, Finkelstein J expressed the position as follows:

[that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on a fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest, or the duty not to make a secret profit.²¹⁹

An agent may avail itself of the disclosure defense by satisfying two

214. *Id.* at 109.

215. *See, e.g.*, DAL PONT, *supra* note 133, at 12.7.

216. *See, e.g.*, *Breen v. Williams* (1996) 186 C.L.R. 71; *Attorney-Gen. v. Blake*, [1998] Ch 439. *See also generally* A. Abadee, *A Fiduciary's Obligation to Disclose in a Commercial Setting*, 29 AUSTL. BUS. L. REV. 32 (2001); T. Cockburn, *Fiduciary Disclosure Obligations in Contracting*, 26 QUEENSL. L. SOC'Y J. 511 (1996); Carlin, *supra* note 23.

217. *Breen v. Williams* (1996) 186 C.L.R. 71, 113.

218. *Attorney-Gen. v. Blake*, [1998] Ch. 439, 455.

219. *Fitzwood Pty. Ltd. v. Unique Goal Pty. Ltd. (in liq)* (2001) 188 A.L.R. 566m 576.

inclusive indicia. First, the agent must make disclosure of the commission to its fiduciary. Second, the agent must make an adequate disclosure of the particulars of the commission to its fiduciary. This part examines the application of each of these indicia in respect to the receipt of arranger fees by an arranger under a syndicated loan.

1. To Whom Should Disclosure Be Made?

Disclosure must be made by the agent to the person or entity to whom it owes fiduciary duties.²²⁰ Where the fiduciary is a corporation, such as in the case of most, if not all, participant banks, there is conjecture as to whom may validly receive notice of the disclosure on behalf of the corporation.²²¹ However, it is submitted that should an arranger make a disclosure to an appropriate senior officer of the participant bank, such as an "Executive Director" or "Vice-President," that disclosure should be sufficient to have been deemed to have been made upon the participant bank corporation.

2. What Should Be Disclosed?

As a general principle, in order for an agent to satisfy its obligation of, among other things, loyalty,²²² the agent must make a "full and frank disclosure of all material facts" in connection with its receipt of a commission on behalf of its principal.²²³ However, an agent is only required to disclose to its principal all relevant and material facts to the agent's knowledge and is not otherwise required to make further prudent inquiries.²²⁴

Despite the requirement of strict disclosure by an agent, the nature and extent of such disclosure will often depend upon the individual circumstances of the case. As a consequence, common law courts have had difficulty applying a base standard of disclosure when asked to consider the adequacy of disclosure to a fiduciary in a particular case.

In *Grantwell Pty Ltd. v. Franks* (hereinafter *Grantwell*)²²⁵ the Full Court of the Supreme Court of South Australia applied a strict approach to certain failed disclosures of a real estate agent pertaining to the value and sale of certain properties. The Court held that even though the agent

220. See, e.g., *DPC Estates Pty Ltd. v. Grey & Consul Dev. Pty Ltd.* (1974) 1 N.S.W.L.R. 443, 466.

221. See generally GLOVER, *supra* note 27, at 5.110, in an analogous discussion of a corporate officer's ratification of a breach of fiduciary duties on behalf of its corporation.

222. See generally DAL PONT & CHALMERS, *supra* note 3, at 4.10.

223. See, e.g., *Anglo-African Merchs. Ltd. v. Bayley*, [1970] 1 Q.B. 311, 322. See generally GLOVER, *supra* note 27, at 5.131.

224. See, e.g., *BLB Corp. of Austl. Est v. Jacobsen* (1974) 48 A.L.J.R. 372, 378.

225. *Grantwell Pty Ltd. v. Franks* (1993) S.A. St. R. 390.

had disclosed to his principals that the properties in issue were indirectly owned by him via two corporations, the agent was in breach of his fiduciary duties because he had specifically omitted to disclose the fact that “the [sale] price was greatly in excess of the price paid by the [agent’s corporations] the year before [to acquire the properties]” and that “persistent efforts to sell [by the agent’s corporations] at the [sale] price had been unsuccessful.”²²⁶

In another case, *BLB Corporation of Australia Est v. Jacobsen* (hereinafter *BLB*),²²⁷ the High Court of Australia took a less prescriptive approach in its determination of the degree of disclosure required by an agent to its principal. The Court concluded that even though the agent had failed to specifically disclose his ninety percent shareholding interest in a customer of his principal, which customer subsequently became insolvent, the facts indicated that the principal had at all times a “comprehensive picture” of the agent’s interest in that customer. Therefore, the Court held that the disclosure made by the agent was sufficient to satisfy his fiduciary duties owed to the principal and that the principal had impliedly consented to the disclosure.²²⁸

In a further case, *Advanced Realty Funding Corp. v. Bannink* (hereinafter *Advanced Realty*),²²⁹ the Ontario Court of Appeal considered the degree of disclosure required by a mortgage broker engaged by a prospective borrower in respect to its receipt of a “finder’s fee,” a situation perhaps analogous to that of the receipt of arranger fees by an arranger. Of relevance to this article, the Court made the following finding:

This judgment does not mean that a mortgage broker is never entitled to collect a finder’s fee. It does mean that it is not sufficient to bury a reference to a finder’s fee in a rather ambiguous sentence in the midst of its contract for fees and commission. If a broker expects or intends to receive a finder’s fee, he has a *positive* obligation to explain this to his client, indicate the amount of it or how it is to be calculated (if this is then known), make sure that his client understands, and receive express consent to the broker receiving the fee. . . .²³⁰

Upon a strict interpretation, the holding in *Advanced Realty* suggests that if an agent is entitled to receive a fee from a third party in connection with its dealings with that third party as agent of the principal, in addition to any fees the agent may be entitled to receive from its principal, the

226. *Id.* at 398.

227. *BLB Corp. of Austl.*, 48 A.L.J.R. 372.

228. *Id.* at 376.

229. *Advanced Realty Funding Corp. v. Bannink* [1979] 109 D.L.R.3d 137.

230. *Id.* at 142 (emphasis added).

agent has a positive duty to the principal to disclose the existence and effect of its entitlement to those fees. The rationale for the Court's interpretation would appear to be based on the proposition that a principal should have a reasonable expectation that its agent will act on its behalf independently and free from any factor that may impinge upon its loyalty to the principal, such as in respect of any commission.

Dal Pont has cautioned against a strict application of the reasoning in *Advanced Realty* for policy reasons stating that:

[T]he *Advanced Realty* case should not be read as requiring an agent, in every case in which the contract between the agent and principal contains a clause entitling the agent to benefits exceeding the agent's remuneration, to specifically bring this to the principal's attention and explain its effect. The relative position of the parties . . . coupled with any applicable industry practice, may make it reasonable to cast on the principal the duty to read carefully and understand the agency contract.²³¹

As discussed earlier, the approach opined by Dal Pont is consistent with current Australian law.²³² Accordingly, an Australian court would not adopt the strict reasoning advanced in *Advanced Realty* by way of importing a positive fiduciary duty upon an agent to make certain disclosures to its principal, such as an arranger's positive disclosure of its receipt of arranger fees to the participant banks under a syndicated loan. However, while a fiduciary does not have a positive duty to disclose any conflict of interest or unauthorized profit arising in connection with a fiduciary relationship, a fiduciary must, in order for it to comply with its duties, seek the forgiveness of its principal for its indiscretions by effecting the requisite degree of disclosure of such indiscretions to its principal.

As illustrated by the different approaches taken by the *Grantwell* and *BLB* Courts to the question of adequate disclosure, it is decidedly difficult to reconcile the often conflicting standards of disclosure required by Australian courts. In the context of the receipt of arranger fees by an arranger, it is submitted that, whilst not free from doubt, a prudent arranger may avail itself of the disclosure defense provided that it sufficiently discloses to the participant banks the fact that it "may" or "will" receive an arranger fee from the borrower in relation to its performance of its duties as arranger under a syndicated loan without the need to specify the specific quantum of the arranger fees in question, for at least the following reasons:

- a) as it is industry custom for an arranger to receive

231. DAL PONT, *supra* note 133, at 12.9.

232. *See supra* note 216.

- an arranger fee from the borrower in consideration of its arrangement of the syndicated loan, participant banks are likely to already have prior knowledge that such fees will be paid under the syndicated loan;
- b) it is arguable that disclosure of the specific quantum of the arranger fee would not serve any real purpose other than to give the participant banks a competitive advantage in the syndicated loan marketplace (on the assumption that the participant banks also undertake the business of arranging loans). Disclosure of the fact that an arranger “may” or “will” receive an arranger fee should give sufficient opportunity to the participant bank to counteract any possible adverse influence that the arranger fee may have upon the loyalty of the arranger;
 - c) Lehane, while acknowledging the strict traditional rule of disclosure, suggests that participant banks need not know the specific amount of any arranger fees unless such fees were extraordinary;²³³ and
 - d) the specific quantum of arranger fees are highly confidential and sensitive information, a fact exacerbated by reason that most participant banks are in direct competition with the arranger with respect to securing future mandates from syndicated loan market participants. Therefore, if an arranger were required to disclose the specific quantum of arranger fees to participant banks, this may have an adverse impact upon, among other things, competition in the marketplace.

In addition, the approach not to disclose the specific quantum of arranger fees to the participant banks is commercially sensible given the fact that it is not likely that an Australian court would, in ordinary circumstances, construe an arranger to be a fiduciary of the participant banks.²³⁴

In conclusion, an arranger may effect the requisite disclosure by

233. Lehane, *supra* note 77, at 237. See also O’Sullivan, *supra* note 8, at 180 (supports the views of Lehane).

234. See the submission made in Part III(C) *supra*.

inserting a suitable contractual provision specifying the fact that it may or will receive arranger fees into the mandate letter or the term sheet, as the case may be. However, as it is not possible to synthesize a specific principle as to the standard of disclosure as applied by the Australian courts, to put the issue beyond doubt, whilst acknowledging this approach to be commercially unpalatable, is to make a complete disclosure of the receipt and quantum of arranger fees to the participant banks under a syndicated loan.

VI. Conclusion

Many commentators²³⁵ have strenuously denied that an arranger assumes fiduciary duties in favor of participant banks in the performance of their role under a syndicated loan. However, the risk that an Australian court, being largely representative of other common law jurisdictions, will not consider an arranger to be the fiduciary of the participant banks under a syndicated loan cannot altogether be ruled out.²³⁶ As Tennekoon cautions:

Some writers²³⁷ have taken the view that fiduciary duties . . . will not be imposed on [an arranger] for the benefit of [participant banks] in a syndicate in respect of the negotiation of loan documentation. It is submitted that the risk that a court will impose fiduciary duties cannot altogether be ruled out.²³⁸

Nevertheless, on balance, the risk of an adverse characterization that an arranger is a fiduciary of the participant banks is minimal for at least two reasons.

First, despite a trend of increased jurisprudential encroachment into the domain of modern day commerce,²³⁹ common law courts are likely to be cautious when deliberating whether or not to import fiduciary status between an arranger and the participant banks under a syndicated loan. The sentiments of this view was supported in *Hodgkinson v. Simms*²⁴⁰ where the Supreme Court of Canada stated in *obiter dicta* that “[c]ommercial interactions between parties at arm’s length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a [fiduciary] duty that

235. See, e.g., O’Sullivan, *supra* note 8; Clarke, *supra* note 47.

236. See, e.g., R. TENNEKOON, *THE LAW AND REGULATION OF INTERNATIONAL FINANCE* 56 (1991).

237. Such as, e.g., Clarke, *supra* note 47, at 234.

238. TENNEKOON, *supra* note 236, at 56.

239. See *supra* Part III(A).

240. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

vindicates the very antithesis of self-interest.”²⁴¹

Second, as a matter of commercial practice, a prudent arranger is capable of mitigating the risk of an adverse construction made by a court that the arranger is a fiduciary of the participant banks by way of an appropriate contractual disclaimer or by disclosing to the participant banks its intended receipt, and possibly quantum, of arranger fees.²⁴²

However, while this article submits that an arranger should not ordinarily be subject to prospective criminal liability under Australian secret commissions legislation, or other comparative legislation of common law jurisdictions, this issue remains untested by Australian courts and may be of concern to arrangers of syndicated loans.²⁴³

In conclusion, while the existence of a fiduciary relationship between an arranger and the participant banks cannot be categorically denied in all circumstances, it is this author’s view that in the absence of any special or unique factual circumstances serving to create any undue reliance or vulnerability on the part of a participant bank, it is unlikely that an Australian or common law court would be inclined to invoke a fiduciary relationship between an arranger and participant banks under a syndicated loan.²⁴⁴ Therefore, absent any possible application of Australian secret commissions legislation or other comparative legislation of common law jurisdictions, it is unlikely that an arranger will be required by a common law court to disgorge and account for any arranger fees received by it in favor of the participant banks under a syndicated loan.

241. *Id.* at 414.

242. *See supra* Part V.

243. *See supra* Part IV(B).

244. This will especially be the case in circumstances where: (a) the arranger uses an appropriate exclusion clause; and/or (b) the nature of a claim by a participant bank is narrowed to issues relating to the recovery of fees paid to an arranger and not to issues surrounding the arranger unfairly inducing the participant bank to participate in the syndicated loan, although sometimes these issues may be inextricably linked.

