LEAD BANK AND AGENT BANK LIABILITY **G A WALKER**

(1) LIABILITY ***Re Colocotronis Tanker Securities Litigation*** **[1976]**

- **(a) Common Law Misrepresentation** ***s2(1) Misrepresentation Act 1967***
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LEAD BANK AND AGENT BANK LIABILITY

G A WALKER

A number of important legal issues arise with regard to the potential liability of each of the parties to an international financial transaction. The function of the documentation is to record and allocate risk and liability between the various participants to the deal in accordance with their relative financial and bargaining positions. Much of this will be dealt with at the negotiation stage with advisors on each side trying to protect the position of their clients in so far as possible.

The issues arise with regard to the arranging bank or managers and co-managers as well as the agent bank under a syndicated lending facility as well as to the lead and agent banks under a bond, note or commercial paper programme. The main factors concerned can be assessed in terms of liability, limitation of liability, exclusion of liability, exclusion limits and remedy. Each of these is considered in turn.

(1) LIABILITY

Liability may attach under a term or syndicated facility against the borrower, the lead manager, other managers and the agent bank. The borrower may breach the payment or financial provisions contained in the agreement or other material non-financial clauses. The banks may agree to waive non-material breaches although payment or other material non-compliance will trigger default. The banks will then have the available contractual remedies including suspension of further payment, cancellation, acceleration, rescission and damages[1].

The borrower will principally be responsible for the information provided in the information (or placement) memorandum. This is often prepared by the borrower and simply passed on to the lead managers on distribution[2]. As misrepresentation will generally only be considered once the borrower has failed to make payment under the loan agreement, the syndicate banks may proceed against the lead manager. The potential liability of lead manager was confirmed in the 1976 *Colocotronis Tanker Securities Litigation*[3] in which the lead manager EABC agreed to remit the full amount of the participation of each of the original US banks within the syndicate[4]. The litigation was reported to have stunned the lending community with lead managers and their legal advisors only subsequently taking additional care to avoid liability under the information memorandum[5].

The agent bank may be liable for breach of these duties under the agreement although these are generally narrowly defined and only come into effect after the first advances have been made to the borrower. The agent bank will not be responsible for the content of the information memorandum. Liability would only otherwise attach if the agent bank had also acted as lead manager although this would be unusual in practice as agency functions are usually carried out by separate administrative departments within the larger financial groups, in particular, in light of the low fees paid.

Liability may also attach to each of the co-lead managers although it is unlikely that other members of the lending syndicate could be liable *inter se* in light of their several commitments[6] and non-involvement with the information memorandum. They may only be liable in contract of tort where they otherwise breached the terms of the loan agreement especially with regard to pari passu recovery and distribution[7].

The main heads of liability to consider are then common law misrepresentation (fraudulent, negligent and innocent), statutory misrepresentation or statutory deceit, breach of common law agency or fiduciary duty and potential regulatory liability under the Financial Services and Markets Act 2000 (FSMA).

(a) Common Law Misrepresentation

A party may be liable under common law for fraudulent, negligent or innocent misrepresentation xwith fraud also being subject to criminal penalty. Fraudulent misrepresentation arises where a misrepresentation is made with knowledge of its falsity or recklessly not caring whether it is true or false[8]. Rescission and damages are available.

A party may be liable for negligent misrepresentation where a special relationship or trust or confidence exists under the leading case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[9]. This also requires actual inducement and causation[10].

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1 LMA 4.2 (no Default), 23.1-13 (events of default), 23.13 (acceleration), 34 (remedies and waivers) 35 (amendments and waivers). Sections 7 (loan default) and 8 (default remedies).

2 Slater, 'Syndicated Bank Loans' [1982] JBL 173, 175-176.

3 *Re Colocotronis Tanker Securities Litigation* 420 F Supp 998 (Sdny 1976).

4 European-American Banking Corporation (EABC) had set up a syndicate with a number of American regional banks to provide syndicated facilities to the Colocotronis Shipping Group. The participating banks argued that the lead manager had a duty to advise them on all material facts relevant to the credit with EABC being expert in international finance and in assessing and promoting relevant participations. EABC had then failed in its duty of care in releasing untrue statements of material fact and omitting other facts.

5 McDonald, *International Syndicated Loans* (1982) 126. For discussion, G A Penn, A M Shea and A Arora, *The Law and Practice of International Banking* (Sweet & Maxwell 1987) para.7.05.

6 LMA 2.2(a). Section 5(1).

7 LMA 28. Section 5(3).

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

9 The court will consider the nature of the involvement of the lead manager in the preparation of the information memorandum. The degree to which the manager was identified as the source of information would also be considered with the complexity of the transaction, other access to information, solicitation and benefit. [1964] AC 65. *Chitty Law Contracts* ( ).

10 *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583; and *The Lucy* [1983] 1 Lloyd's Rep 188. The statement must also generally be one of fact rather than of law, advice, opinion or intention (unless the opinion or intention was not actually held). *Edgington v Fitzmaurice* (1885) 29 Chd 459 (the directors were held liable where they had represented that the proceeds of a debenture issue were to be used to purchase new equipment when the company was already insolvent and the funds were to be used to cover outstanding debts).

Statements of law are not misrepresentations to the extent that everyone is assumed to know the law. This would not apply where statements of law and fact are mixed which may apply with regard to any statements of legal capacity, legal validity, legal effect, security,

Damages will generally not be available where the misrepresentation had been made innocently unless the reference had been incorporated as a term to the contract[11]. Damages may nevertheless be available in lieu of rescission under s2(2) of the Misrepresentation Act 1967 where rescission would otherwise be available[12].

(b) Statutory Misrepresentation and Deceit

The lead manager may be liable for negligent misrepresentation under s2(1) of the Misrepresentation Act 1967 unless he can establish that he believed the representation to be true on reasonable grounds[13]. An officer of a body corporate will also be liable to creditors where there has been intentional deceit under s19 of the Theft Act 1968[14].

(c) Agency Liability

The lead manager will generally deal with the other syndicate banks as principal and will not act as agent. This is often confirmed by an express term in the loan agreement and possibly the information memorandum[15]. The agent bank will be subject to the law of agency although only with regard to the duties accepted under the loan agreement[16]. An agent must act subject to contract[17], act with due care and skill[18] and not delegate authority unless otherwise permitted[19]. Agents will generally be considered to constitute fiduciaries in light of the trust and confidence placed on them by their principals. An agent is also subject to a duty to account[20] and not to accept any bribes[21]

(d) Fiduciary Duties

Where the arranging or agent bank was considered to be acting in a fiduciary capacity, standard fiduciary duties would be applies. These include avoiding any conflicts of interest,[22] not making any secret profit[23] and exercising due diligence[24].

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exchange controls or taxation. Statements of opinion may constitute actionable misrepresentations where the opinion is not actually held or implies facts that are incorrect. *Brown v Raphael* [1958] 2 All ER 79 CA; and *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64.

Statements of intention are actionable where the intention was not held at the time it was made. *Edgington v Fitzmaurice*. This would also apply to forecasts which are not held or where there is an implied representation as to underlying facts. *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5 CA. Summaries may also be actionable where they are not fair and misleading. Omissions are not directly actionable without an express duty to disclose. A partial explanation may still constitute a misrepresentation or a failure to act may be considered to imply confirmation in a particular case. A special duty to disclose may also be implied in the particular case.

11 *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493. The need to allege fraud to claim rescission was removed under s1 of the Misrepresentation Act 1967. This applies where the person has entered into a contract after a misrepresentation and the misrepresentation has become a term of the contract or the contract has been performed. Chitty.

12 s2(2) applies where a person has entered into a contract after the misrepresentation has been made to him otherwise than fraudulently and he would have been entitled to rescind the contract. In such a case, a court or arbitrator may declare the contact to subsist and award damages in lieu of rescission where it would be equitable to do so having regard to the nature of the misrepresentation and the loss caused and to the effect of the rescission on the other party.

13 s2(1) applies where a person has entered into a contract after a misrepresentation has been made and loss has been suffered. The person making the misrepresentation maybe liable without the need to establish fraud unless he can satisfy the statutory defence of true belief on reasonable grounds. This reverses the burden of proof where the misrepresentation has not been made fraudulently.

14 *R v Kylsant* [1932] 1 KB 442 CA. A prospectus had given a false statement as to the financial condition of a company where it had failed to explain that the past dividends had only been possible through drawing on secret reserves. *R v Bishirgian* [1936] 1 All ER 586 CA. The prospectus had failed to explain that the purpose of the capital raising was to finance a strategic expansion to corner the supply of pepper in world markets.

15 LMA 26.3 (role of the arranger). The arranger will have no obligations of any kind to any party under the agreement or in connection with any finance document except as specifically provided.

16 Section 5(5).

17 The agent must carry out his contractual duties and comply with instructions. *Turpin v Bilton* (1843) 5 Man & G 455 (the agent was liable for failing to ensure the principal's ship with the ship subsequently being lost). The agent must also obey lawful and reasonable instruction, provided that this is not illegal. *The Hermione* [1922] P 162. Failure to act will not incur liability unless there has been an assumption of responsibility. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. The agent must generally act within the scope of his terms of authority and not exceed that authority.

18 The agent must exercise reasonable care and skill in the performance of its duties. This applies to the contractual duties assumed and other duties owed in tort with concurrent liability arising. *Henderson v Merrett Syndicates Ltd*.

19 An agent must not delegate its authority apart from in connection with minor ministerial or administrative acts or necessity unless there is express or implied authority to do so. *De Bussche v ALT* (1878) 8 Chd 286 CA.

20 The agent must keep accurate accounts of all transactions. *Pearse v Green* (1819) 1 Cac & W 135. An agent must also clearly segregate his principal's money and property. *Lupton v White* (1808) 15 Ves 432.

21 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 CHD 339 CA (the defendant was managing director of the plaintiff company and had received a secret commission from shipbuilders for the construction of fishing smacks and bonuses from two other companies with which orders had been placed).

22 A fiduciary must not put themselves in a position where their duties conflict with their own interests or the interests of another principal. *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; and *Armstrong v Jackson* [1917] 2 KB 822 (a stockbroker had to repay funds to his client after selling shares he held personally but having been instructed to purchase them on the open market). The rule is breached even where the agent has acted in good faith and realised a benefit for the principal. *Boardman v Phipps* [167] 2 AC 46 (the trustees of an estate had to account for all profits made after they acquired a controlling interest in a company in which the estate held an interest with the House of Lords ruling that they had generated the profit as a result of their fiduciary position and the opportunity and knowledge made available while acting in that capacity).

23 An agent must not use his position to generate a profit. *Boardman v Phipps* (n); *Lamb v Evans* [1893] 1 CH 218 (canvassers for a trade directory were not entitled to use materials for any other publication obtained in the employment of the first proprietor); and *Hippisley*

(e) Regulatory Liability

Various heads of liability may arise under the FSMA. These principally relate to authorisation, permission and promotion (ss 19, 20 and 21), listing disclosure and false or misleading particulars (ss 80 and 90), damages for any breach of rule (s 150 and now s 138D FSMA as amended), market abuse (s 118 FSMA) and misleading statements (s 397 FSMA and now ss 89 and 90 FSA 2012).

Acting as a lead manager or lending syndicate member will generally not require authorisation or permission under ss 19 and 20 FSMA[25]. The acceptance and on-lending of wholesale funds will generally not constitute the accepting of deposits and the carrying on of a deposit-taking activity[26]. Arranging banks and other syndicate members will generally be authorised and have permission to carry on deposit taking activity in the UK where they would otherwise accept deposits from the general public in any case.

It is unlikely that the information memorandum will constitute an instrument 'creating or acknowledging indebtedness' which is a security[27] and specified investment under the FSMA[28]. The lead manager and syndicate members may have to hold permission for this purpose. The information memorandum may be considered to constitute a prospectus for the purposes of securities laws although various exemptions may be available[29]. It is unlikely that the memorandum would constitute a debenture under English law[30] nor a security under US law[31]. The lead manager must ensure that it is not providing any advice on the memorandum which may otherwise constitute advising on investments[32].

Distributing the information memorandum and soliciting interested participation may constitute financial promotion which must only be carried out by an authorised person or approved by an authorised person under s 21 FSMA. A number of exemptions are available including to investment professionals, certified high net worth individuals and sophisticated investors[33]. The memorandum may constitute a prospectus under Part VI FSMA. A general duty to disclose is imposed (s 80 FSMA) with compensation being available for false or misleading particulars (s 90 FSMA). This would not apply where a security is not involved or there is no public offering. Equivalent exemptions apply as under the FPO.

Offering circulars and prospectuses are now governed by Part VI of FSMA as amended to give effect to the EU Prospectus Directive in July 2005[34]. The relevant provisions are now set out in the Listing Rules[35], the Prospectus Rules[36] and the Disclosure and Transparency Rules[37]. Syndicated loans will generally not constitute transferable securities for the purposes of Part VI FSMA[38] with a series of relevant exempt offers being available in any case[39].

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v Knee Bros [1905] 1 KB 1 (the agent had to account for the discount obtained on printing and advertising which constituted a secret profit even where they had acted honestly in accordance with trade custom).

[24] A fiduciary must act with due diligence and due skill and care. A trustee must bring to the management of the trust affairs the same care and diligence that a man of ordinary prudence would be expected to use in his own concerns. *Knox v McKinnon* (1888) 13 App Cas 73.

[25] Lending other than loans secured on land do not constitute investments under Part II of Schedule 2 of the FSMA and Part III of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) as amended. The regulated activity of arranging deals for investments (para.3 Schedule 2 FSMA and para.25 RAO) will not otherwise apply to the extent that no investments are involved.

[26] The term 'deposit' does not include funds received by another authorised person who has permission to accept deposits. Paras.5(2) and 6(1)(a)(ii) RAO. The definition of a credit institution under the recast European Banking Consolidated Directive wsa amended to include some wholesale and capital market activity. On the meaning of deposit and deposit-taking business under the Banking Act 1979, *SCF Finance Co Ltd v Masri* [1986] 1 All ER 40 (QB); and *SCF Finance Co Ltd v Masri* (No.2) (1987) 131 SJ 74. For comment, Welch, 'Meaning of Deposit and Deposit-Taking Business under the Banking Act 1979 – Whether Contract Unlawful and Monies Paid Recoverable' (1986) 1 *JIBL* 54.

[27] Security is defined to include any investment specified in Articles 76-82 RAO which will specifically include instruments creating or acknowledging indebtedness under Article 77.

[28] Para.12 Schedule 2 FSMA and para.77(1)(f) RAO.

[29] Wood (n) para.23-05; and paras.7-16 and 23-07.

[30] Philip Wood (n) para.7-16. See also Penn, Shea and Arora (n) para.7.13; and Penn, 'Sterling Commercial Paper' [1986] *BFLR* 195, 201-209; and Goodall, 'Offers of Commercial Paper in the UK' *IFLR* (April 1984) 15-19. Arranging acceptance of debentures in connection with loans is excluded under Article 31 although it is unclear whether the borrower would be 'accepting' the information memorandum.

[31] This would apply with regard to any note or certificate of interest or participation although the memorandum would not constitute any separate transferable certificate and only constitute an invitation to participate. For discussion, Clarke and Farrar, 'Rights and Duties of Managing and Agent Banks in Syndicated Loans to Government Borrowers' [1982] *University of Illinois Law Review* 229, 236.

[32] Para.7 Schedule 2 FSMA and Article 53 RAO.

[33] Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 as amended.

[34] Directive 2003/71/EC.

[35] Issued under s73A(2) as amended by the Transparency Obligations Directive (Disclosure and Transparency Rules) Instrument 2006 (2006/70). The FSA acts as the UK Listing Authority (UKLA) following transfer of listing from the London Stock Exchange. The London Stock Exchange operates two separate markets for listed securities with the Gilt Edged and Fixed Interest Market (GEFIM) for 'regulated market' securities and the Professional Securities Market (PSM) for unregulated securities. A prospectus is required where securities are to be offered to the public in the UK or admitted to trading on the GEFIM. Listing particulars are required where the securities are to be admitted to trading on the PSM.

[36] Under ss73A(4) and 84 FSMA.

[37] Under ss73A(3) and 89A FSMA

[38] Transferable securities means transferable securities under the Markets in Financial Instruments Directive (MIFID) 2004/39/EC other than money market instruments with a maturity of less than 12 months. S102A(3) FSMA. This applies to securities which are negotiable on the capital market except payment instruments.

[39] Exempt offers include to qualified investors (including authorised financial institutions, national and regional governments, central banks and international and supranational institutions, legal entities with more than 250 employees, a balance sheet total of more than €43m or an annual net turnover of more than €50m, registered individual and corporate investors and qualified investors in other Member States), offers to less than 100 offerees, large offers (with a consideration of €50,000 or more), large denominations (denominated amounts of, at least, €50,000), and small offers (of consideration not in excess of €100,000).

The lead manager or agent bank must not engage in market abuse under s118 FSMA as amended following implementation of the EU Market Abuse Directive (MAD) in July 2005[40]. The original offences of misuse of information, misleading impressions and market distortion under s118 were extended under the MAD to include insider dealing, improper disclosure, manipulated transactions and manipulating devices as well as dissemination[41]. Insider dealing is also a criminal offence under the Criminal Justice Act 1993 which came into effect in May 1994[42]. Market manipulation was also an offence under s397 FSMA as replaced by the misleading statements and impressions provisions in ss89 and 90 Financial Services Act 2012. Arranging a lending syndicate or entering into a syndicated loan will not constitute securities for these purposes although the banks concerned must be careful not to undertake any separate dealing or trading that may breach any of these provisions.

An action for damages is also available under s 138D FSMA as amended (previously s 150 FSMA) where loss has been suffered as a result of contravention of any FSA rule. This is subject to any defences available in an action for breach of statutory duty. This is only available to private persons rather than companies. While this would not specifically apply with regard to arranging a syndicate or lending under a term facility, the banks concerned must be careful not to breach any other FSA rules and thereby lead to a private person incurring loss.

(2) LIMITED DUTY

The arranging bank and agent bank will use various devices to limit their liability to the syndicate in the event of the borrower's subsequent default. A number of clauses may be included both within the information memorandum and the facility agreement. These generally relate to scope of duty, information supply, own credit assessment, no reliance or inducement and no fiduciary or other duty.

(a) No Duty

The memorandum will record that the arranger has been requested by the borrower to put the facility together and that no other duties have been assumed. This will be confirmed in the facility agreement[43]. The role and function of the agent bank will also be narrowly defined under the agreement. The agreement will record the agent's appointment and authority (LMA 26.1) and specify its receipt, payment, banking, notification and default duties[44]. The agent is given authority to act under the agreement (LMA 26.1(b)) and on majority lender instruction (LMA 26.7(a)).

The agent's duties will be expressly described as being mechanical and administrative in nature (LMA 26.2(e)). The agent will only have limited documentation transfer, default and non-payment reporting obligations (LMA 26.2(a), (c) and (d)). The agent will be entitled to provide banking services to the borrower (LMA 26.5) and have other rights and discretions[45]. Neither the agent nor lead manager may be required to act in any way that would reasonably be considered to constitute a breach of law, regulation or duty of confidentiality or other fiduciary duties[46]. The agent is not responsible for carrying out any money laundering or other checks[47].

(b) Information Supply

The memorandum will specify that the information has been provided and approved and verified by the borrower and not by the manager. The information will not have been verified independently and no representation or warranty made with regard to its completeness, accuracy or validity express or implied. This will be restated in the agreement. Neither the agent nor manager will be responsible for the adequacy, accuracy or completeness of any information supplied nor for the legality, validity, effectiveness, adequacy or enforceability of any finance document or any other agreement, arrangement or document entered into[48].

(c) Own Credit Assessment

The information memorandum will specify that the manager has not undertaken any review of the financial condition or affairs of the borrower and that no credit assessment, evaluation or recommendation is made under the memorandum. Each lender must undertake their own independent credit assessment on the basis of such inquiries or investigations as maybe considered necessary.

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40 Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005 and FSA Policy Statement 05/3.

41 a118(2)-(8) FSMA. The FSA has issued a Code of Market Conduct (COMC) under ss119-120 FSMA. Separate statement of policy on penalties was issued under ss124-125. A statutory defence is provided for under s123 with other 'safe harbours' being included within the COMC under ss120 and 122. In the event of an offence being committed, the FSA may impose an unlimited fine (s123(1)) or issue a public statement or censure (s123(3)).

42 This applies with regard to dealing in securities on a regulated market as well as encouraging another to do so or disclosing inside information.

43 The arranger has no obligations of any kind to any other party under LMA 26.3.

44 Section 5(5)(a)-(e).

45 These include: (a) relying on any representation, notice of document believed to genuine, correct and appropriately authorised and any statement by a director, authorised signatory or employee of any person regarding any matters which may reasonably be assumed to be within the person's knowledge and power to verify; (b) assume that no default has occurred, any right, power, authority or discretion vested in any party has not been exercised and any notice or request made on behalf of or with the consent and knowledge of all of the obligors unless actual notice has been received to the contrary in its capacity as agent; (c) engage, pay and rely on advice and services of any professional parties including lawyers, accountants, surveyors or other experts; (d) act through its personnel and agents with regard to the finance documents; and (e) disclose any information to any party which it reasonably believes has been received as agent under the agreement. LMA 26.6(a)-(e).

46 LMA 26.69(f). The agent can refrain from acting until security has been provided for any cost, loss or liability incurred and may act as it considers to be in the best interests of the lenders in the absence of any other majority express instruction. LMA 26.7(c) and (d).

47 LMA 26.9(d). [The agency division of the agent will be treated as a separate entity from its other divisions or departments with any information received by another division or department not being deemed to have been received by agent. LMA 26.12.]

48 LMA 26.8(a) and (b).

This obligation to undertake an independent credit assessment will be restated in the loan agreement in the form of a representation or warranty. Each lender will confirm that it has and will continue to be solely responsible for making its own independent appraisal and investigation of all risks arising under the finance documentation. This will specifically include the financial condition of each of the borrowers, documentation validity, recourse and the accuracy of the information memorandum and any other information provided by the agent or any other party[49]. This obligation will be undertaken on a continuing basis with neither the lead manager nor agent being required to undertake any continuing review of the financial condition of the borrower.

(d) No Reliance and No Inducement

Each of the banks will also be required to confirm expressly that they did not rely on any information provided by the manager or agent[50]. There can be no liability misrepresentation if there has been no actual reliance and no inducement[51].

(e) No Fiduciary Duty

The agreement will provide that neither the manager nor agent is trustees nor fiduciaries and subject to any fiduciary duties[52]. The manager and agent bank will not be bound to account for any sum or profit received on their own account[53]. This would avoid any accounting for secret profit as a fiduciary.

3. LIMITED LIABILITY

The arrangers and agent will also attempt to limit their liability through various further devices in addition to limiting the scope of potential liability initially. These include through exclusion clauses, set-off, estoppel, indemnity and possibly contributory negligence.

(a) Exclusion

The manager and agent bank will attempt to include appropriate exclusion or disclaimers of liability in the loan documentation. The objective is to limit the extent of any liability that may be incurred following a breach of duty rather than to limit the scope of the duty as outlined above. There is no need to draw a party's attention to an exclusion clause where the agreement has been signed unless there has been fraud or misrepresentation[54] Exclusion clauses are valid and not unenforceable on the basis of being unreasonable[55]. Any liability will generally be excluded for any action taken by or under the finance documentation unless directly caused by gross negligence or wilful misconduct[56].

(b) Set-Off

The manager and agent will retain any rights of set-off. An express right of deduction from payments to be made by the agent may be included[57]. The borrowers will generally be prohibited from exercising any rights of set-off against payments to be made to the lenders.

(c) Estoppel

The arranger and agent may attempt to retain any rights of estoppel against the borrower or other banks although care has to be exercised to ensure that no estoppel right are argued against them.[58] A non-reliance clause may operate by way of estoppel[59].

(d) Indemnity

The manager may request an indemnity from the borrower in respect of any losses suffered as a result of inaccuracies in the information memorandum. This would not cover any deliberate tortious action[60] although innocent or negligent conduct could also be covered. The agent bank will be entitled to a general indemnity under the common law for any losses suffered as a result of action taken within the scope of its

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49 LMA 26.14. This includes specifically: (a) the financial condition, status and nature of each member of the group; (b) the legality, validity, effectiveness, adequacy or enforceability of any finance document or other agreement, arrangement or document entered into; and (c) whether the lender has recourse and the nature and extent of that recourse against any party under the documentation.

50 LMA 26.14(d) The adequacy, accuracy and completeness of the information memorandum and any other information provided by the agent, any party under the agreement or any other person under the finance documentation.

51 *Smith v Chadwick* (1884) 9 App Cas 187 HL (Smith admitted that he had not been influenced by the statement that a person was a director of the company). It was confirmed in *Lowe v Lombank Ltd* [1960] 1All ER 611, [1960] 1 WLR 196 CA that this would operate as an estoppel preventing the party making the admission from arguing to the contrary. [*Encyclopaedia of Banking Law* para.[5392].]

52 LMA 26.4(a).

53 LMA 26.4(b).

54 *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837 HL; *Cockerton v Nadiera Aznar SA* [1960] 2 Lloyd's REP 450; *Mendelson v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215 CA

55 *Suisse Atlantique Societe d'Arnement Maritime SA v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 367, [1966] 2 All ER 61 HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 HL; and *George Mitchell (Chester Hall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737 HL. See generally *Hallsbury's Laws* ( ); and *Chitty on Contracts* (26 ed) vol.1 para.945.

56 LMA 26.9.

57 LMA 26.17.

58 This was one of the arguments raised in *JP Morgan Chase Bank v Springwell* (n 70).

59 *Lowe v Lombank Ltd* (n 51).

60 *Shackell v Rosier* (1836) 2 Bing NC 64 (publication of libel); *W H Smith & Son v Clinton & Harris* (1908) 99 LT 840 (libel); *Haseldine v Hosken* [1933] 1 KB 822 CA (champetry); *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 67, [1957] 2 All ER 844 CA (deceit). *Encyclopaedia of Banking* ( ) paras.[5257]-[5279].

authority[61]. This will not include losses arising as a result of the agent's negligence or breach of duty. Express indemnity is generally provided for which will extend to any costs incurred other than through gross negligence or wilful misconduct.

The banks will be liable to indemnify the agent in proportion to their share of the commitments undertaken[62]. Each lender is required in proportion to its share of the total commitments (or share of the total commitments immediately before they were reduced to zero) to indemnify the agent within three business days of demand against any costs, loss or liability (including without limitation for negligence or any other category of liability whatsoever) incurred otherwise than by reason of the agent's gross negligence or wilful misconduct.

(e) Contributory Negligence

In the event of liability being established, a party may still be able to have this reduced on the basis of contributory negligence under the Law Reform (Contributory Negligence) Act 1945. This will reduce the amount recovered by a party by a proportion calculated having regard to his own degree of fault and contributory causation.

(4) EXCLUSION LIMITS

Various limitations are imposed by law no the extent to which parties can limit their liability either under contact or tort. Limitation of liability clauses will be construed strictly and *contra proferentem*. Exclusion will not be possible with regard to certain types of liability with otherwise legitimate clauses being subject to statutory controls on unfair terms. Parties must also be careful where separate oral warranties or parallel representations have been made outside the scope of the exclusions provided for. Estoppel may be argued against the banks preventing them from relying on their protective clauses or separate liability may have arisen such as under fiduciary duty or a no conflict rule which is not covered.

Exclusion from liability clauses will not be enforced where they attempt to avoid liability in connection with:

(a) Fraud or fraudulent misrepresentation;
(b) Criminal liability;
(c) Statutory liability;
(d) Where the effect of an exclusion or limitation clause has been misrepresented[63];
(e) Where a contrary oral warranty has been provided which contradicts the limitation or exclusion[64].

Standard clauses that attempt to limit liability are also subject to the Unfair Contract Terms Act 1977 and to the Unfair Terms and Consumer Contracts Regulations 1999[65]. The Consumer Contracts Regulations will only apply to consumers who are natural persons although the consumer under the Unfair Contract Terms Act 1977 applies more general. Liabilities for negligence cannot be excluded or restricted unless the term or notice concerned satisfies the requirement of reasonableness[66]. Negligence and reasonableness are defined[67]. Additional provisions apply where standard terms of business are imposed in a contract with a consumer[68].

The reasonableness test is applied to any contractual provision that attempts to exclude or restrict liability or negligent misrepresentation under the Misrepresentation Act 1967[69]. The lead manager could not exclude liability for fraudulent misrepresentation with any other exclusion clauses being subject to the reasonableness test. The provisions will also be strictly construed against the party relying on them.

The effectiveness of such clauses in professional contracts has been upheld repeatedly including in the *JP Morgan v Springwell* decision in 2008[70]. Springwell was the investment vehicle for the Polemis Greek shipping group which had purchased US$724m of investments in

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61 *Adams v Morgan & Co Ltd* [1924] 1 KB 751 CA; *Thacker v Hardy* (1878) 4 QBD 685 CA.

62 LMA 26.10. This may be extended to include any losses incurred following a disruption to the payment system under LMA 29.10.

63 *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 804, [1951] 1 All ER 631 CA; and *Jacques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 65 CA.

64 *Couchman v Ill* [1947] KB 554, [1947] 1 All ER 103 CA; *Mendelson v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215 CA.

65 SI 1999/2083 which implements the EU Directive on Unfair Contract Terms 93/13/EEC. This replaces the earlier Regulations SI 1994/3159.

66 UCTA s2(2). Liability for death or personal injury resulting from negligence cannot be excluded. UCTA s2(1). A person's agreement to or awareness of the term or notice purporting to exclude or restrict liability does not indicate voluntary acceptance of the risk. UCTA s2(3).

67 Negligence means the breach (a) of any obligation, arising from the express and implied terms of the contract; to take reasonable care or exercise reasonable skill in the performance of the contract; (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any strict of duty); and (c) of the common law duty of care imposed by the Occupier's Liability Act 1957. UCTA s(1). The term must be fair and reasonable having regard to the circumstances which were or ought reasonably to have been known or in the contemplation of the parties when the contract was made. UCTA s11(1). Additional guidelines are provided in Schedule 2 UCTA. These refer to: (a) the strength of the bargaining position of the parties relative to each other including any alternative means; (b) whether the customer received an inducement to agree to the term or had an opportunity to enter into a similar contract with other persons without the term; (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term including under trade custom or previous dealing between the parties; (d) whether it was reasonable at the time of the contract to expect that compliance with a condition would be practicable; and (e) whether the goods, insofar as relevant, were manufactured, processed or adapted to the special order of the customer.

68 The UCTA applies the reasonable test with regard to breach of contract (s3(2)(a)), substantially different performance (s3(2)(b)(i)) or allows no performance at all (s3(2)(b)(ii)). The consumer cannot be required to indemnify any other person in respect of the liability incurred as a result of negligence or breach of contract unless the term is reasonable. UCTA s4(1). A person deals as consumer where he neither makes the contract in the course of a business nor hold himself out as doing so and the other party makes the contract in the course of business. UCTA s12(1)(a) and (b).

69 Misrepresentation Act 1967 s3.

emerging markets debt issued by JP Morgan including Russian 'GKO Linked Notes'[71]. The value of the notes subsequently collapsed on the declaration of Russian default in August 1998. Springwell claimed around US$500m in loss of value on the portfolio and loss of alternative shipping income with the failure to purchase new ships for the group. Both the actions in contract and tort were dismissed by Mrs Justice Gloster[72]. An initial US action had been dismissed[73]. The pre-default claims were rejected on the basis that Springwell was an experienced investor and that JP Morgan owned it and had not assumed it any duty of advice or responsibility in respect of investment decisions[74]. Chase sought to rely on various disclaimers and limitation of liability clauses which were upheld by the Judge[75].

The Judge did accept that Springwell had not been an 'execution only' client alone but with only a low duty of care being imposed limited to providing accurate information on the investment products discussed. There was no separate advisory relationship in light of Springwell's sophistication and the absence of any formal advisory agreement or written record. The Judge considered that the disclaimer and limitation clauses referred to by Chase were not exclusion clauses as such but only clarified the nature of the relationship between the parties following *IFE v Goldman Sachs*[76]. Any argument that Chase could not rely on the disclaimers as they had not been clearly drawn to Springwell's attention was also rejected[77]. All arguments based in misrepresentation with regard to the suitability of particular products and the stability of the Russian market were also rejected, relying on the disclaimers made in the Chase documentation. Springwell had undertaken its own investments assessment and placed no reliance on the representations made.

The Springwell decision was important in establishing the continued importance and validity of disclaimer clauses both in terms of limited duty, no reliance and exclusion. The no duty assumed arguments confirm *IFE v Goldman Sachs*. Additional advisory or special relations will not be easily complied into professional market relations and contractual provisions will be strictly applied even if construed contra profertem. To that extent, the decision upholds the integrity of contractual agreement and market practice and expectation.

(5) REMEDIES

The general remedies available in the event of breach of contractual or tortious duty will be available against the lead manager or agent depending upon the circumstances.[78] These include:

(a) Suspension or withholding of any further advance;
(b) Cancellation of the obligation to lend under the facility;
(c) Acceleration of repayment;
(d) Rescission of the loan documentation;
(e) Damages for breach of contract or tort.

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70 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 2848 (Comm) on the first judgement (the pre-default claims); and *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1793 (Comm) on the second judgement (the post-default claims). Mrs Justice Gloster awarded that Springwell should pay 65% of Chase's costs of £24m (with £3m interest) on an indemnity rather than standard basis. [2008] EWHC 2848 (Comm). She subsequently refused leave to appeal. [2009] EWHC 282 (Comm).

71 The GKO Linked Notes were issued by one of the Chase companies and were referenced to underlying short-term, non-interest bearing bonds denominated in roubles quoted at a discount to face value and issued by the Russian Federation before default. (GKO was an acronym for *Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsio*.) The notes embedded forward contracts which allowed the conversion of the rouble proceeds into US dollars. The notes had been profitable between April 1996 and August 1998 before the default and forced restructuring.

72 Springwell claimed damages or equitable compensation for breach of contract, negligence, breach of fiduciary duty, negligent misstatement and/or under Section 2 of the Misrepresentation Act 1967 under the 'Investment Claims'. There was also a separate 'excess profit claim', 'shipping losses claim', 'post-default note claims' and 'custody fees claim'.

73 Springwell had brought an action against Chase in December 1999 in the US for fraud and negligent advice although this had been dismissed on a jurisdictional basis with no appeal being allowed. Chase then sought a declaration of no liability in April 2001 in the UK with Springwell counter-claiming for damages or compensation for failure to provide proper investment advice in relation to the emerging market investments. Original additional claims in fraud and dishonesty were subsequently abandoned before the trial commenced. The trial was held between 17 April 2007 and 17 October 2007 with 68 days in court and 48 days on evidence and 14 on submission. There were 232 pages of written opening submissions and 520 pages of closing submissions from Springwell. Chase produced 81 pages of opening submissions and over 2,310 pages of written closing submissions. 23 sets of lever-arch trial bundles were prepared with 390 arch-files in total.

74 Springwell argued that Chase owed it a duty of care to advise on the balance and content of the portfolio and suitability of investments and that following its failure to do so, no reasonable advisors would have allowed Springwell to hold the portfolio it did by August 1998. This should have been well diversified, predominantly based on liquid and low risk investments and structured to avoid any appreciable risk that the capital value of the investments and portfolio would have been substantially reduced by falling market conditions. Springwell had argued that Chase's salesman Justin Atkinson (JA) had provided investment advice between 1990 and 1998.

75 Chase argued that no advisory relationship had existed and that any separate liability had been excluded under various disclaimers and limitation clauses. These were, in particular, set out in 'Master Forward Agreement', a 'Global Master Repurchase Agreement', two additional letters which contained terms for 'Dealings in Developing Countries Securities' and the term sheets and confirmation notes attached to each of the notes and instruments purchased. The effect of these was to prevent any advisory relationship arising with Springwell not being able to argue that it had placed any reliance on the advice or representations provided by Chase. Gloster J also noted that even if advice had been provided, she did not accept that Adam (Adamandios) Polemis would have accepted it.

76 *IFE Funds SA v Goldman Sachs International* [2007] EW CA Civ 811, [2007] 2 Lloyd's 449. Toulson J had held that there had been no representation and no duty was owed with therefore no breach. This was upheld by the Appeal Court. See also *Peekay Intermark Ltd v Australia & New Zealand Banking Corporation; Deepak Fertilisers v ICI; Bankers Trust International Plc v P T Dharmala Sakti Sejahtera;* and *Valse Holding SA v Merrill Lynch International Bank Ltd*.

77 *Interfoto v Stiletto* [1989] 1 QB 433.

78 (n 1).