

THE EFFECT OF DISCLAIMER PROVISIONS ON BANK LIABILITY AND ITS IMPLICATIONS FOR ARRANGERS OF SYNDICATED LOANS

INTRODUCTION

The tension between an investor's inclination to impose expectations on the bank that provides them with information about the investment, and the bank's inclination to disclaim nearly all responsibility for the accuracy of that information. This dichotomy is highlighted by recent high-profile cases that analyze the shielding effects of disclaimer clauses for banks sued for negligence and misrepresentation. This paper aims to elucidate whether and to what extent arranging banks can rely on disclaimer clauses when such claims are made. This is a complex area of liability; by way of limitation, this paper will focus primarily on the claims of negligence and misrepresentation. Additionally, the case selection here has been guided by cases discussed in the landmark judgments in *JP Morgan Chase Bank v. Springwell Navigation Corporation*.¹ Overall, this paper holds that in light of the expertise of parties engaging syndicated loans, a court is unlikely to impose judicial burdens beyond the parties' allocation of liabilities as documented in the disclaimer, and thus disclaimers provide an exculpatory effect for arranging banks.

This paper continues in Part II by delivering background information about arranging bank liability to clarify the context of the discussion. Then, Part III provides a case summary and analysis of the following: *IFE Fund SA v. Goldman Sachs International*,¹, *Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd*, and finally, for a comparative perspective, the U.S. case of *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.* To account for the fact-intensive analysis courts provide on misrepresentation and negligence issues, this paper will detail the pertinent facts of the case as necessary to convey the court's reasoning. After each case, the implications of the judgment for disclaimers and arranging bank liability will be considered. Part IV concludes the paper.

I. OVERVIEW OF SYNDICATED LOANS WITH RESPECT TO ARRANGING BANK LIABILITY

When banks lend large amounts of money, they may allocate the associated credit risk by lending as a group, or syndicate. This arrangement is called a syndicated loan. The facility can be complex, and it involves many entities with specific functions and responsibilities. The bank known as the arranging bank, or arranger, is responsible for organizing the syndicate and negotiating the loan documentation.² Among other duties, the arranger will distribute information about the investment to potential participants in a document known commonly as an Informational Memorandum.³ The Informational Memorandum explains the purpose of the loan and the borrower's business and financial profile.⁴

While the borrower is primarily responsible for the information contained in the Informational Memorandum, because the arranger distributes it to participants, in the event the borrower is unable to fulfill its obligations, the participants may bring claims against the arranger including common law misrepresentation, negligence, statutory misrepresentation under Section 2(1) of the Misrepresentation Act 1976, and breach of fiduciary duty.⁵

II. RECENT HIGH-PROFILE CASE LAW ON THE EFFECT OF DISCLAIMERS ON BANK LIABILITY

a. *IFE Fund SA v. Goldman Sachs International*

IFE Funds is a Court of Appeal case where the court found an arranging bank had no more than a good faith duty towards the plaintiff, a participant in the syndicate, in light of the bank's disclaimer in the Informational Memorandum distributed to the participants.⁶ The Court of Appeal affirmed the Higher Court's rejection of the plaintiff's negligence and misrepresentation claims, which were based partly on an argument that the disclaimer was an exclusion clause and thus should be held to a reasonableness standard.⁷

¹ See generally *JP Morgan Chase Bank v. Springwell Navigation Corporation* [2008] EWHC 2848 (Comm); *JP Morgan Chase Bank v. Navigation Corporation* [2008] EWHC 1793 (Comm); *Springwell v JP Morgan Chase Bank* [2010] EWCA Civ 1221; see also Walker, GA; see also available at, <http://www.jonesday.com/files/Publication/409632ec-509a-4a96-8d16-8e173c9bdf97/Presentation/PublicationAttachment/c8838d5b-7889-4fd2-8731-a94dde7b66f8/JPMorganChase%20v%20SpringwellNavigation%20P2.pdf>

² Walker, GA "International Finance Markets," *Introduction to international Finance Law and Practice* (forthcoming).

³ Walker, GA, "Lead Bank and Agent Bank Liability," *Introduction to international Finance Law and Practice* (forthcoming).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *IFE Fund SA v. Goldman Sachs International* [2007] EWCA Civ 811 (CA), para. 106, 28, 34.

⁷ See *IFE Fund SA v. Goldman Sachs International* [2006] EWHC 2887 (Comm).

Party Liability

i. Summary and Analysis

Goldman Sachs International (“GSI”) was the underwriter and arranger of a facility that partly financed an acquisition.⁸ IFE Fund SA (“IFE”) purchased bonds and warrants issued by the acquiring company from GSI € 20 million.⁹ Two months before IFE’s purchase, GSI provided an Informational Memorandum (“IM”) to IFE.¹⁰ The IM contained an “Important Notice” (“Notice”) that limited the scope of GSI’s responsibility for the information provided in the IM. Namely, it said that GSI did not independently verify the information, made no express or implied representations about its accuracy, and that the information would not be updated.¹¹ These were standard market terms.¹² After GSI sent out the IM, they received two reports indicating that certain information in the IM about the target company’s financial performance might have been materially incorrect.¹³ GSI did not pass on this information to IFE before IFE made its investment. The acquisition IFE partly financed was unsuccessful, and the target was placed in receivership.¹⁴ Seeking damages for its loss, IFE brought claims against GSI for misrepresentation under s 2(1) of the Misrepresentation Act 1976 as well as negligence claims: the tort of negligent misstatement, and in the alternative, a breach of duty of care to inform.¹⁵

The issue relevant to these claims was whether GSI made an implied representation in the disclaimer that obligated it to update IFE about the borrower’s financials.¹⁶ At the High Court, Toulson J, found in favor of GSI on the misrepresentation claim, reasoning that in light of the Notice, there was no implied representation that GSI was unaware of facts showing that the information about the target in the IM was or might have been materially incorrect.¹⁷¹⁸ In regards to negligence, Toulson J found IFE’s negligent misstatement claim insufficient for lack of implied representations, similarly to the misrepresentation claim.¹⁹ Toulson J also held against IFE on the alternative claim of a breach of duty of care to inform. In reaching his judgment, he dispelled IFE’s argument that the Notice amounted to an exclusion or limitation on liability for negligence, which would have subjected its terms to a reasonableness standard.²⁰ Instead, the judge reasoned that the Notice characterized the relationship between GSI and IFE; the terms provided “qualifying” language to the information in the IM, rather than served to limit or exclude GSI’s liability.²¹ The Court of Appeal affirmed Toulson J’s holdings and dismissed IFE’s appeal.²²

In addition, both courts considered that GSI may owe a duty of good faith; however, this did not impose any obligations that would help IFE’s case since only actual knowledge of incorrect facts paired with a failure to disclose them would breach the duty of good faith.²³ *Cf. See In Re Colocotronis Tanker Securities Litigation* 420 F.Supp. 998 (1976) (where the plaintiff alleged in part under a claim for common law fraud that the lead manager of a syndicated lending facility had induced participants to join by misstating and omitting material facts about the borrower’s financial profile).²⁴

ii. General implications for arranging bank liability

In analyzing whether there were representations in the Memo, Toulson J distinguished the relationship between the GSI and IFE from that between a bank and a member of the public. He stated that “in the specialized world of syndicated finance there is everything to be said for leaving the participants to determine [their] respective responsibilities and

⁸ [2007] EWCA Civ 811 (CA) 137.

⁹ [2006] para 1

¹⁰ [2007] para 2

¹¹ [2006] para 40 (in part, the Notice stated, “The Arranger has not independently verified the information set out in this Memorandum. Accordingly, no representation, warranty or undertaking [...] is made...” and “The Arranger expressly does not undertake to review the financial condition [...] of Auto[dis], Finelist or any of their affiliates [...] in respect of the facilities, at any time or to advise any potential or actual participant [...] of any information coming to the attention of the Arranger”).

¹² [2006] para 44-45

¹³ [2007] EWCA Civ 811 (CA) 137. Citing Toulson J, *IFE Fund SA v. Goldman Sachs International* [2006] EWHC 2887 (Comm), para 77.

¹⁴ *Ibid.*

¹⁵ [2006] para 2; [2007] EWCA Civ 811 (CA) 143, 147.

¹⁶ *Ibid.*

¹⁷ [2006] para 60

¹⁸ Va. L. Rev. (1978) at 898.

¹⁹ 2006 para 61

²⁰ 2006 para 71

²¹ 2006 para 69, 71.

²² 2007 para 28, 34

²³ 2006 para 60; 2007 para 74, 78.

²⁴ The parties settled before a final ruling on the merits. *See Virginia Law Review* 64

Party Liability

risks”, and found the Notice evidenced this determination in part.²⁵ Therefore, *IFE* shows that a court will likely preserve the freedom of two sophisticated parties to engage in a complex financial transaction without imposing judicial burdens that would shift their own balancing of liability.²⁶ Since a Memorandum also memorializes this balance, it will likely be upheld in an arranging bank’s favor.

On the other hand, it is possible that the level of deference given by the *IFE Court* was due to the fact that fraud was not alleged as part of the plaintiff’s claim.²⁷ Still, the court’s emphasis on allowing industry practice to continue probably indicates that, provided there is no dishonest conduct, courts will generally uphold arranging banks’ disclaimers.²⁸ Again, this likely has the practical effect of allowing arrangers to mitigate their liability through disclaimers.²⁹

In sum, the court’s ruling on the disclaimer clause in *IFE Fund* signifies that a court is likely to defer to the parties’ allocation of liabilities and responsibilities as set forth in the Memorandum. Thus, the disclaimer will probably benefit the arranging bank for its exculpatory effects.³⁰ This will likely be true whether or not the disclaimer is considered part of a contract.³¹

b. Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd

In *Peekay*, the claimant’s misrepresentation claim failed when the defendant bank’s terms and conditions for the investment made clear that the investment was fundamentally different than what the claimant had been told, and the claimant signed those terms and made them part of the contract for the investment.³² While the defendant in this case is an investment bank and not an arranging bank of a syndicated loan, the principle emerging from *Peekay* was relied upon in *Springwell*.³³

i. Case Summary and Analysis

In *Peekay*, a director of the claimant company (“Mr. P”) regularly invested in emerging market instruments on behalf of Peekay through a regional manager (“Mrs. B”) of the defendant investment bank’s (“ANZ”) subsidiary. In February 1998, Mrs. B asked if Mr. P would be interested in investing in a GKO³⁴-linked deposit, which she described to him in rough terms. In her description, Mrs. B conveyed what she believed to be true about the proposed investment; thus, she did not tell Mr. P that investors would not have control over liquidation in an event of sovereign default. Mr. P expressed an interest in investing \$250,000 in the product. Then, Mrs. B forwarded Mr. P a document containing final terms and conditions (“FTCs”).

The FTCs did not relate to the product that Mrs. B had roughly described to Mr. P. The FTCs did contain various disclaimers, including a “Risk Disclosure Statement” (the “Notice”). It stated the investor was to make an independent assessment of the investment and that the investor fully understood the risks involved.³⁵ Mr. P briefly looked at the FTCs and signed them. He returned them with instructions to make an order for the “Russian Hedged GKO Note as per the attached document”.³⁶ In August 1998, following the Russian government’s moratorium on certain debt obligations, ANZ instituted its default procedures for the GKO, and Peekay recovered only \$5,918.06.

The issue on appeal was Peekay’s allegation that Mrs. B misrepresented the nature of the investment, per section 2(1) of the Misrepresentation Act 1967, thereby inducing him to make the investment.³⁷ Ruling in favor the defendant, the Court of Appeal reversed the High Court’s judgment.³⁸ In his judgment, Moore-Bick L.J provided several reasons for the reversal. While he agreed that Mrs. B may have made an implicit representation that

²⁵ 2006 para 54, *see also* para 59.

²⁶ *See* 2006 para 59, 63

²⁷ Cf. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F.Supp.2d 155, 170 (S.D.N.Y. 2009) (*see also* “Express Exclusion of Liability,” Encyclopaedia of Banking Law, 5253).

²⁸ *See* Sophie Hughes, “Information memoranda — liabilities and disclaimers” (2007) 3 J.I.B.F.L. 166.

²⁹ It does not appear the *IFE Court* considered the disclaimer a limitation on liability which should be construed *contra proferentem*, nor an exclusion clause, which would be subject to reasonableness; this is somewhat surprising in light of the practical effect of the disclaimer.

³⁰ *See JP Morgan Chase v. Springwell*; *see also* Walker, GA, “Lead Bank and Agent Bank Liability,” INTERNATIONAL FINANCE LAW AND PRACTICE (forthcoming).

³¹ In dicta, one point of disagreement between the courts was whether the Informational Memo was a contract. Toulson J found that it was not a contract. (para 65). Gage LJ noted that it was a contract based on a reliance theory. (para 52).

³² *Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 (CA).

³³ *See Springwell v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at para. 143 – 144.

³⁴ GKO’s are a series of bonds issued by the Russian government in the later 1990s.

³⁵ *See* the full warning at para 14.

³⁶ *Ibid.* at para 16.

³⁷ *Ibid* 22 – 23.

³⁸ *Ibid* 53.

Party Liability

the investment would give Mr. P a proprietary interest in the GKO, he found the terms of the FTC sufficiently made clear that the investment was fundamentally different from what he understood from the conversations with Mrs. B.³⁹

Secondly, the judge found that it was not reasonable for Mr. P to assume that any discrepancies between Mrs. B's description and the terms of the FTC would be pointed out to him by Mrs. B when Mr. P was an experienced investor and was aware the FTCs contained the only formal description of the investment he would receive.⁴⁰ Thirdly, the court reasoned that when Mr. P sent the instructions for the order, which incorporated by reference the FTCs he signed, he made an offer to enter a contract with ANZ on those terms; thus, it was part of the contract for investment that Mr. P was aware of the nature of the investment.⁴¹

Effectively, the judge found that Mr. P was induced to sign the documents and enter the contract by *his own* assumption that the investment product would correspond to Mrs. B's description.⁴² It was no defense that he did not read the FTCs carefully.⁴³ The court allowed, but did not decide on, the defendant's contractual estoppel argument that because Peekay signed the FTCs which stating that he understood them as well as the risky nature of GKO investments, he was estopped from claiming misrepresentation.⁴⁴

ii. General implications for arranging bank liability with respect to disclaimers

Similarly to *IFE Funds*, the Court of Appeal in *Peekay* upheld the disclaimer and did not impose further liabilities on the defendant. Just as the court recognized the parties in *IFE* were sophisticated in syndicated loan transactions, in *Peekay*, a key to the court's decision was that the claimant was considered an expert, and this was made clear to him. Thus, this likely extends the point noted above: where the parties in a financial transaction are experienced, the disclaimer is more likely to stand, whether in the context of a syndicated loan or private investment account.

Furthermore, an additional parallel between the cases is that when a sophisticated investor relies on his own assumptions of what the bank will take responsibility for, the court will not spare investors the cost of that mistake when the bank makes clear that it disclaims those responsibilities.⁴⁵

c. Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F.Supp.2d 155, 170 (S.D.N.Y. 2009)

A U.S. case emerging from the fallout of the 2008 financial crisis serves this paper by providing an international comparative perspective on the effects of disclaimers in mitigating arranging bank liability. In analyzing the sufficiency of the plaintiff's allegations against JP Morgan, the court in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.* discussed the reasonableness of the plaintiffs' reliance on the defendants' Information Memoranda.⁴⁶

i. Case Summary and Analysis

³⁹ Para 46.

⁴⁰ Para 52; para 23 (reasoning that "if [Mr.P] had read that document, he would have seen that the investment was described as a note linked to GKO bonds, rather than a share in the bonds themselves. That ought at least to have raised in the mind of an experienced investor the question whether the investment he was being offered was a derivative [...] Moreover, the terms in which [Mrs. B] had described the investment to him [...] were scarcely such as to enable him to obtain a very clear understanding of the precise nature of the investment.")

⁴¹ Para 60

⁴² para 52

⁴³ para 43

⁴⁴ Para 56-57 (Reasoning, "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. [...] Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, [...] I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*" [1991] Ch 448, affirmed on appeal [1992] Ch 421); the court provided no further description of what it meant by an estoppel of that kind.

⁴⁵ See *Valse Holdings SA v. Merrill Lynch International Bank* [2004] EWCH 2471 (Comm), para. 26, 69 (Morrison J holding the defendant owed no contractual duty to the client about the suitability of investment portfolio when he was an investing expert, it was an advisory trading account, and Merrill Lynch made clear in its terms and conditions that the client was responsible for determining the suitability of its advice); See also *Encyclopaedia of Banking Law* (citing cases to support the proposition, "Even before the Misrepresentation Act 1967 there were a number of cases where the complainant was unable to show that he was induced by a misrepresentation since he was a man of affairs who was quite competent to form an opinion for himself and whose experience must have taught him how little reliance was to be placed upon representations of the type in question."), 5253.

⁴⁶ *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F.Supp.2d 155, 170 (S.D.N.Y. 2009).

Party Liability

Morgan Stanley was the arranging bank (and agent) for a transaction involving bonds issued by a special investment vehicle. The bonds were subject to ratings by the credit rating agencies that were notoriously misaligned with market practices. Morgan Stanley distributed Information Memoranda to investors that contained express disclaimers of liability. The plaintiffs brought a multitude of claims against the defendants, including common law fraud, negligence, negligent misrepresentation, and breach of duty.⁴⁷ While, these claims were not judged on the merits as the case settled in 2013, the court analyzed whether several of the plaintiffs' claims were sufficiently pled.⁴⁸

The court's discussion that is most pertinent to this paper emerges from Morgan Stanley's motion to dismiss the plaintiff's common law fraud claims on the basis that the plaintiff's did not satisfy the element of reliance necessary to establish the claim.⁴⁹ Morgan Stanley argued that the plaintiffs' reliance on the allegedly false and misleading ratings was unreasonable when the plaintiffs were sophisticated investors and the Information Memoranda contained disclaimers.⁵⁰

The judge dismissed Morgan Stanley's motion to dismiss the common law fraud claims, finding that the plaintiffs' pleadings were sufficient.⁵¹ While the court agreed the investors were sophisticated, it reasoned that because the market had come to rely on the accuracy of credit ratings and independence of the rating agencies, the plaintiffs' reliance was reasonable.⁵²

ii. General implications for arranging bank liability with respect to disclaimers

Although it is in the context of fraudulent rather than negligent misrepresentation, the reasonableness analysis in *Abu Dhabi* ports similarity to the court's reasoning in both *IFE* and *Peekay*. For example, in *Peekay*, the court did not find the claimant's reliance reasonable when he was an experienced investor and claimed that he relied on a non-specific description of an investment. Although the *IFE Fund* court did not apply a reasonableness analysis to the claimant's reliance claim per se, it was not persuaded that the claimant had grounds for relying on the bank's updating it about information in the Memoranda that may have been incorrect.⁵³ Thus, one might say the court analyzed whether the claimant's assumptions about what the defendant was representing were reasonable as part of its decision.

In drawing these parallels, one may point out that *Abu Dhabi* contributes to this line of cases by establishing that even when a claimant is a sophisticated, experienced investor, if its expectations about the bank's representations are in line with the market at large, then a court may find the bank liable for misrepresentation. In other words, a court is likely to find that disclaimers outside the range of market terms will not serve an exculpatory function for arranging banks.

On the other hand, the expertise of the claimant may favor the bank's argument in a fraudulent misrepresentation case. In *Bankers Trust International plc v PT Dharmala Sakti Sejahtera*, when the court addressed whether the defendant had made fraudulent representations about complicated credit swaps to the claimant, it highlighted the threshold question of whether the claimant was induced.⁵⁴ The credit swaps were part of a new and complex investment product that the bank had devised and was marketing to potential clients. Through a fact-intensive analysis, the court found that the claimant failed to show by direct evidence that it was induced by the bank to enter the transaction in the way that it did, and furthermore, that "by and large capable of evaluating and looking after its own position and, in my judgment and contrary to its own case, did so".⁵⁵ Thus, the investor's expertise may still work against him, even if the investment product in combination with the bank's role may edge on the limits of what is market.

III. CONCLUSION

In sum, recent high-profile case law about the effect of disclaimer clauses on bank liability proves to be highly fact-intensive and circumstantial. In deducing a principle that applies to arranging banks, one may put forth that in general, a court is likely to uphold the disclaimer clauses in Informational Memoranda. The court may take the view

⁴⁷ Ibid. at para. 20.

⁴⁸ <http://www.bloomberg.com/news/articles/2013-04-26/morgan-stanley-settles-washington-abu-dhabi-lawuits>

⁴⁹ Morgan Stanley at para 79.

⁵⁰ Morgan Stanley at para 70.

⁵¹ Para 72.

⁵² Morgan Stanley at para 72.

⁵³ See [2007] para 34.

⁵⁴ *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] C.L.C 518 at *532 ("Once such a fraudulent representation is shown, that is the end of the matter if the recipient has actually been induced thereby to enter the contract. ... [The] question [of inducement] involves a subjective investigation of the actual impact of the representation on its actual recipient, having regard to his actual characteristics and knowledge, whether or not these were within the knowledge of the maker of the representation.")

⁵⁵ See *537.

Party Liability

that the disclaimer is not an exclusion of liability subject to legal limits, but rather, that it defines the relationship between the bank and the claimant in such a way that the bank's liability for negligence and misrepresentation is reduced. This is particularly likely when the investor is an experienced expert. In order to continue receiving the benefits of disclaimer clauses, it is likely advisable for arrangers to carefully and clearly phrase these provisions in Informational Memoranda and maintain them to market standards.