

Finance Update

Welcome to Taylor Wessing's February 2007 update summarising what we think are the more interesting recent legal developments in banking and finance.

Companies Act 2006 - what has come into force so far

The first Commencement Order has been made under the Companies Act 2006 (CA 2006), bringing certain provisions into effect from 1 January 2007, 20 January 2007 and 6 April 2007 respectively. The Companies Act 2006 (Commencement No 1, Transitional Provisions and Savings) Order 2006 (SI 2006 No 3428) is concerned mainly with the issue of electronic communication, although it also introduces new provisions in respect of a public company's right to investigate who has an interest in its shares and the liability of directors in respect of statements made in various reports prepared under company law. It should also be noted that certain Parts of the new Act (in particular those relating to transparency obligations) came into force on the day that the Act was passed (8 November 2006).

Unfortunately, contrary to rumours circulating towards the end of the year, the provisions relating to companies providing financial assistance for the purchase of their own shares (Section 151 and following) have not been repealed by this first order and are now rumoured to be scheduled for repeal in October.

Fixed Charges: Make sure you get it right

A recent decision is a useful reminder that one must take care when drafting charges that are intended to be fixed. If one uses too general a category of asset subject to the fixed charge and some of the assets in the category are treated as floating charge assets, there is a risk that all the assets in the category will be held to be subject only to a floating charge.

The Facts: A number of persons lent some money to a company (the "Borrower") secured by a debenture from the Borrower. The Debenture purported to create a fixed charge over all the debts of the Borrower and required all book and other debts be collected by the Borrower as agent for the debenture holder and pay them into a collection account. No collection account was set up for 4 months during which time the Borrower had entered into an invoice discounting facility with a third party. Once set up, all the proceeds of the invoice discounting facility were paid into the account which was blocked. The Borrower got into financial difficulties and administrative receivers were appointed who made an application to the court as to whether the assets held by them were subject to fixed or floating charges.

The Decision: The judge considered that when deciding whether a charge is fixed or floating "it is all or nothing. Either the clause creates a fixed charge over all of the assets to which it refers or it creates a fixed charge over none of them." The judge did not consider one could construe a charge as being fixed over some assets and floating over others. As the Borrower had been free to deal with the proceeds of the book debts at least for the time before the collection account was set up, the charge was floating.

Comment: This decision is not new law. The "all or nothing" principle was first enunciated by the judge at first instance in *re Asrs Establishment Limited* in 1999. Whilst the Court of Appeal did not give the concept unqualified approval in 2000, Walker LJ, having said he would not accept the "all or nothing" view without reservations, did consider that, in practice, it would be "the most likely outcome". It is also consistent with the House of Lords decision in *Cosslett (Contractors) Limited (in administration) v Bridgend CC [2001]* where a piece of heavy plant was included in a general charge on constructional plant and held to be the subject of a floating charge. Therefore, in order to avoid any arguments as to whether or not any charge created is fixed or floating, assets of specific value which can be controlled

should be charged separately rather than as part of class of assets in respect of some of which the chargor enjoys rights of disposal or substitution since even if control is operated in respect of the valued assets, the fixed nature might be tainted by the freedom enjoyed in respect of the remaining assets in the category.

In the matter of Beam Tube Products Ltd [2006] EWHC 486 (Ch)

Swaps and Derivatives: new ISDA interest rate and currency swap definitions published

The 2006 ISDA Definitions (the "2006 Definitions") were published on 12th January 2007. They are intended for use in confirmations of individual transactions governed by ISDA Master Agreements rather than the Master Agreements or schedules themselves. The 2006 Definitions are an update of the 2000 ISDA Definitions (the "2000 Definitions"). Certain definitions and provisions of the 2000 Definitions (including the Rate Options and related provisions) that were anticipated to need periodic updating were published in the Annex to the 2000 Definitions. There is no Annex to the 2006 Definitions. All definitions and provisions of the 2006 Definitions, including the Rate Options and related provisions, are contained in the 2006 Definitions.

Mortgage exit administration fees

The Financial Services Authority has issued a Statement of Good Practice on recent increases in mortgage exit administration fees (MEAFs), and how it expects mortgage lenders to address the issues raised.

In relation to current customers, lenders will have to decide by 28 February 2007 which of the following outcomes they will adopt for their current customers: (i) charge no MEAF; (ii) charge the original MEAF; (iii) charge a revised MEAF; or (iv) charge their current increased MEAF.

The FSA is unlikely to investigate further a lender which adopts one of the first two options, or the third option if the revised MEAF is lower than the original MEAF. However, the FSA will require lenders that adopt any other option to justify their position. The "original MEAF" will usually be the MEAF that was disclosed to the customer when they entered the original contract, took out a further advance, or changed their mortgage product.

In relation to past customers the FSA expects lenders to treat past customers who complain about the level of the MEAF they were charged when they exited their mortgage contract in the same way as the firm will be treating comparable current customers. So, for example, if a firm will only charge its current customers the original MEAF, then if a past customer who has paid a higher MEAF to exit complains, he or she can expect a refund of the difference between the actual MEAF paid on exit and the original MEAF. There is no time limit in relation to claims by past customers so the effects of this Statement are likely to prove administratively burdensome.

The Council of Mortgage Lenders has worked with the FSA in drawing up the Statement

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/012.shtml>

Further information

For further information or advice other than in relation to insolvency matters please contact either the person at Taylor Wessing with whom you generally deal or:

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