

Finance Update

Welcome to Taylor Wessing's June 2004 update summarising what we think are the more interesting legal developments in banking and finance.

Administrative Receivers: use of their powers

A court has confirmed that the powers conferred by sections 234 and 236 Insolvency Act 1986 (getting in the company's property and inquiry into company's dealings) are given to enable the relevant office holder to discharge their functions and not to assist the appointer in an action against a guarantor. In this case the administrative receivers obtained privileged documents and passed them on to their appointer without even reviewing them. It was held that the appointer was not entitled to rely on them. This case should make it easier for administrative receivers to resist pressure from their appointers to obtain and supply information. Although, following the Enterprise Act, administrative receivers will eventually become rare, as there are lot of pre Enterprise Act debentures still in place they are likely to be around for some time yet.

GE Capital Commercial Finance Limited v Sutton & others; Anglo Petroleum Limited v GE Capital Commercial Finance Ltd [2004] EWCA Civ 315

Banking: Agents' and Trustees' rights of indemnity

A recent case provides an interesting analysis on the rights of a trustee to require an indemnity when asked by the beneficiaries to accelerate some bonds. The trust deed provided that following an event of default, the trustee, if so requested or directed by bondholders, subject to being indemnified to its satisfaction, must give notice to the issuer and guarantor that the bonds were immediately due and repayable. In the case in question, although the trustee had obtained a declaration by a judge that an event of default had occurred under the bonds, it was clearly not entirely happy that there was no risk of an action by the issuer for wrongful acceleration and therefore insisted on receiving indemnities before accelerating the bonds. Three principal bondholders offered indemnities but the trustee rejected these as it wanted joint and several rather than several indemnities and was also unhappy with the financial status of one of the bondholders. The bondholders went to court to try to compel the trustee to accelerate on the basis that the trustee's refusal to accept the indemnities was Wednesbury irrational, ie one that no reasonable body could have come to.

The judge considered that on a worst case scenario a wrongful acceleration could give rise to a claim by the guarantor against the trustee for damages in the region of €876 million. A trustee was not required to accept any personal liability for acting in accordance with his trust and the indemnities offered were inadequate. As a result the decision of the trustee was not unreasonable.

This case is interesting firstly as it shows that bondholders, which might be entirely unrelated, might be expected to agree joint and several liability to persuade a trustee to accelerate a bond. A further point of interest is that LMA loan agreements contain a similar provision to that in the bonds as the Agent can refrain from acting in accordance with the instructions of the Lenders/Majority Lenders until it has received such security as it may require. However the LMA agreement has a built in indemnity from the banks in favour of the Agent so in most cases the creditworthiness of the banks is likely to be such that the Agent would not seek further security. However, the obligations of the banks are several so if the creditworthiness one or more members of the syndicate is questionable then the Agent might seek to rely on the clause where it was being asked to do something where it felt there was a risk of incurring liabilities either to the borrower or a third party.

Concord Trust v The Law Debenture Trust Corporation PLC [2004] EWHC 1216 (Ch)

Banking: Small Firms Loan Guarantee Scheme

The Graham review team looking at the small firms loan guarantee has published an interim report, which sets out the initial findings of the review. The report includes an analysis of the current state of the debt market for small and medium sized enterprises and then a chapter setting out overview data on the current use of SFLG. The SFLG was introduced to help individuals overcome the problems obtaining the finance to start up new small businesses and also help small established businesses expand. It guarantees loans from banks and other financial institutions for small firms that have viable business proposals but which have tried and failed to get a conventional loan because of lack of security. The review will publish its final report in summer 2004. The interim report is available on

http://www.hm-treasury.gov.uk/independent_reviews/graham_review/review_graham_index.cfm

Banking:

This month's Ombudsman News contains two interesting articles; one entitled 'giving all customers equal access to banking services' and the other 'calculating redress for loss of investment opportunity'.

<http://www.financial-ombudsman.org/publications/ombudsman-news/37/37.htm>

Consumer Credit:

The DTI has introduced new rules for consumer credit to ensure all consumers will get clear and detailed information about their credit agreements from lenders before they sign up enabling them to compare and shop around for the best deal. It is also intended to replace excessive charges for settling an agreement early with a new fairer system. The lender will also have to set out three representative examples of how much it would cost a consumer to settle a loan early, if the lender intends to charge.

The new regulations are also intended to tighten up credit advertising so that consumers will be better able to compare products; and introduce a standard way of calculating the annual percentage rate (APR) for credit cards, a key factor that consumers use to compare products; They also introduce a new signature box for consumers to sign if they are purchasing any additional insurance products, such as payment protection plans, on credit. This is intended to highlight any extra costs. The changes will apply to credit advertisements from 31st October 2004, and to all new agreements from May 2005. The new rule setting out what a lender can charge when an agreement is settled early will apply to existing agreements of up to ten years from May 2007. For loans over ten years it will apply from May 2010. If you want to read the 4 sets of regulations themselves, please go to

http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm#review

Consumer Credit:

The Consumer Credit (Agreements) (Amendment) Regulations 2004 came into force on 31 May 2005. They amend the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553 so as to set out the order of the prescribed content of documents embodying a regulated consumer credit agreement, a regulated consumer hire agreement, and a modifying agreement, and the place of the signature and separate boxes required; provide for an additional form of consent to be signed by a debtor in specified circumstances where the debtor is purchasing certain insurance products on credit; strengthen legibility and prominence requirements; provide for the use of particular assumptions in calculating the APR and the Total Charge for Credit to be stated in running-account credit agreements; require certain additional information to be included in an agreement; and simplify the language used.

Company: Companies Bill

As part of its proposals to reform Company law, the government is consulting on proposals to increase the flexibility and accessibility of company law in future by introducing a reform power to enable company law to be amended as necessary (e.g. to take into account developments in European law) by way of secondary legislation and a power to restate the law in order to simplify it without changing its effect. It is intended that both powers would be subject to operational and procedural constraints. Most people will be relieved to see that remaining among the proposals in the Companies Bill is the plan to abolish the prohibition on financial assistance for private limited companies. Unfortunately there is still no date planned for when the bill will become law. To read the consultation document itself please click on the link below (the principal changes proposed are set out in annex c)

http://www.dti.gov.uk/cld/pdfs/powerscondoc_final.pdf

Financial Assistance: compliance with the whitewash procedures

A recent decision has confirmed that the courts are adopting a flexible attitude as to compliance with the whitewash procedure. A company, J, funded the acquisition by way of intra group loan from the target, T, (which in turn borrowed the funds from two banks) and a loan from the remaining shareholder. The security for the loans included guarantees and security from T to the banks and the shareholder. The parties noted that T was giving financial assistance and the S155 whitewash procedure was followed. In the statutory declaration seven parties were identified as the recipients of the financial assistance (including the two banks lending to T). In addition, in the entry on page 2 of the Form 155 where one is asked to set out the amount of cash to be transferred to the person to be identified they had stated '£ nil'.

T subsequently went into administration and the administrators challenged the effectiveness of the whitewash owing to the inaccuracies in the statutory declaration, claiming it did not comply with S155 and was therefore void. Somewhat surprisingly, the judge considered that the inclusion of the banks might be appropriate if their fees were being paid by T. However, even if they should not have been included he did not think their inclusion was fatal to the validity of the declaration as it was clear that assistance was being provided to J and the addition of unnecessary parties would not have meant the statutory requirements had not been met.

The statement that no cash was being transferred when T was lending monies to fund the share purchase was considered to be an error but one that did not invalidate the declaration. Reading the statutory declaration as a whole it the form and terms of the financial assistance was reasonably clear. As in *Re S H & Co (Realisations) 1990 Ltd*, in reaching his decision on the validity of the statutory declaration, the judge considered the civil and criminal consequences that would follow if he had concluded that the statutory declaration was invalid.

The judge's reasoning as to who should be included as the persons assisted is somewhat worrying as it seems to divorce the assistance from the person acquiring or selling the shares. However, this comment was obiter as the parties had conceded that the declaration was defective in this respect and should not be looked to as establishing a new practice.

Whilst the parties got away with putting nil in the box detailing cash passing, where there is an inter company loan, best practice must be to insert the amount of the loan.

On the whole, this case seems to provide some further comfort to directors and their advisers that the courts will consider the information contained in the statutory declaration in its entirety in order to decide whether all of the statutory requirements have been fulfilled and will not declare a declaration invalid for technical omissions where the overall effect of the transaction is clear.

Re Hill & Tyler Limited (in administration) [2004] EWHC 1261 (Ch)

Money Laundering: even more legislation

Just when you thought you had got to grips with 'know your customer' procedures, the Commission has made a formal proposal for a third Money Laundering Directive to update and replace the existing 1991 Directive (as amended in 2001). In particular, money laundering would be defined as concealing or disguising the proceeds of a wider range of serious crimes. It would also ensure coherent application in all Member States of the latest Recommendations of the Financial Action Task Force (FATF), the world anti-money laundering body, which now cover not only the laundering of the proceeds of crime but the financing of terrorism. The proposal will be forwarded to the European Parliament and the EU's Council of Ministers for adoption under the so-called 'co-decision' procedure. To read the press release and form of the proposal go to

http://europa.eu.int/comm/internal_market/en/company/financialcrime/index.htm

Mortgage: Solicitors' representations

A recent decision has shown that judges are unlikely to be sympathetic when a mortgagor's subsidiaries claims to have the benefit of a lease to prevent the mortgagee obtaining possession of the charged property. The mortgagee claimed that either the lease was a sham or that the mortgagor would be precluded or estopped from relying on any lease. On the facts, the judge held that the mortgagor was prevented or estopped from relying on any lease as a result of their solicitors' comments that there were no impediments to the freehold property.

Merthyr Mining Co Ltd and others v Merthyr Coal Ltd and others [2004] All ER (D) 300 (Jun).

Mortgage: Undue Influence

The Court of Appeal has recently held that a replacement or substitute mortgage with the same lender would be voidable if it was inseparably connected with an earlier mortgage that was voidable for undue influence and of which the lender had constructive notice. In this case, the initial mortgage was only released to enable a sale of the property subject to a new mortgage being granted over the new property. As it was replacing the voidable mortgage it too was voidable.

Yorkshire Bank plc v Tinsley (CA)[2004] EWCA Civ 816.

PFI: Procurement Directives

The OGC has issued consultation papers on the introduction of the new procurement directives into English law. To read them go to <http://www.ogc.gov.uk/index.asp?id=1000084>

Projects: PPP

In addition to the new procurement directives, the EU Commission has published a Green Paper on public private partnerships and Community law on public contracts and concessions which aims to develop PPP within the EU. To read the paper itself please go to http://europa.eu.int/eur-lex/en/com/gpr/2004/com2004_0327en01.pdf

Further information

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