

# Finance Update

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

## Leveraged Finance: Liability of Arrangers for Misrepresentation

Arrangers and agents will no doubt be pleased to learn that the Court of Appeal has confirmed the decision last year that an arranger was not liable for either misrepresentation or negligence in respect of an inaccurate information memorandum circulated as part of the syndication process.

### The facts

As part of the syndication of facilities to fund the acquisition of an English target, the arranger had circulated an information memorandum with 2 accountants' reports annexed to it. In accordance with market practice, the memorandum contained a standard form disclaimer on the part of the arranger. After circulation but before the aggrieved investor had invested, the arranger received information from the accountants which raised the possibility that the information circulated might have been materially incorrect. It was and the target subsequently went into receivership after accountancy fraud was uncovered.

### The decision

The court held that the disclaimer made it clear that the arranger was not assuming any liability to the participants and had no responsibility to check the accuracy of the contents and expressly made clear that the arranger did not undertake to advise any investor of any information coming to the attention of the arranger after the date of the memorandum. The court did, however, consider that the arranger had made an implied representation of good faith. Nevertheless, this meant that it would only be liable for misrepresentation if it knew the information memorandum was misleading and bad faith could be proved.

### Comment

It is always reassuring for arrangers and agents to know that disclaimers do work. However, the judges' comments on the implied duty of good faith show that care should be taken in the event that further information subsequently comes to light.

*IFE Fund SA v Goldman Sachs International [2007] EWCA Civ 811*

## Banking: Guarantees

The Court of Appeal has shown a commonsense approach in a recent case concerning the enforceability of a guarantee following the variation of the underlying guaranteed contract.

### The facts

A supplier agreed to supply goods to a longstanding customer. In many cases in the past the purchase price of the goods had been financed by third parties but when this was not arranged on this occasion, the purchaser's parent had to provide a guarantee and indemnity before the supplier would ship the goods. Following the issue of the guarantee, the purchaser obtained financing from companies on lease-purchase terms. As part of the financing arrangements, the supplier entered into agreements with the purchaser and the finance companies under which title in certain of the supplied goods passed to the finance companies in return for payment of part of the relevant purchase price. The purchaser subsequently went into liquidation with the balance of the purchase price for the goods still

owing. The guarantor claimed that the new arrangements fell outside the terms of the guarantee and refused to pay when demand was made. The judge at first instance disagreed with the guarantor so the guarantor appealed.

### The decision

The court considered that the arrangements with the finance companies did not discharge of the original contract of sale and substitute new contracts under which the supplier sold the goods to the finance companies in return for part-payment of the original price with the purchaser entering into new obligations to the supplier to pay the outstanding balance (which was what the judge had found at first instance). Instead they considered the true effect of the new arrangements was that the purchaser's original obligation to pay for the goods was discharged but only to the extent that the supplier obtained the right to obtain payment from the finance companies. The purchaser's obligation to pay remained in existence to the extent of the remaining balance. Because the purchaser's obligation to pay for the goods was not wholly discharged but was merely reduced by the amount discharged by the finance companies, the guaranteed obligation continued in existence and, owing to the protective language contained in the guarantee, the guarantor was not discharged.

### Comment

Whilst the end result is clearly of comfort to any party relying on guarantees, the judgment is not particularly well reasoned and none of the judges seemed willing to get to grips with the case law. Interestingly, there was no mention of the 2005 Court of Appeal decision in *Triodos Bank NV v Dobbs* and therefore no consideration of whether the amendment was within the 'general purview of the original guarantee'. This is a shame as it would have been helpful to have some further clarification on the extent to which an underlying obligation can be amended without discharging a guarantee.

*Wittmann (UK) Ltd v Willdov Engineering SA [2007] EWCA Civ 824*

## Administration: Preferential Debts

### The Facts

The administrators of a football club were concerned as to what constituted wages for the purposes of calculating what would be payable in priority to all other expenses of the administration and the administrators' own remuneration. The players are one of the club's greatest assets and therefore the administrators were keen to continue their contracts if possible but were concerned that, if they adopted the contracts, any subsequent liability for wrongful dismissal would be included as wages and count as a preferential claim.

### The decision

The judge held that liability for any such payment would not be for wages but rather damages for breach of contract and therefore would not take priority pursuant to paragraphs 99(4)-(6) of Schedule B1 to the Insolvency Act 1986.

*Re Leeds United Association Football Club Ltd Fleming and others v Healy and others [2007] EWHC 1761 (Ch)*

## Mortgages: Arrears and Repossession

The CML has published a report on how firms manage arrears and possessions. Unsurprisingly perhaps, the report concludes that there are significantly more repossessions and a shortfall in realisation proceeds in the non prime market compared to prime. The report is available at the CML website at <http://www.cml.org.uk>

## LSTA updates syndicated secured loan CDS physical settlement rider

The Loan Syndications and Trading Association (LSTA) in the US has published on its website an updated version of its Syndicated Secured Loan Credit Default Swap Physical Settlement Rider which is intended for use with the ISDA Syndicated Secured Loan CDS Standard Terms Supplement (updated by ISDA last month)

To access the rider itself please go to the LSTA website at <http://www.lsta.org>

## Capital Markets: Challenge to the effectiveness of standard ISDA Master Agreement wording

A recently reported case has raised concerns about the effectiveness of certain wording in the ISDA Master Agreements. Essentially one of the parties is arguing that the provisions in the Master Agreement to the effect that payments under the swap are ineffective once an Early Termination Date has occurred constitute a fraud on the operation of bankruptcy provisions (one of the triggers of an Early Termination Date) which would be contrary to public policy in Canada at least. It looks like they will also be challenging the provisions under English law now that the Court of Appeal has lifted the stay on the Commercial Court determining the effect of these provisions. The published judgment provides little or no detail of the proposed legal basis of the challenge under English law but it is to be hoped the case will be heard quickly so that any uncertainty surrounding the provisions is removed.

*AWB Geneva SA (2) Pioneer Metal Logistics Co Ltd BVI v (1) North America Steamships Ltd (2) Wolrige Mahon Ltd (2007) [2007] EWCA Civ 739*

## Further information

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