

Finance Update

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

Administration: When can one appoint

Rather worryingly from a borrower's perspective but reassuring from a lender's, a court has recently held that, unlike in an application for a winding up petition, (where, if the company disputes the debt in good faith and the petitioner relies on nothing more than non-payment of the demand to show insolvency, the court will not make an order) in the context of an administration, a person was a 'creditor' within the meaning of the 1986 Act so long as he had a good arguable case that a debt of a sufficient amount was owing to him. The court specifically rejected the assertion that the established practice in relation to winding-up petitions should apply to administrations owing to the differences between the two regimes.

On the evidence, the court considered that company was or was likely to become unable to pay its debts within the meaning of the 1986 Act, and even if the company was able to pay its debts as they fell due it was likely that it would be unable to do so in the foreseeable future so that it was 'likely to become unable to pay its debts'.

In this instance, moreover, there were allegations that the principal asset of the company had been transferred at an undervalue to an associated company, making it more attractive for an administrator to sort the matter out promptly rather than wait until the dispute over the debt be thrashed out in the courts before anything further could be done.

This decision compliments an earlier decision in *BCPMS (Europe) Ltd & ors v GMAC Commercial Financial Plc & ors* (2006) where a dispute over a qualifying floating chargeholder's entitlement to enforce was held not to prevent the chargeholder from appointing an administrator, albeit it ran the risk of having to indemnify the chargor should it subsequently transpire that it was not entitled to appoint. These decisions assist lenders in that they show that a debtor cannot raise such arguments in order to block the appointment of an administrator.

Hammonds (a firm) v Pro-fit USA Ltd [2007] All ER (D) 109 (Aug)

Overdraft charges

Barclays Bank has been ordered by the court to stop taking overdraft charges from a customer's account until the High Court test case on overdraft charges has been decided (which will not be until 2008). Whilst this does not apply in relation to any other account, the decision puts some pressure on banks to consider their policies in this interim period. However, it is likely that most banks will continue to charge in the interim as it would be impossible to backdate the charges if the test case goes their way.

Fry v Barclays Bank Plc The Times August 24 2007

Mortgages: Too much information?

The CML has asked its members to review whether their mortgage deeds contain details such as the mortgage account number and/or the amount of the loan and to consider whether that policy should change in the light of the recent publicity on the BBC showing that copy mortgage deeds can be obtained from the Land Registry by any applicant for a minimum fee.

The fear is that such details could be used to commit identity fraud, especially as the deed contains a copy signature. Following criticism, the Land Registry has agreed to review its policy. It has also apparently confirmed that it is not a Land Registry requirement that the mortgage account number is on the deed.

Mortgages: Unfair contract Terms

The FSA has recently published on its website an undertaking given by Barclays Bank PLC, trading under the name of Woolwich, which contains details of terms in its mortgage documentation which the FSA considered to be unfair under the Unfair Terms in Consumer Contracts Regulations 1999. To read the wording in question please go to <http://www.fsa.gov.uk/pubs/other/barclays.pdf>

Second consultation on e-conveyancing (electronic charges and new form of discharge)

The Land Registry has issued a second consultation on e-conveyancing in relation to electronic legal charges and electronic discharges by way of E-DS1 both of which it hopes to introduce by mid 2008.

Clearly there are many issues which need to be thought through such as the form of the new electronic charge and the willingness of practitioners to execute them electronically with the authority of the relevant chargor. Similarly with an E-DS1, new procedures would have to be put in place to satisfy purchasers and their mortgagees that an existing charge has or will be discharged to their satisfaction on completion. The deadline for response is Friday 16 November 2007 and the consultation documents themselves are at <http://econsultations.e-conveyancing.gov.uk/inovem/consult.ti/SecondaryLegislationPart2/consultationHome>

Invoice Finance and Money Laundering

JMLSG, with assistance from the Asset Based Finance Association, has issued guidance on how the invoice finance industry can combat money laundering. The guidance is available at <http://www.jmlsg.org.uk/bba/jsp/polopoly.jsp?d=763&a=10219>

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:

Rodney Dukes

E-mail: r.dukes@taylorwessing.com
Tel: +44 (0)20 7300 4189

Paul Harrison

E-mail: p.harrison@taylorwessing.com
Tel: +44 (0)20 7300 4191

Dominic Ross

E-mail: dl.ross@taylorwessing.com
Tel: +44 (0)20 7300 4282

Martin Yells

E-mail: m.yells@taylorwessing.com
Tel: +44 (0)20 7300 4113

Bob Gayford

E-mail: b.gayford@taylorwessing.com
Tel: +44 (0)20 7300 4192

Simon Lovell

E-mail: s.lovell@taylorwessing.com
Tel: +44 (0)20 7300 4605

Peter Shepherd

E-mail: p.shepherd@taylorwessing.com
Tel: +44 (0)20 7300 4141

Akmal Ghauri

E-mail: a.ghauri@taylorwessing.com
Tel: +44 (0)20 7300 4740

Marke Raines

E-mail: m.raines@taylorwessing.com
Tel: +44 (0)20 7300 4181

Graham Wedlake

E-mail: g.wedlake@taylorwessing.com
Tel: +44 (0)20 7300 7157

For further information or advice relating to insolvency and contentious matters please contact:

Patrick Cook

E-mail: p.cook@taylorwessing.com
Tel: +44 (0)20 7300 4898

Alison Goldthorp

E-mail: a.goldthorp@taylorwessing.com
Tel: +44 (0)20 7300 4891

Michael Frawley

E-mail: m.frawley@taylorwessing.com
Tel: +44 (0)20 7300 4849

Nick Moser

E-mail: n.moser@taylorwessing.com
Tel: +44 (0)20 7300 4866

Shane Gleghorn

E-mail: s.gleghorn@taylorwessing.com
Tel: +44 (0)20 7300 4242

Neil Smyth

E-mail: n.smyth@taylorwessing.com
Tel: +44 (0)20 7300 4921

Note: This newsletter is a summary and not necessarily a comprehensive statement of the law. Readers should not act upon it without taking relevant professional advice.

www.taylorwessing.com