

C/M/S/ Cameron McKenna



Finance and Security

Coverage of this month's finance and security law

January 2007

Looking forward

Developments scheduled for the months ahead

Date	Item	Significance
Various to 2008	Companies Act 2006	The Act will be implemented at different (as yet unpublished) times between April 2007 and October 2008.
20 February 2007	Dormant Bank Accounts	Treasury ask for response to consultation paper.
From April 2007	Consumer Credit Act 2006	“Unfair relationships” test will be introduced, to allow consumers to challenge unfair treatment by lenders.
May 2007	EU mortgage credit harmonisation	EU action to make the market for mortgages more efficient and competitive. Mortgage Funding Expert Group, formed to identify barriers to cross-border mortgage activity and propose solutions, will publish findings.
1 July 2007	UCP 600	Revised rules on documentary credits are expected to be written into most letters of credit.
1 November 2007	Markets in Financial Instruments Directive	MiFID will be implemented on this date.

Law Now

Articles on our free information website this month

Date	Item	Significance
2 January 2007	Guarantees: the risks of unclear documents and "Entire Agreement" clauses	The court decided an assurance by a director that he would pay the fees the company owed was not a guarantee of those fees, despite a letter signed at the same time that included a term that the directors would be liable if the company failed to pay.
8 January 2007	Companies' details on websites and in electronic communications	From 1 January 2007, the statutory requirement for companies to state particulars on stationery has been extended to websites and electronic communications.
12 January 2007	Financial Collateral Arrangements - European Commission report	The Directive on financial collateral arrangements might be extended to include credit claims as eligible collateral.
23 January 2007	Court does not validate payments made from frozen bank account	Reminds banks of need to spot winding-up petitions against their customers.
30 January 2007	Secured creditor can intervene in charged property before enforcement	The first time the Court of Appeal has analysed the rights of parties to a securitisation. And a reminder of how extensive a secured creditor's rights are in charged property, even before the right to enforce arises.

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Banking

CASES

Charges

Charge-holder can intervene in charged property before security enforceable

(1) Citibank Na (2) MBIA Assurance Sa v QVT Financial LP

[2007] EWCA Civ 11 CA (Civ Div) (Sir Anthony Clarke MR, Arden LJ, Dyson LJ) 22/1/2007

In this Eurotunnel restructuring case, although a holder of security would not normally be expected to take steps in relation to a charged property before the security became enforceable, unless it could show that the sufficiency of the security was threatened, there was nothing to prevent the parties from agreeing that the holder should have rights to intervene before the security became enforceable.

The appellant noteholder (Q) appealed against a decision ((2006) EWHC 3215 (Ch)) determining the proper interpretation of a trust deed and deed of charge in relation to the proposed exercise of an option arising under the restructuring of the Eurotunnel debt. The first respondent (C) was the trustee of a trust constituted by a trust deed and deed of charge between C, the second respondent (M) and a special purpose vehicle (F). The subject-matter of the trust was

predominantly Eurotunnel tier 3 junior debt owned by F. That debt had been used to secure seven tranches of notes issued by F. M was the "note controlling party" under the trust deed while it remained guarantor of some of those notes. A proposed restructuring of the Eurotunnel group approved by the French court provided for the assignment of the tier 3 debt by F to a Eurotunnel company in consideration of the issue of certain notes redeemable as shares in Eurotunnel plus cash, with an option to receive cash instead of the notes. M directed C to exercise the tier 3 cash option. Q took the view that it would be contrary to C's position as trustee to exercise or consent to the exercise of the cash option. C sought directions from the court, which held that M had power pursuant to the trust deed and deed of charge to direct or instruct C to exercise the option and that the exercise of the option did not require C's consent under the negative pledges contained in the deed of charge and conditions attached to the notes. Q submitted that (1) C had no power to exercise the tier 3 cash option and therefore could not be instructed to do so by M; (2) the exercise of the option by F required C's consent under clause 19.4 of the deed of charge or condition 4 of the notes and M had no right to direct the giving of that consent; alternatively that C's right to exercise the option was not

within the rights which M could direct C to exercise because it was not within clause 12.2 of the trust deed.

HELD: (1) The judge was right that C had power to cause the exercise by F of the tier 3 cash option. That was a question of interpretation of the trust deed and deed of charge. In the normal way the holder of security would not be expected to take steps in relation to the charged property before the security became enforceable, unless it could show that the sufficiency of the security was threatened, but there was nothing which prevented the parties from agreeing that the holder should have rights to intervene before the security became enforceable, *Nelson v Hannam* (1943) 1 Ch 59 applied. Clause 8.1 of the deed of charge imposed on F the duty to do all such other acts or things or execute any other document as might in the opinion of C or M be necessary or desirable to enforce any rights under the "participation documents", and the restructuring plan was such a document replacing or supplementing the credit agreement. Therefore C had power to cause the exercise by F of the tier 3 cash option. It made no difference that the effect of the exercise of the option was to turn property into cash. (2) C was bound to give a direction to F if so required by M

on two bases. The first was if M formed the opinion that it was necessary or advisable that F should exercise the option for the purposes of clause 8.1.3 of the deed of charge. The second was that clause 12.2 of the trust deed had to be interpreted according to its tenor and there was nothing on the face of it to limit it, where security had not become enforceable, to a case where the trustee was seeking to invoke F's right to exercise the tier 3 cash option in order to preserve the sufficiency of the security. Having regard to the rights conferred by clause 8.1 of the deed of charge, no such limitation could be implied. Moreover, the negative pledge clauses did not on their true interpretation apply where the action taken by F was being taken at the direction of C and, so long as it was the note controlling party, M. The negative pledge clauses made no sense if the consent of those parties had already been given because the purpose of the clauses was to prevent transactions without their consent. In any event exercising the tier 3 cash option would not be a disposal for the purposes of the negative pledge clauses.

Appeal dismissed.

ARTICLES

Asset based lending

Risky business? Assessing the lender's real environmental risk and how to avoid it

This article examines some of the key areas of environmental risk and discusses steps lenders can take to limit their exposure to liability, including complying with the revised Equator Principles in project finance.

(M. Townsend, J. Pavry and C. Warren: JIBFL, 12.06, 488) 07.02.013

Loans

Taking security in secured syndicated cross-border transactions

This article looks at three key issues which an English lawyer needs to think about when taking security for a syndicate of lenders in a European cross-border transaction:

- how to create security for a syndicate;
- the impact on the security that any trading of the loans will have; and
- the impact on the security of a change of security agent.

(C. Gibbons: JIBFL, 12.06, 511) 07.02.009

Interim loan agreements: a guide for commitment-phobes

When lenders commit to funding a leveraged acquisition, they are often asked to sign an interim loan agreement along with the commitment letter and term sheet. This article explores why interim

loan agreements have developed, what terms they typically contain and some points of which lenders and sponsors should be aware.

(D. Campbell: JIBFL, 12.06, 481) 07.02.012

Project finance

Nothing left to negotiate: current financing terms for LNG projects

This article looks at the terms upon which LNG plants are currently being financed. These terms have now become more or less standard – on a generalised level – and constitute a significant departure from the terms that would normally prevail in the project finance market. The article looks in particular at the terms upon which sponsors of LNG projects are prepared to guarantee the bank debt during the construction period.

(G Vinter: IELTR, 11/12.06, 278) 07.02.043

Securitisation

A tax on securitization

Among its many effects on banks' regulatory capital, Basel II might prove to be an additional capital tax on securitization.

(M. Nicolaides: IFLR, 12.06, 18) 07.02.003

TECHNICAL

Security

Report from the commission to the council and the European parliament evaluation report on the financial collateral arrangements directive (2002/47/EC)

The Financial Collateral Arrangements Directive 2002/47/EC (hereafter only "FCD" or "the Directive") creates a uniform EU legal framework for the (cross-border) use of financial collateral and thus abolishes most of the formal requirements traditionally imposed on collateral arrangements. Financial collateral are assets provided by a borrower to a lender to minimise the risk of financial loss to the lender in the event of the borrower defaulting on its financial obligations to the lender. Collateral is increasingly used in all types of transactions, including capital markets, bank treasury and funding, payment and clearing systems and general bank lending. The collateral provided is most often in the form of cash or securities. This report assesses FCD's implementation, its impact, and whether the Directive needs amendment.

The report is available at:

http://www.ec.europa.eu/internal_market/financial-markets/collateral/index_en.htm – directive

(European Commission, COM (2006)833 final, 20.12.06)

NOTICES

Loans

Revised LMA documents

The exercise to revise the rubric on the LMA recommended documents continues and the revised versions of the investment grade primary documents and the leveraged primary documents was launched on 25 January 2007.

There are some additional changes to the documents as follows:

Investment Grade Primary

The principal changes (in addition to some smaller drafting changes) are the new provisions providing for

- (i) automatic cancellation of the Total Commitments at the end of the relevant Availability Period; and
- (ii) a turnover trust in the guarantee provisions.

It is recommended that members file copies of the current documents in preparation for the release of the revised documents next week.

Leveraged Primary

The principal changes (in addition to some smaller drafting changes) are

- (i) the incorporation of the Financial Covenant Provisions and related changes to the definitions into the body of the document and the consequential changes to the use of certain financial definitions throughout the document;

- (ii) a new provision providing an automatic cancellation of unutilised Commitments at the end of the relevant Availability Period;

- (iii) a new provision incorporating a turnover trust in the guarantee provisions;

- (iv) an alteration to the guarantee provisions to guarantee the Parent's obligations; and

- (v) a note to the Form of Transfer Certificate and to the form of Assignment Agreement to emphasise that the New Lender is responsible for due diligence on security issues on transfers.

Risk Sharing Finance Facility

The European Commission and the European Investment Bank have joined forces to set up the Risk Sharing Finance Facility.

RSFF is an innovative scheme to improve access to debt financing for private companies or public institutions promoting activities in the field of: Research, Technological Development Demonstration Innovation investments

(EIB, 11.01.07)

Mortgages

Consultation on the Report of the Mortgage Funding Expert Group and the Report of the Mortgage Industry and Consumer Dialogue

The European Commission has published reports from the Mortgage Funding Expert Group (MFEG) and the Mortgage Industry and Consumer Dialogue (MICD),

established in April 2006 to explore the issues of mortgage and consumer protection. The report of the MFEG reviews all barriers to the emergence of an efficient and competitive pan-European mortgage funding market, and proposes solutions to remove existing obstacles. It focuses on both primary and secondary markets and covers all funding techniques such as deposits, covered bonds and residential mortgage backed securities. The MICD explored in detail four key consumer protection issues, namely pre-contractual information, advice, early repayment and the annual percentage rate of charge. The reports will assist the Commission in finalising its White Paper, due in June 2007.

Copies of the report are available from http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm

(CEC, January 2007)

CML reacts to reports on European mortgage markets

The Council of Mortgage Lenders today responded to the European Commission's publication yesterday of two working group reports on mortgage funding and consumer protection in European mortgage markets.

(CML, 18.01.07)

BLOG

Current updates on banking law issues

Have you tried out the Bank Lawyers' Blog? Updated with topical information every few days.

You can discuss items of interest with fellow bank lawyers or research it for banking information.

These are some topics in the last month:

- First securitised debt case? Citibank v MBIA
- World-wide freezing order
- House of Lords' appeal reform - and no more wigs
- New money laundering regulations
- Dormant bank accounts
- Small business banking competition
- Rome 1 - "damaging" changes to contract law
- Funding leveraged acquisitions
- Financial Collateral Arrangements - an evaluation

Do try it!

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