TRAVERS SMITH

Finance Monthly

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Welcome to the monthly finance bulletin from our banking and corporate recovery department. This issue contains our usual overview of some recent market developments and trends in the finance sector, including a spotlight on Landlords and *Luminar*. Please get in touch if it raises any issues that you would like to discuss.

Jeremy Walsh, Head of Banking and Corporate Recovery Department

HMRC abandons withholding proposals

In a statement welcomed by banks, borrowing groups, mezzanine providers and private equity firms, HMRC has announced that notwithstanding proposals set out in its consultation paper of March 2012, it will not be (i) removing the distinction between yearly interest and short interest which permits payment of interest on loans of less than one year to be made without deduction of tax; (ii) requiring a withholding on PIK notes to be paid in cash rather than (as now) satisfied by the issue of PIK notes to HMRC; or (iii) abolishing the exemption from withholding tax now enjoyed by interest payments made under debt assumed by a foreign affiliate listed on a designated stock exchange (such as Luxemburg) known as the "quoted Eurobond exemption". The October statement, however, reaffirms HMRC's intention to reconsider the whole question of taxation of cross-border interest payments – and suggests that changes may also be made to PIK issuance procedure.

Tobin Tax Back

Following the failure of all twenty-seven member states to agree to a financial transaction tax in June 2012, the EU Commission President José Manuel Barroso has welcomed the recent statement of intent of ten countries (France, Germany, Italy, Spain, Austria, Belgium, Greece, Portugal, Slovakia and Slovenia) to participate in a common financial transaction tax. The tax will need to be implemented amongst the ten by means of the enhanced co-operation procedure, which permits implementation by some member states with the sanction of a majority vote. If the tax follows the proposals made by the Commission in September 2011, it will be charged at 0.01% of the face amount of derivatives deals and 0.1% on the trading of bonds and shares.

Government moderates Insolvency Petition Reform

Responses to consultations in 2009 and 2011 aimed at reducing court involvement in debtors' bankruptcy petitions; creditor petition bankruptcies; and certain company winding-up proceedings have persuaded the government to limit its proposals to debtors' bankruptcy petitions. The courts will assume a reduced administrative role in these types of petition, which will permit the electronic application of the debtor to be made to an adjudicator – probably acting under the auspices of the Department for Business, Innovation and Skills. The amendments to the Insolvency Act 1986 are included in the Enterprise and Regulatory Reform Bill. The conditions for a debtors' bankruptcy application will be unchanged – the substance of the law remains the same.

Vickers v Volcker v Liikanen

The Parliamentary Commission on banking standards is currently taking evidence from both Paul Volcker, the archtitect of the reasonably well entrenched US Volcker plan and Erkki Liikanen, the author of the recent report on banking reform to the EU Commissioner, all against the background of reasonably well developed UK primary legislation resulting from the Vickers' report. The difficulty is that whilst each regime (US, EU and UK) advocates a ring-fence model, they offer slightly different approaches. All three models require a division between deposit-take activities and trading/investment bank functions, but Volcker requires legal separation regardless of size, Liikanen proposes legal separation where "significant" shares or volumes pose issues for wider financial stability; and Vickers requires legal separation where retail/SME deposits exceed £25bn. Differences also emerge with respect to the nature of the separation. Vickers and Liikanen allow the ring-fenced entities to be separate and independent parts of the same group, while the Volcker Rule disallows proprietary trading anywhere within a group which includes a deposit-taking bank. There are also differences of approach in terms of the range of activities capable of being undertaken by and between the ring-fenced entities.

Vickers allows arm's length market condition arrangements whilst Volcker severely restricts dealings. Distinctions

Spotlight on…Landlords and *Luminar*

Six months ago Spotlight focused on the *Goldacre* and *Luminar* cases. The *Luminar* case held that where an advance quarterly rent instalment fell due immediately before a company went into administration or liquidation, the unpaid rent would not constitute a prioritised administration or liquidation expense, even though the landlord was constrained by the moratorium on proceedings against the tenant under the Insolvency Rules and the tenant would thereby occupy property rent free for the benefit of its other creditors.

Figures recently published by PwC and the Local Data Company show that 953 stores disappeared from the High Street in the first six months of this year, compared with 174 for the whole of 2011. Not all these closures will have been as a result of insolvency procedures, but many will – including high profile chains such as Peacocks, Blacks Leisure, Game Group and Clinton Cards. In addition, it is clear that the appointment of administrators is being timed to fall immediately after a quarter date in order to exploit the judgment in the *Luminar* case. Optical Express and JJB Sports both went into administration on 1 October, shortly following the rent quarter date of 29 September.

Morgan J has, in a recent presentation to the Insolvency Lawyers Association, highlighted the arbitrary results of both the *Luminar* and *Goldacre* decisions. If a tenant fails to pay rent on a rent quarter day, enters administration immediately afterwards and ceases trading just before the next quarter day, the landlord is not entitled to claim the rent due as an administration expense (*Luminar*). If the tenant is still in occupation and trading on the next rent quarter day but ceases to trade and relinquishes the premises the following day, then the landlord is entitled to treat the full quarter's rent for the following quarter as an administration expense, notwithstanding occupation for only one or two days (*Goldacre*). A short and no doubt inadequate summary of Morgan J's analysis and conclusion in his lecture is (a) neither *Goldacre* nor *Luminar* make good sense; (b) the cases apply a rigid accruals approach on the basis of 19th century cases which may well be unfounded; (c) even greater absurdities arise if the accrual basis is applied to the accrual of annual service charge balancing payments or liability for enhanced rental sums falling due after a rent review process of lengthy duration; (d) landlords should be entitled to recover rent as an expense of the administration or liquidation consistent with the period during which the company retains the premises for the benefit of the administration or winding-up; and (e) the courts may not feel constrained to follow either decision.

also exist between bail-in arrangements and other regulatory requirements, although there is inevitably greater overlap under the CRD umbrella between the UK and the EU proposals. The Chairman of the Parliamentary Commission has admitted that Paul Volker's defence of the US reforms was "extremely impressive" and whilst the Vickers' proposals will no doubt be vigorously defended by Sir John when he appears before the Commission, the complete implementation of his proposals no longer appears inevitable.

Government endorses Wheatley LIBOR recommendations

On 17 October HM Treasury endorsed the Wheatley recommendations and committed to their implementation by early 2013.

In the courts

Rubin and another v Eurofinance SA and others and New Cap Reinsurance Corporation (in liquidation) and another v A E Grant and others [2012] UKSC 46

On 24 October the Supreme Court handed down its judgment in the joined cases of *Rubin v Eurofinance* and *New Cap v A E Grant*. In what may prove to be a controversial judgment, the Supreme Court held by a majority that the ordinary common law rules apply to the recognition and enforcement of judgments in avoidance actions in insolvency proceedings. The UNCITRAL Model law on Cross-Border Insolvency is not designed to provide for enforcement of judgments and there is no ability under the Cross-Border Insolvency Regulations 2006 to recognise judgments given in the course of foreign insolvency proceedings. This decision reverses the trend towards the universalist principles espoused in the Court of Appeal judgments. The decision has significant implications for the conduct of cross-border insolvency proceedings and will be the subject of a separate flyer over the next few days.

SNR Denton UK LLP v Kirwan & Others UKEAT/0158/12

The Employment Appeal Tribunal (EAT) has recently considered whether the use of external solicitors instructed by administrators constitutes a replacement of in-house lawyers working for the company in administration and a service provision change, contrary to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The usual preoccupation with TUPE is with the continuation of employment contracts following a business transfer, but TUPE also applies where there is a "service provision change". Ms Kirwan, the director of legal services at Jarvis Accommodation Services (JAS), alleged a service provision change where (i) JAS went into administration, (ii) Dentons were engaged by the administrators, Deloittes, to act as advisers in relation to the administration and (iii) Ms Kirwan was made redundant. Ms Kirwan alleged that the Denton lawyers were fulfilling the same duties as she performed for JAS, there had therefore been a service provision change and that her contract of employment had transferred to Dentons.

At the first hearing, the Tribunal found in Ms Kirwan's favour, holding that the Denton lawyers and Ms Kirwan carried out the same duties before and after the administration; that this was for the same client, JAS, and that the duties were not necessarily in connection with a task of short duration or single event.

On appeal the EAT reversed the Tribunal decision and held in favour of Dentons. The EAT determined that the duties performed by Dentons and Ms Kirwan were essentially the same but that (in reliance on the recent EAT case of *Hunter v McCarrick* [2012] IRLR 274) those duties were not carried out pre and post administration for JAS. Whilst the administrators were acting as agents for JAS, Dentons performed their duties on behalf of the administrators. The EAT concluded that it was unnecessary for them to consider whether the administration would constitute a single specific event or task of short duration, noting that whilst the statutory limits on the duration of administration (one year unless extended) might suggest that activities were related to a single specific event or task of short duration, this was a question of fact.

An appeal is possible from this case, perhaps dependent on the outcome of a forthcoming appeal from *Hunter*.

Recent transactions

We have recently advised:

- **Silicon Valley Bank** on its provision of senior debt financing to Francisco Partners in relation to its recent acquisition and take private of Kewill plc, a leading global provider of software and services to logistics and supply chain service providers.
- **Lloyds Banking Group** on the provision of a revolving credit facility to Maplin Electronics, the high-street electronics retailer

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