TRAVERS SMITH

Finance Monthly

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Welcome to the monthly finance bulletin from our finance and restructuring group. This issue contains our usual overview of some recent market developments and trends in the finance sector, including a spotlight on the Fiduciary relationships in Syndicate Documentation. Please get in touch if it raises any issues that you would like to discuss.

Matthew Ayre, Head of Finance

Black Horse Down

In *Harrison v Black Horse Ltd [2012]*, the Court of Appeal roundly rejected the claimants' arguments that the failure by a lender to disclose its receipt of commission (which amounted to 87% of the cost of the insurance) resulted in an agreement which was unfair to the claimants under section 140A of the Consumer Credit Act 1974 (CCA) which gives extensive powers to a court to reopen arrangements.

One of the main planks of the CA decision in *Harrison* was that Black Horse, the lender, had in fact complied with ICOB rules which were the "touchstone" as to whether a relationship was unfair or not. The *Harrison* case was eventually settled out of court before an appeal to the Supreme Court, but the CA decision was thought helpful to lenders who were in compliance with ICOB rules. In a decision handed down on 12 November, the Supreme Court overruled *Harrison*. In *Plevin v Paragon Personal Finance Ltd [2014]*, which similarly involved the payment of a significant commission (amounting to 71.8% of the premium) the Supreme Court acknowledged that the ICOB and other regulatory rules constituted some evidence of the standard of commercial conduct reasonably to be expected of a creditor, but were not exclusively determinative of the unfairness question posed by section 140A. ICOB rules merely impose a minimum standard of conduct. Whether a creditor's relationship with a debtor is unfair will depend upon a variety of reasons, which do not have to include a breach of duty. Regulatory rules impose "*hard edge*" requirements, whereas "*the question of fairness involves a large element of forensic judgment … and an altogether wider range of considerations*". Those considerations, in the Supreme Court's judgment, included the debtor's personal circumstances. In *Plevin*, the Supreme Court found that the non-disclosure of commission was sufficient to have rendered the relationship unfair and referred the case back to Manchester County Court to determine what suitable powers might be exercised under section 140B of the CCA.

Mrs Plevin's second argument, however, was unsuccessful before the Supreme Court and lenders may derive some comfort from this. The substance of this unsuccessful argument was that the lender had failed to assess the suitability of the PPI policy to Mrs Plevin's needs, although this was determined to be a function fulfilled by the intermediary broker, who was, in fact, Mrs Plevin's agent. At the Court of Appeal level it was successfully argued that the acts and omissions of the broker were in reality done "on behalf" of the lender, but the Supreme Court was not prepared to disrupt the ordinary and natural meanings of the words in the context of a relationship where the broker was clearly, albeit inadequately, acting as agent for, and on behalf of, Mrs Plevin.

Securitisation as a good thing

The perceived profligate selling of complex financial products before the financial crisis and the poor evaluation of risks associated with the US sub-prime mortgage sector has resulted in a significant contraction in the EU securitisation market. Ironically, the US securitisation market has undergone something of a resurgence. A number of measures are now being taken in the EU to revitalise this sector, which is perceived as a means to significantly expand sources of finance beyond traditional forms of bank debt funding. In May 2014, the Bank of England and the European Central Bank issued a joint paper supporting a more efficient securitisation market in the EU. The European Banking Authority also published a discussion paper on simple standard and transparent securitisation in response to the European Commission's call for advice in December 2013 with respect to the potential ways of promoting a safe and stable securitisation market. The European Commission is expected to publish a paper setting out a "road map" for securitisation over the next few months. The road map, which apparently lists various initiatives, was discussed by EU Finance Ministers at the Milan meeting in September 2014 and plans include the development of a high quality securitisation model that could be afforded more lenient regulatory treatment.

Spotlight on… Fiduciary relationships in Syndicate Documentation

The Supreme Court decision in *FHR European Ventures LLP and others v Cedar Capital Partners LLC [2014]* UKSC 45 was preoccupied with the treatment of bribes or secret commissions received by an agent in breach of his fiduciary duty. In holding that the payments received were held on trust for the principal (rather than giving rise merely to a claim for compensation) the Supreme Court elevated the right of the principal to a proprietary claim against the monies received by the agent, with associate tracing rights and a prioritised right to those monies above unsecured creditors of the agent on an insolvency.

This is an important decision which reminds practitioners of the significance of a fiduciary relationship. It derives from two basic principles stemming from a fiduciary relationship. First, that an agent must not profit from his trust, and secondly that an agent acting for two principals without the informed consent of both is likely to be in breach of his obligations of undivided loyalty to either one or the other. Whether a fiduciary relationship exists between two parties is therefore a point of some importance. Without anything else, the relationship between agent and principal (being one based on trust and confidence) may well give rise to fiduciary duties.

For a financial institution acting as arranger, agent, or security trustee this gives pause for thought, since assuming any of these roles may well give rise, absent other considerations, to fiduciary duties. Well advised financial institutions will, however, require express terms to be included in syndicate documentation which limit their obligations, delineate their duties of care and exclude fiduciary duties completely. The November 2014 LMA Guide to agency protections stresses the importance of excluding fiduciary duties and placing contractual limits on other obligations to ensure that the role of an agent is limited to a solely mechanical and administrative function. In *Torre Asset Funding Ltd & Another v RBS Plc [2013]*, the High Court readily concluded that the contractual provisions within an LMA based facility agreement established precisely that. Similarly, the court in *IFE Fund SA v Goldman Sachs International [2007]* gave effect to contractual provisions relieving an arranger from an obligation to disclose certain information received from auditors. In *Saltri III Ltd v MD Mezzanine SA SICAR and others [2012]*, where the potentially conflicting duties of a security trustee were considered, the court concluded that such a trustee could be in a fiduciary position insofar as some of its functions were concerned and not others, but that contractual provisions would prevail over any implied assumption of any fiduciary duty.

Game Over

The Supreme Court has refused Game's application to appeal the Court of Appeal's decision in *Pillar Denton Ltd & Ors v Jervis & Ors [2014]*. *Pillar Denton* overruled the *Goldacre* and *Luminar* decisions which afforded tenants in administration an effective quarter's rent holiday and required rent to be paid as an expense of the administration for the period of rental occupation.

LMA Developments and Auditor Selection Approach

The LMA has made changes to its Leveraged Facility Agreement over the last month, as well as producing a new Super Senior Revolving Facility Agreement with a multi-currency option and related Intercreditor Agreement. A new Real Estate Finance Termsheet has also been produced. The changes to the LMA Leveraged Facility Agreement are principally preoccupied with (a) the new ICE LIBOR Screen Rate and Interest Setting Regime, (b) changes to operational provisions on letters of credit and online communications by Agents, and (c) changes to the Auditor appointment regime in order to address the EU prohibition, with effect from 2016 at the very latest (the precise date depends on national legislation) of any sort of contractual control on an entity's choice of auditor. There are no grandfathering provisions and any provision in existing facility agreements will, with effect from introduction of the EU legislation, be invalid. The new definition of Parent's Auditors anticipates the complete absence of any control, or as an alternative where the Parent is not subject to the EU legislation, a concept of Majority Lender approval. The document does however introduce the concept of a separate appointment of "Monitoring Accountants" which could report on financial covenant compliance and also a proposed clause which is designed to protect borrowers from the triggering of events of default caused by any control clause being held to be unlawful or invalid under the new legislation.

In the courts

***Singularis Holdings Ltd v PricewaterhouseCoopers [2014]* UKPC 36**

On 10 November, the Privy Council handed down the above judgment, which was a result of an appeal from the Bermudian Court of Appeal. The Bermudian office of PwC was successful in resisting the production of information and documents relating to that company to the Cayman Island liquidators of Singularis in response to orders requiring production of those materials issued by the Cayman Islands Court. The *Singularis* case was preoccupied with the extent to which a foreign court is obliged to compel advisers and accountants (such as PwC) subject to their jurisdiction to comply with foreign court orders designed to assist foreign liquidators. The decision moves some way from the previous Privy Council decision in *Cambridge Gas [2006]* which ruled that a US chapter 11 Plan of Reorganisation could be enforced in the Isle of Man without the implementation of domestic proceedings in the Isle of Man. The so-called "modified universalism" principle radically espoused by Lord Hoffman in the *Cambridge Gas* decision was rejected by the Supreme Court in *Rubin and Another v Eurofinance SA & Others [2012]* where it was held that normal common law principles applied to the enforcement of foreign insolvency judgments through the English courts in the same way as any other judgments. Those principles fundamentally require that the person affected by the foreign judgment must have submitted to the jurisdiction of that foreign court either by agreement or by appearing voluntarily before that court.

These fundamental requirements were absent in the *Singularis* case, but the Privy Council still unanimously concluded that the concept of "modified universalism" continues to exist, subject to significant constraints. The Privy Council decision was heavily influenced by the fact that the ability to require the provision of the Bermudian audit working papers was available under Bermudian law but not under the law of the Cayman Islands where the insolvency proceedings originated and the court concluded that the Bermudian court should not have granted an order which the Cayman Island courts could not have ordered. If the type of relief sought by the Cayman Island liquidators had been available as a matter of Cayman Islands law, the Privy Council may have been disposed to provide the type of common law assistance envisaged by the "modified universalism" principles. Lord Sumption was persuaded that the modified universalism principles espoused in *Cambridge Gas* could be in the public interest, but in addition to the relief availability point discussed above, made it clear that those principles should only be applied (a) where the relief requested is necessary for the performance of the insolvency official's functions (such as the provision of information or in order to identify and locate assets); (b) where the territorial limits of the existence of a court's powers frustrate the resolution of a worldwide winding-up; and (c) to assist insolvency officers and not in the context of other arrangements (including a voluntary winding-up).

Transaction News

We have recently advised HSBC Bank plc on the management buy-out by LDC of Clifford Thames, a UK market leading automotive data firm.

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