TRAVERS SMITH

# Finance Monthly

## May 2015

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 susceptibility of EU based foreign companies to UK insolvency procedures. Please get in touch if it raises any issues that you would like to discuss.

*Matthew Ayre, Head of Finance*

### Pick'n'Mix

In November 2008, Woolworths plc went into administration, swiftly followed by the closure of all Woolworths' stores and the redundancy of all Woolworths' retail employees. In January 2012, an employment tribunal found that the administrators had failed to comply with their collective consultation duties under s.188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which implemented the European Collective Redundancy Directive into English law. TULRCA imposes a duty to consult in circumstances where at least 20 employees at one establishment are dismissed over a period of 90 days. Although the employment tribunal was clear as to the collective consultation failure, those employees employed at individual stores with less than 20 employees were excluded from the award of 60 days' gross pay, the employment tribunal having determined that for the purposes of TULRCA, each store was a separate establishment.

In May 2013, to the consternation of employers, the Employment Appeals Tribunal (EAT) ruled that the words "at one establishment" in TULRCA were to be disregarded. In the Woolworths' context, each store could not be considered as a separate establishment and every employee was therefore entitled to a protective award. The difficulty was that TULRCA does not replicate the Directive's provisions and was concluded by the EAT to be incompatible with the Directive's characterisation of an establishment, the provisions of which the EAT was minded to apply. The accepted approach on directives is that they are legally binding on member states but do not give rise to recourse rights directly available to citizens (in contrast with EU Regulations, which do give rise to direct recourse rights). The EAT decision is to be appealed at the UK Court of Appeal later this year, but the UK's appeal process has been somewhat overtaken by events in Europe. In February 2015, the Advocate General, to the surprise of many, expressed the opinion that the EAT's decision was wrong and that the Directive only requires collective consultation where 20 or more redundancies in 90 days are effected at one establishment. On 30 April 2015 the ECJ endorsed this approach. In a development likely to be welcomed by employers and UK insolvency practitioners, it is likely that the CA will reverse the EAT's decision and the law will revert to that espoused by the original employment tribunal decision.

### A question of leverage

The Bank of England's Financial Policy Committee concluded its review of the leverage loan market at the end of March and despite fears that it would impose guidelines on leverage (strict guidelines apply in the US to the required ratio of debt to EBITDA), it has not done so. In the second quarter of 2012, the UK average leverage multiple for private equity bank deals was 6.4x. In the last quarter of 2014, it was 4.77x and in the first quarter of 2015, 5.5x. The Policy Committee noted that the debt to EBITDA ratios had recently increased, but concluded that the UK banking system currently appeared resilient to stress in the leverage loan market. Accordingly no action was necessary at present to mitigate risks in the market.

### Guarantees and corporate benefit

Practitioners are generally well aware of the principal duty of a director to promote the success of the company of which he is a director and generally act in its best interests. That duty may appear to be compromised in the common situation where a company assumes contingent liabilities under a guarantee in relation to the obligations of another company. In the context of a larger group with a degree of interdependence, however, the provision of a guarantee in relation to the obligations of a related group member may well make justifiable economic sense for the guaranteeing company. The best evidence that a proper evaluation of the benefit accruing to a company giving a guarantee has been made (in order to avoid both director risk and a risk to the lender that the provision of the guarantee constitutes a transaction at an undervalue (s.238 (IA 1986)) is a sober, bespoke, minuted appraisal of corporate benefit in the board minutes approving the

**Spotlight on… the susceptibility of EU based foreign companies to UK insolvency procedures**

When considering the applicability of UK insolvency proceedings to foreign companies (ignoring any special insolvency regimes appropriate to certain industry sectors) the principal determinant under the European Insolvency Regulation will be the location of that company's centre of main interests (COMI). COMI is presumed to be where the company's registered office is located but that presumption can be displaced if the central administration of the company is elsewhere. If the foreign company's COMI is in the UK, then main proceedings (winding-up, creditors' voluntary liquidation (as confirmed by the court), administration (including out of court appointments) and voluntary arrangements) may all be instituted in the UK and those proceedings will be automatically recognised in all EU member states (other than Denmark). The appointment of an insolvency officer in the UK pursuant to those proceedings will permit the invocation by that officer of the UK Insolvency Act reviewable transaction regime. Somewhat counter intuitively, the COMI principles referred to above will also apply to companies outside the EU (save that recognition of such proceedings will be confined to the relevant EU member states).

If COMI of a foreign company is located in another EU member state, then secondary proceedings may still be opened in the UK under the EU Insolvency Regulation if the company has an establishment in the UK. Secondary proceedings are currently confined to winding-up proceedings save in certain limited circumstances, such as where main proceedings are unavailable in the state where the relevant company has its COMI. The Supreme Court has recently declined to conclude that the minimal operations and skeleton staff maintained in London by Olympic Airlines following the main proceedings in Greece constituted an establishment, being "a place of operations where the debtor carries out a non-transitory economic activity with human means and goods". If successful, the institution of secondary winding-up proceedings would have constituted a "qualifying insolvency event" enabling a pension shortfall claim to be made by Olympics' pension trustees under the Pensions Act 2004.

The fact that a foreign company does not have its COMI within the UK or EU does not preclude the English courts considering a narrower range of insolvency proceedings (including a winding-up) where that company is found to have "sufficient connection" (e.g. assets located in the UK) under s.220-221 of the Insolvency Act 1986 (IA). The IA also facilitates co-operation within the UK and other, mainly Commonwealth, jurisdictions. Complicating matters still further, the Cross-Border Insolvency Regulations may also overlay or supersede such IA provisions.

transaction. This is less likely to be achieved by short form proforma board minutes which simply annex the relevant documents, a recent market development which is perhaps to be deprecated.

## In the courts

### *Wood v Capital Bridging Finance Ltd [2015] EWCA Civ 451*

Capital advanced loans against mortgages over residential property for the purpose of businesses carried on by the borrower. As such, the loans fell within the FSMA 2000 (Regulated Activities) Order 2001 and were unregulated under the Consumer Credit Act. Capital obtained judgment in the amount of £151,883.34 against Mrs Wood, a 75 year old lady who had entered into a facility agreement which included her signed acknowledgement that the loan "was for the purposes of a business carried on by me" and which, in consequence was not regulated by the CCA. In fact, Mrs Wood obtained the loan in order to on-lend the funds to her son-in-law in connection with *his* business. He had failed to repay Mrs Wood, decamping to North Cyrus with his family. Whilst Section 16B(2) of the CCA creates a presumption that an acknowledgement in the above terms is conclusive as to the inapplicability of the CCA, Section 16(B)(3) disapplies that presumption if a creditor knows or has reasonable cause to suspect that the agreement was not being entered into for a business purpose. Capital had in fact been advised by Mrs Wood's broker in writing and by Mrs Wood verbally that the loan was to be applied in financing her son-in-law's business, and not her own. Mrs Wood, however, went further and at the instigation of her son-in-law, dishonestly pretended that she was not living at the mortgaged property and doctored bank statements with a false residential address. Subsequently, she pleaded the defence that she had not borrowed the money and had not signed any documents, contentions which led to her characterisation by the judge as an "unreliable historian". Notwithstanding this, an order for sale of the property was denied to Capital due to defective witnessing of the mortgage and its consequent ineffectiveness as a deed. Capital therefore pursued their claim as a money judgment and the Court of Appeal, determining that the agreement was regulated under the CCA, concluded that it could only be enforced by an enforcement order at the discretion of the court under section 127 of the CCA. Unfortunately, Capital had not applied for an enforcement order and their argument that Mrs Wood was in any event estopped, (whether contractually, or by representation or by convention) was unsuccessful. The argument in favour of estoppel by representation or convention was defeated because there was no relevant reliance by Capital, who knew the true position. The argument based on contractual estoppel, if allowed, would effectively contradict the clear prohibition against contracting out of CCA protection under s.173(1) of the CCA. The appeal was allowed and the money judgment against Mrs Wood set aside.

### *Re DTEK Finance BV [2015] EWHC 1164 (Ch)*

This case demonstrates the English courts' willingness to entertain and approve schemes of arrangement in the context of New York law governed High Yield Bonds. DTEK, a Netherlands incorporated company pursued an energy supply business in the Ukraine. Its business was so adversely affected by the instability in the region that it faced the prospect of defaulting (with severe cross- default implications for its group) under notes maturing on 28 April 2015. The DTEK group was in restructuring talks with its creditors, an alternative widely supported by most but not all of the noteholders. An exchange offer and consent proposal pushing out maturities and discounting the notes failed to achieve the required tender threshold of 98% of noteholders. The Indenture regulating the notes was governed by New York law, but those noteholders voting in favour of the exchange offer were automatically deemed to have voted in favour of a change of law from New York to English law (which required only a majority vote under the terms of the Indenture) and in favour of a scheme of arrangement (which required a vote of 75% in value and 50% in number of noteholders). The change in law (as established by the recent *Apcoa* judgment in the case of a loan agreement) was considered by the High Court to be adequate in itself to establish a "sufficient connection" with the English courts and allow the court to approve the scheme. The move by DTEK of its centre of main operations to England, the existence of significant DTEK assets (in the shape of bank accounts) maintained in London; and the fact that various subsidiary guarantees were governed by English law may also have been enough to establish "sufficient connection".

## Transaction News

We have advised:

- **Zoopla** on its £150m credit facility used to part fund the acquisition of price comparison website uSwitch from LDC and other sellers for up to £190m;
- **Bridgepoint** in connection with the debt financing aspects of their acquisition of a majority stake in Nordic Cinema Group ("NCG"). Bridgepoint has acquired NCG from Ratos AB and Bonnier Holding in a transaction totalling SEK 4.7 billion (EUR 501.7 million);
- **Alteri Europe, L.P.** (the direct lending arm of Alteri Investors) in relation to its provision of a secured term loan facility to UK clothing retailer Austin Reed.

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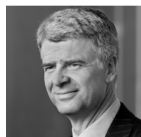

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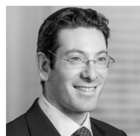

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