TRAVERS SMITH

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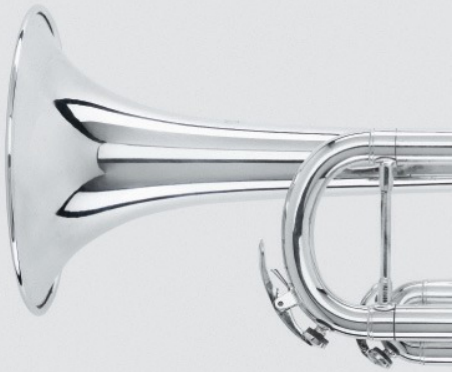

Welcome to our final monthly finance bulletin for 2010. This issue includes an overview of some recent market developments and trends in the finance sector, as well as a spotlight on Eurobonds as a refinancing alternative. Please get in touch if it raises any issues that you would like to discuss. Best wishes for the festive season and a wonderful New Year!

Jeremy Walsh, Head of Banking and Corporate Recovery Department

Government Response to Consultation on Registration of Charges created by Companies and Limited Liability Partnerships

The Government has published a response to the recent consultation on registration of company charges, proposing a single UK-wide scheme that will apply to all companies incorporated under the Companies Act 2006 (the "Act") or its predecessors as well as unregistered companies and limited liability partnerships. Features include:

- overseas companies are wholly excluded from the scheme;
- the requirement to register will apply to all charges granted by a company registered in the UK over any of its property, wherever situated, unless expressly excluded by regulations under the Act or any other statute (of which rent security deposit deeds are to be an example);
- any person taking a charge will be deemed to have notice of any previously registered charge and a buyer of property subject to an unregistered charge will take free of the charge (with an exception for property subject to the rules of a specialist register);
- the requirements for registration will include an extract from the charge instrument being placed on the public record; and
- it will be possible to register a charge electronically.

Draft regulations will be published for comments in early 2011, with implementation envisaged in 2012/13.

In the courts

In the matter of Super Aguri F1 Limited
ChD, 26 October 2010
Unreported

This was a contested application by the former joint administrators (the "Applicants") of Super Aguri F1 Limited ("SAF"), a former Formula 1 racing team, for an order that they be remunerated £270,000 plus VAT on a time cost basis together with disbursements of £75,000 plus VAT.

The joint liquidators (the "Respondents") of SAF had offered to pay a fee of £75,000 plus VAT together with payment of the disbursements in full. Two Honda companies ("Honda"), which represented 72% of the total indebtedness of SAF, had opposed both the appointment of the Applicants and the administration strategy of selling the company as a going concern.

Subject to a minor reduction for some duplicated work, the administrators' costs, including separately-charged support staff, were allowed. In particular, the high cost incurred as a result of the 'Rolls Royce' approach to the creditors' meeting was allowed in full on the basis that the administration was high-profile, complex and "conducted in an atmosphere akin to trench warfare", such was Honda's hostility. The Applicants rightly had regard to the views of SAF's other creditors and their own professional reputation. The decision reiterated the principle that minority creditors' views (both on the administrator's appointment and his proposals) were relevant, whether or not the majority creditors approved.

Spotlight on… Eurobonds – a refinancing alternative?

Bond issuance may provide a larger portion of the liquidity required by the market in coming years. However, whilst straight Eurobond covenants have traditionally been very light, some (at this point, modest) changes have been seen.

Historically, public debt in the form of Eurobonds did not have the strong covenant structures seen in bank loans. The difficulty in obtaining waivers and consents for bond covenants explains this to a great extent. In addition, by convention rather than by law, they did not have security, and would not become involved in any rescheduling alongside commercial bank debt. The whole package reflected the credit standing of the typical "blue chip" bond issuer and acknowledged the banks' relatively strong position.

However, a gradual reduction in the quality of issuers, and their increasing participation in restructurings, has resulted in bond investors attempting to negotiate stronger covenants in bonds. Some key provisions under current review are:

- *negative pledge*: the typical position is that no other bonds of a similar standing are to be secured; issuers should avoid committing to an "all monies" provision;
- *change of control*: there is little merit in having a put option in the event of a change of control; it could precipitate a cash flow problem and its cost on a fixed rate bond could be considerable. A better approach to a put option would be for the interest rate to ratchet on a change of control;
- *disposals*: there is no real difference between this risk and the risk of increased debt being incurred closer to group assets, so a simple gearing or net asset value test would appear to be appropriate; issuers should avoid any balance sheet insolvency test incorporating contingent liabilities; and
- *information*: access to legal and financial advice at the cost of the issuer is not workable, is materially prejudicial to the issuer and may prejudice some bondholders (bondholders may have different interests at stake).

Issuers should take care to ensure that any revised "market standard" position does not ignore their credit standing.

Kelly v Inflection Fund Ltd
ChD, 11 November 2010
[2010] EWHC 2850 (Ch)

In this case the Judge had to consider the applicability of the 'prescribed part' provisions under section 176(A)(2) of the Insolvency Act 1986 ("IA 1986"). The court was asked to decide whether or not the holder of a floating charge could, upon realising that his security was valueless (due to prior claims of fixed charge holders), elect to relinquish that security and become a fully unsecured creditor in order to participate in the 'prescribed part' which the liquidator is bound to set aside for unsecured creditors.

In reaching the conclusion that this was a valid course of action, the Judge considered two recent cases, *Re Permacell Finesse Limited* and *Re Airbase Services (UK) Ltd*. These were distinguished on the grounds that, in each case, the creditor had enforced his floating charge, realised some return from it and then tried to participate in the prescribed part in order to reduce its shortfall. This, it was held, is the mischief prohibited by section 176(A)(2) IA 1986, which should not prohibit a creditor from entirely surrendering his security and electing to have his debts treated as unsecured.

Satinland Finance SARL & Trimast Holding SARL v BNP Paribas Trust Corporation UK Limited and Irish Nationwide Building Society
ChD, 24 November 2010
[2010] All ER (D) 287 (Nov)

The holders (the "Noteholders") of more than 25% of subordinated notes issued by Irish Nationwide Building Society ("INBS") sought to enforce a demand against the trustee of the note issue ("BNP"), to present a petition to wind up INBS. This followed statements made by the Irish Government (which effectively controlled INBS) implying that losses would be imposed on the Noteholders otherwise than in accordance with the terms of the notes.

Mann J held that the Noteholders could not require BNP as trustee to bring proceedings to enforce obligations owed to the Noteholders because there were no relevant obligations to be enforced under the terms of the subordinated notes. The alternative case, that the Minister's statements amounted to a repudiatory breach which BNP should have acted upon (and that the court should therefore direct BNP to do so), was also rejected, as there was no bad faith, and BNP had considered this course of action. Even if the court were to make a direction, it would not make the direction sought.

Recent transactions

Lowell refinancing

We advised Lowell Financial Limited on the refinancing of its £120m senior secured asset-based revolving working capital facility, arranged by RBS, with the syndicate made up of existing lenders Lloyds, NAB and EAB and new lenders RBS and WestLB, and the consequential restructuring of Lowell's existing £30m mezzanine acquisition term facility.

Acquisition of Office Group

We advised Silverfleet Capital on the debt financing of its acquisition of the Office footwear retail group, with senior secured facilities arranged by Lloyds Banking Group, Co-op Bank and Banca IMI.

Travers Smith news

Our pensions department recently helped its joint clients, the Lehmans trustees and the Pension Protection Fund, win an important victory in the High Court. The court held that liabilities under a Financial Support Direction issued after a company has gone into administration were administration expenses, effectively ranking them ahead of debts owed to floating charge holders and unsecured creditors.

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