



Finance Monthly

November 2010

Welcome to the monthly finance bulletin from our banking and corporate recovery department. We were delighted to be placed highly in the most recent Chambers and Partners directory, in particular amongst the top tier of law firms advising sponsors on banking transactions. This bulletin provides an overview of some recent market developments and trends in the finance sector. This issue also features a spotlight on readiness for refinancing. Please get in touch if it raises any issues that you would like to discuss.

Jeremy Walsh, Head of Banking Department

G20 endorses Basel III and draft legislation expected March 2011

On 12 November 2010, the G20 leaders endorsed the Basel III agreement. On the same day, the European Commission stated its intention to publish the draft legislation applying Basel III, by amendments to the Capital Requirements Directive, in March 2011.

CBI/ACCA survey highlights the range of financing options being utilised by small businesses during the credit crunch

A report jointly published on 29 October 2010 by the Confederation of British Industry and the Association of Chartered Certified Accountants has analysed the various financing options being used by UK small and medium-sized firms ("SME's"). Their findings show that, although bank overdrafts are still the most common form of funding for SME's, there is general concern in the market about the availability of bank facilities which is making many SME's resort to alternative sources of funding. These alternative sources include extending credit from suppliers, late payment and borrowing from owners, directors, families and friends.

The report concludes that, despite apparent scepticism as to the availability of credit in financial markets, bank overdrafts are still the most popular form of finance. However, financial staff and advisers need to be better-placed to offer advice to SME's as to the implications of offering or accepting trade credit arrangements, and more needs to be done to educate SME's as to the benefits of effective credit risk profiling.

FMLC and CLLS respond to the consultation on the implementation of EU Directive 2009/44/EC on settlement finality and financial collateral arrangements (the "Directive")

The Financial Markets Law Committee and the City of London Law Society have now responded to a consultation on the Directive, which is likely to result in the amendment of the Financial Collateral Arrangements (No.2) Regulations 2003 (the "FCAR") and the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

One of the key issues raised in both responses is the difficulty in assessing whether the FCAR apply to floating charges, particularly over intangible securities. Amongst other things, this is important because the FCAR disapply the requirement to register floating charges under the Companies Act 2006.

Both responses propose the resolution of ambiguities in the legislation, suggesting the introduction of a wide definition of "possession" and/or revised interpretation of "control", at least one of which is required on the part of a chargee over the charged assets in order for the FCARs to apply.

Insolvencies in the third quarter 2010

The Insolvency Service recently published statistics showing insolvencies in England and Wales in the third quarter of 2010. There were 3,974 company liquidations, a decrease of 13.9% on the same period a year ago. Other corporate insolvencies showed a decrease of 27.7% on the same period a year ago.

Spotlight on... readiness for refinancing

In our October monthly finance bulletin we discussed the incoming "refinancing wall". This month we consider practical and strategic steps that a company can consider taking to maximise its prospects of securing a successful refinancing in the current market.

Refinancing with incumbent lender(s):

- Consider when the dialogue should be started. Too late and you could run out of time; too early and the lenders may not engage properly. Whenever you meet, have all relevant information to hand or accessible.
- In addition to information required to be provided under your facilities documents, consider any additional information about your business, recent trading and prospects that will assist in presenting the case for a refinancing, and how it should be presented.
- Does your business have any "loose ends" to sort out before the refinancing discussions start? Examples of issues to consider are changes in key management positions, underperforming contracts, property liabilities or business units and litigation.
- Can a refinancing be avoided (e.g. by agreeing to extend maturities of existing loans)?

Discussions with your investors:

- Your investors may have a significant role to play in getting the refinancing away. What are their views as to how you should approach the refinancing discussions? Would they provide any further funding as part of the refinancing package, if necessary?

Planning in the alternative:

- What are your fall-back position(s) if your incumbent lenders are unwilling to refinance? Consider potential alternative providers, both debt and equity. How much time and what information would they need? An asset-based lender, for example, will require detailed asset valuation figures.

Be proactive:

- Given the limited liquidity in the market, it is important for borrowers to approach their lenders with sensible proposals that are substantiated by credible information.

In the courts

Leyland Printing Company Limited (in administration) v Leyprint Limited (in administration) *[2010] EWHC 2105 (Ch)*

The administrator of the Applicants applied for directions as to the proper treatment of creditors' claims that had become statute-barred (due to previous administrators' delay) under the Limitation Act 1980. No objections had been received from creditors, and a director of the parent company of the Applicants expressly stated they had no objection to the application.

The judge confirmed that (unlike liquidation) the making of an administration order under the regime prior to the Enterprise Act 2002 did not cause time to stop running for the purposes of the Limitation Act 1980, because it conferred no power on the administrator to distribute the company's assets. He also confirmed that a creditor whose claim is statute-barred can only prove in a liquidation or administration with the consent of the creditors and members whose position would be adversely affected. In this case, the creditors' failure to object did not amount to agreement to the admission of statute-barred claims.

BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL PLC and others *[2010] EWHC 2005 (Ch)*

The court considered whether Eurosail-UK 2007-3BL PLC, the issuer of notes in the context of a mortgage securitisation (the "Issuer"), was unable to pay its debts within the meaning of section 123(2) of the Insolvency Act 1986, triggering an event of default and, potentially, enforcement of the notes and the switching of priority in respect of the proceeds of the underlying mortgages.

The judge found that the Issuer was not unable to pay its debts under section 123(2). For the purposes of the "balance sheet insolvency test", assets should be valued at their present value and should not include contingent or prospective assets. The test should take account of contingent and prospective liabilities, in the context of the relevant facts, but they should not necessarily be valued as if due immediately. As a result, an apparent deficit on a balance sheet would not always indicate balance sheet insolvency.

This conclusion was reached regardless of the existence of a special call option in respect of the notes granted to the Issuer's associate company entered into to ensure "insolvency-remoteness".

Recent transactions

We have advised on a number of recent transactions, including:

Acquisition of Lumison

We recently advised Bridgepoint Development Capital on the financing for its acquisition of IT services company Lumison.

Meyer Bergman

Instructed by Meyer Bergman, we advised the joint venture vehicle in connection with the financing and acquisition of The Burlington Arcade, Piccadilly.

Metric Property Investments plc

We advised Metric Property Investments plc on a £50m revolving acquisitions facility arranged by The Royal Bank of Scotland plc.

Department news

Chambers and Partners directory

We were very pleased to receive high rankings in a number of sectors in the most recent Chambers and Partners directory. In particular, we were delighted to be placed in the top tier of law firms advising sponsors on banking transactions.



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