

Welcome

Welcome to the January edition of the finance news. 2011 was an eventful year and we enjoyed the opportunity to discuss the changes in the market with those of you who attended our finance clubs. The finance club in Birmingham has been running successfully for over ten years and the club is going from strength to strength in our Manchester, Nottingham and Leicester offices. We hope to see many of you at our next events.

At the last finance club meetings we enjoyed presentations on the Bribery Act that told us what the Act really meant for our businesses and day-to-day work. In March the club will focus on the structures which have become more common in the property market over the last couple of years including joint ventures and the use of offshore vehicles. More information and dates can be found on the back page.

Bribery Act: React, don't over re-act

As from 1 July 2011, businesses operating in the UK which fail to implement adequate procedures to prevent bribery face criminal liability punishable by unlimited fines, potentially in the tens of millions of pounds.

The government has published guidance on this new legislation, but the courts are tasked with deciding whether organisations have implemented procedures which are adequate to prevent bribery. International enforcement agencies will collaborate so as to improve their detection of bribery offences worldwide. This is not scaremongering; this is a fact of business life.

The Bribery Act introduced a new crime of failing to prevent bribery to which there is only one defence - companies must demonstrate that they implement 'adequate procedures' to combat corruption. Otherwise, this is a strict liability offence. Organisations can be held liable for their employees and those who provide services to them such as agents, intermediaries and advisors.

Individuals guilty of bribery are susceptible to unlimited fines and up to ten years imprisonment. Any senior manager who connives in bribery is personally liable.

In addition to fines, organisations run the risk that they may be prevented from tendering for public contracts and possible confiscation of assets under the Proceeds of Crime Act. Directors involved in bribery face disqualification and shareholders may decide that any negative effect on their investment resulting from a bribery prosecution merits recovery from the directors in their personal capacity. The negative publicity from a criminal trial is difficult to put a value on.

No business will be able to implement procedures in isolation. Many companies will insist that their trading partners are Bribery Act compliant as a stipulation to trading with them. For lenders, the prospects of a borrower being investigated for bribery are unwelcome. Businesses involved in bribery and corruption face serious consequences which may severely impair their ability to meet repayment obligations.

It is a daunting prospect, but there is no need to overreact. Despite the hype, reasonable hospitality to network and improve relationships with customers is unlikely to attract criminal prosecution.

If undertaken wisely, establishing an anti-bribery programme should not require a vast budget. A focused approach to the development of policies and procedures which deal with the legislation, the published guidance and common sense is needed. Most UK businesses routinely implement health & safety legislation, data protection and anti-discrimination laws. Bribery Act compliance need not be any more burdensome if approached sensibly.

If you require any further information or assistance on how we can help you implement procedures to comply with the Bribery Act please call your usual contact at Gateley or, alternatively, contact Simon Pigden, partner in our commercial team on +44 (0)121 234 0153 or SPigden@gateleyuk.com.



Revised scheme for registration of charges

The Department for Business, Innovation and Skills (BIS) has published the government's proposals following consultation on the proposed new scheme for registration of security created by UK companies and limited liability partnerships.

The proposals are in line with the implementation of the Companies Act 2006, and will result in a number of changes. The key points to note are:

- A single regime will apply to all companies incorporated in the UK. Currently, a different registry applies to companies in Scotland to those in England and Wales;
- There will be a definition of the date of creation of a security. In addition, the current extension of time for filing charges created outside the UK will be removed. All charges will need to be registered within 21 days of the date of creation;
- There will be no need to file particulars of the property charged. This will be replaced by a requirement to file a certified copy of the charge which will be available for inspection on the registers at Companies House, subject to redaction of certain sensitive information;
- It will be possible to file details of charges electronically. The new regime will also include provision for filing of the details of the removal of a charge. Additional safeguards will be included to prevent fraudulent removal of particulars of a charge from Companies House.

The government estimates the proposed changes will save UK business over £22 million per annum. The current timetable envisages that the draft amending regulations will be published early in the new year and changes to the Companies Act 2006 will be introduced to come into effect from 1 October 2012.

Non-competition clauses and the rule in *Cherry -v- Boulton*

A recent Supreme Court case (*Re Kaupthing Singer and Friedlander, also known as Mills -v- HSBC Trustee (CI) Ltd*) has considered the rule in *Cherry* and *Boulton* and principle against double proof in light of non-competition clauses in guarantees.

- Rule against double proof: the estate of an insolvent entity cannot pay twice for the same debt so can only accept one claim from one creditor for that debt.

- Rule in *Cherry -v- Boulton*: where a person owes a debt to a fund (such as an insolvent estate) and is also entitled to a claim from that fund, the debt owed to the fund must be paid before the claim.

The court held that the rule against double proof excludes the operation of the rule in *Cherry -v- Boulton* (overruling previous High Court and Court of Appeal decisions).

So what does this mean for guarantees?

Bank guarantees will almost always contain a non-competition clause preventing the guarantor from exercising its right to claim against an insolvent principal obligor, giving priority of claim to the beneficiary of the guarantee. The Court's decision means that this priority now takes effect automatically, regardless of the drafting of the non-competition clause. The guarantor cannot use the rule in *Cherry -v- Boulton* to reduce any debts it may owe to an insolvent principal obligor, by setting off the claim that guarantor has against the estate of that insolvent principal obligor. It seems, in light of this case, that non-competition clauses are unnecessary however, as with all matters relating to guarantees, we expect that a cautious approach will be taken by the market and that these clauses will remain for the foreseeable future.

Financial regulatory reform

On 16 June 2011, the government published the consultation paper 'A New Approach to Financial Regulation: The Blueprint for Reform' which includes a White Paper on regulatory reform, together with a draft Bill. The White Paper recaps the proposals to reform financial regulation in the UK by the creation of three new regulatory bodies.

- The Financial Policy Committee (FPC) a macro prudential regulator within the Bank of England. The FPC will monitor the financial system, identify risks to stability; make recommendations on action and have the power to intervene where appropriate.
- The Prudential Regulation Authority (PRA), a subsidiary of the Bank of England, will undertake prudential regulation of firms which manage significant 'balance sheet risk' such as banks, insurers and large complex investment firms; and
- The Financial Conduct Authority (FCA). The FCA will be the conduct regulator covering retail, wholesale and market conduct. Its remit will be to protect consumers and promote confidence in financial services and markets. At present, however, the White Paper and Bill makes very little reference to consumer credit lending as the government has yet to announce

whether regulation will transfer from the OFT to the FCA in relation to those businesses which hold a consumer credit licence.

Thankfully the government has chosen to amend the Financial Services and Markets Act 2000 (FSMA) to give effect to the reform programme, rather than to repeal the Act and start again. This avoids the cost implications to firms currently regulated under FSMA being subject to a completely new Act.

Much of the White Paper is in line with market expectations. It appears that the new regulators will have far greater powers to intervene where they see necessary and lenders should expect a far more intensive and intrusive regulatory environment. Lenders, however, do not have to fear the new regulators just yet as it is likely that the new framework will not be established until the middle of 2013.

Lehman/Nortel update: FSDs as expenses

In our last edition we reported to you on the then recent High Court ruling in the Nortel case (*Bloom and Ors -v- Pensions Regulator (Nortel, Re)*). On Friday 14 October 2011, the Court of Appeal upheld the High Court's decision in that case confirming that in insolvency proceedings, trustees will have super priority status as creditors above other unsecured claims.

The Court confirmed that liability arising from a Financial Support Direction ('FSD') issued by the Pensions Regulator after the target employer had gone into administration or insolvent liquidation would rank as an expense of the insolvency process, so any subsequent Contribution Notice ('CN'), issued for non-compliance with a FSD, would be paid before debts which are due to the insolvent company's creditors. The cost of complying with a FSD issued after administration had begun would rank above other, unsecured creditors in the insolvency process.

It should be noted that the case only concerned FSDs issued after the administration had begun. Further, the Court did not consider the question as to time at which the FSD is deemed to be 'made', but noted that it could be earlier than its issue, perhaps when a warning notice is sent by the Regulator or when a determination is made by the regulator's determinations panel.

What are the consequences?

This case represents a struggle between pension scheme trustees and their members on one hand and UK business on the other. Lenders to groups which contain

companies with a final salary pension scheme in deficit will need to consider the risk that, on insolvency, a FSD may impair the value realised through security. A key part of any security review for such groups should be an assessment of the risk of a FSD or CN being issued.

A further argument from the business perspective is that because of the open-ended nature of the obligation under a FSD, this could damage the rescue culture that underlies the administration regime in the UK. In addition, administrators may be wary of taking on cases where there is a risk of regulator intervention unless they receive extra comfort that they will be paid. Administrators' costs do rank as expenses in the administration, but they are still at the foot of that list unless the court orders otherwise.

From the scheme's point of view, to have held that a FSD was simply a provable debt might have seen a FSD issued against an insolvent target disappear down a black hole with little prospect of being met.

The Lehman/Nortel case will no doubt be bound for the Supreme Court, unless parliament legislates first to protect UK business and alter the way in which FSDs are treated in an insolvency. **We'll keep you posted.....**

Bibby -v- Magson: delivery of deeds

On 14 October 2011 the Court ruled on the case of *Bibby Financial Services and Others -v- Magson* and others. The case looked at personal guarantees and warranties signed by individual directors of a company entering into a debt factoring agreement which were found not to be binding because they had not been 'delivered' within the meaning of the Law of Property (Miscellaneous Provisions) Act 1989 and the Law Of Property Act 1925.

The directors had made some manuscript amendments to the deeds which had been signed by the directors, witnessed and passed back to the other side. The directors claimed that they had signed them only as a gesture of their intent to proceed but when returning them to the debt factoring company they had expected, in light of discussions at the time, clean copies (taking into account the manuscript amendments) for re-signing and dating and could not have therefore intended to be bound by the copies they signed. The Court agreed and held that, on the evidence, none of the deeds were intended to be delivered (a requirement for documents to be enforceable as deeds). It was not sufficient that the deed be signed and handed over to the beneficiary - the person signing it had to be clear that they intended to be bound by it.

Finance club – dates for your diary

The next finance club presentations will take place in March. The presentations will be in our offices and commence at 5.15pm for 5.30pm. The date of each presentation is:

- Birmingham – Wednesday 7 March;
- Leicester - Wednesday 14 March;
- Manchester – Thursday 22 March;
- Nottingham - Tuesday 6 March.

The finance club will focus on the structures which have become more common in the property market over the last couple of years, including joint ventures and the use of offshore vehicles. Many of these are driven by the desire of borrowers to manage their property assets in a more tax-efficient way. The presentations will outline the taxation background to some of the more popular structures and provide suggestions as to how banks should take these into account in their facilities and security.

If you would like to attend any of our events please email us at events@gateleyuk.com.

Highlights

Our success has been recognised recently when we were voted Insider Midlands Corporate Law Firm of the Year for 2011 and shortlisted for the corresponding award in the North West. In addition, the Legal Week 2011 client satisfaction report which surveys senior in-house lawyers across the U.K. gave us top marks for partner contact/relationships. In this survey, Gateley has been named 'Best Legal Adviser'.

Key deals

Recent banking & finance transactions that we have been involved in include acting for:

- Titan Europe plc in the restructuring of facilities made available to its Italian subsidiaries Italttractor ITM S.p.A. and Italttractor Operations S.p.A;
- the company on the refinancing of JR Hutt Holdings Limited (Halsall Toys) by Barclays Bank plc;
- HSBC Bank plc in the provision of facilities to Anglesey Group Estates Limited (formerly Pritchard Holdings Limited) including taking security in respect of an investment portfolio of over 30 properties;
- The Pritchard Group plc on its £140,000,000 refinancing by Lloyds TSB Bank plc;

- Santander UK plc in the financing of the purchase by Ravenstone Manor Limited of the business and assets of Ravenstone Hotel Limited; and
- Varena Holdings Limited in the acquisition of debt and security over Ancyra Group from HBOS.

Banking & finance team



We are delighted to announce that Colin Mattis has joined the firm as a partner to lead the development of our banking and finance practice in

London. Colin has joined from another national firm where he headed up its banking and finance south team. Colin specialises in corporate banking, acquisition finance, structured finance and property and development finance. He has represented institutional investors, UK and US banks and public and private companies working on UK and cross-border acquisitions and disposals, management buy-outs, joint ventures and private equity transactions.

In addition to his extensive banking and finance experience, Colin has advised clients in multiple industry sectors covering property, healthcare, technology, motor, shipping, retail and leisure, utilities and telecommunications sectors.

Colin can be contacted on +44 (0) 207 653 1615 or CMattis@gateleyuk.com.

We are also delighted to announce that Anna Mayfield of our Nottingham office will now be leading the development of our Banking & Finance practice in the East Midlands. Anna has been with Gateley for 8 years and specialises in corporate banking, acquisition finance, structured finance and property and development finance. She has represented institutional investors, banks and borrowers on UK and cross-border joint ventures, property finance, acquisitions and disposals, management buy-outs and private equity transactions.

Anna can be contacted on +44 (0)115 983 8234 or AMayfield@gateleyuk.com.

And finally...

We aim to make finance news as popular and relevant to you as our finance club. Feedback from the banking & finance markets is invaluable in helping us ensure we target the right kind of issues and so any suggestions from readers for topics in future editions or other feedback would be welcomed at:

banking&finance@gateleyuk.com.