

Finance Update

June 2009

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General Finance News

Association of Corporate Treasurers (ACT)

In Spring of 2009, the Loan Market Association published a revised form of its investment grade loan facility documentation including new express confidentiality clauses, changes on taxation provisions and on non-bank lenders appointing a third party to receive communications. A commentary on these changes is provided in the [Slaughter and May Financing Briefing](#) (published on the ACT website) which provides an update to the main ACT Guide.

Banking Act 2009

As previously reported in the [March 2009 Finance Update](#), a new special resolution regime (SRR) for ailing banks came into effect on 21 February 2009, the provisions of which are set out in the Banking Act 2009 and related legislation. The statutory objectives of the SRR are, among other things, to protect and enhance the stability of the financial systems of the UK and public confidence in them, and to protect depositors. The SRR is comprised of three "stabilisation options": the sale of all or part of the bank's business to a private sector purchaser, the transfer of all or part of the bank's business to a bridge bank wholly owned by the Bank of England, or temporary public ownership. The SRR also includes a new bank insolvency procedure (with a principal function to, among other things, ensure that depositors have their accounts transferred, or achieve compensation from the Financial Services Compensation Scheme, as quickly as possible) and a new bank administration procedure to deal with a situation whereby there is a partial sale or transfer of the bank's business.

The Financial Markets Law Committee has raised concerns about the Banking Act 2009 by way of a letter to the Banking Reform Team at HM Treasury. The letter includes concerns about the contractual rights of third parties in light of The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009.

Building Societies

The Financial Services Authority (FSA) published a [consultation paper](#), on 5 June 2009, setting out proposed guidance to ensure that building societies diversifying away from their traditional businesses have adequate risk management systems and the necessary skills to operate safely. The consultation period ends on 5 September 2009 and it is intended that proposals resulting from this consultation will be implemented in 2010.

City of London Law Society

A joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees has published guidance on the execution of documents at virtual signings or completions (where parties sign transaction documents and then email or fax signature pages to the lawyers responsible for compiling the signed transaction documents). The guidance was published as a consequence of the decision of Underhill J in *R (on the application of Mercury Tax Group*

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Ltd and another) v HM Revenue & Customs and others [2008] EWHC 2721 (see the [January 2009 Finance Update](#)), which cast into doubt the effectiveness of virtual signings in certain circumstances.

The guidance includes a non-exhaustive range of options for parties wishing to execute documents in such situations. Each option sets out a series of steps for the parties and their lawyers to follow to build a robust paper trail in order to reduce the risk of disputes over matters such as which version of an agreement was entered into or whether a party's lawyer had authority to attach a pre-signed execution page to the final draft. A firm-wide note on best practice for virtual completions is being put together.

The guidance is [here](#).

Companies Act 2006

A variety of legislation has been published in relation to the Companies Act 2006, including the following:

- the [Company and Business Names \(Miscellaneous Provisions\) Regulations 2009](#) were published on 6 May, together with an [explanatory memorandum](#). These Regulations deal with restrictions relating to the registered name of a company and business names and are due to come into force on 1 October 2009;
- a revised draft of the [Registrar of Companies and Applications for Striking Off Regulations 2009](#) was published on 21 May. This revises the previous version of these Regulations, published at the end of last year, to allow, amongst other things, for overseas companies to apply for rectification of certain information on the Companies House Register;
- a revised draft of the [Overseas Companies Regulations 2009](#) was published on 21 May. These Regulations impose various registration and filing requirements on companies incorporated overseas which open a branch or place of business in the UK. It is intended that these Regulations will come into force on 1 October 2009; and
- the [Overseas Companies \(Company Contracts and Registration of Charges\) Regulations 2009](#) have been the subject of a [government consultation](#). Under the Companies Act 2006, an overseas company is only required to register at Companies House where it has an establishment (a branch or place of business which is not a branch) in the UK. Therefore, registration of charges for overseas companies will only apply to an overseas company if they have registered an establishment, which can be checked on the Companies House register. These Regulations are due to come into effect on 1 October 2009, however, as can be seen in the government response to the consultation, they are likely to be reviewed (along with the regime for registration of charges for UK companies) in 2010.

Department for Business Innovation and Skills

The Department for Business Enterprise and Regulatory Reform has been renamed as the Department for Business Innovation and Skills (BIS).

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HM Treasury

On 7 May, HM Treasury published a report '**UK International Financial Services – The Future**'. The Report states that the UK's financial services sector can continue to be a world leader by working alongside businesses and emerging economies, while encouraging global regulatory reform.

Limited Partnerships and Limited Liability Partnerships

Draft **Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009** were published on 27 May. It is intended that these Regulations will replace the provisions in a variety of regulations relating to the Companies Act 1985 with those relating to the Companies Act 2006 and that these Regulations will come into force on 1 October 2009.

A draft **Legislative Reform (Limited Partnerships) Order 2009** was published on 4 June. This Order is intended to clarify the process for registration of limited partnerships and to remove uncertainties around the application of the Limited Partnerships Act 1907. This is expected to come into force on 1 October 2009.

Remuneration

The Committee of European Banking Supervisors has published its final high-level **principles for remuneration policies**. It expects these to be implemented before the third quarter of 2009, allowing for a transitional period in relation to existing contracts.

Investor groups, such as The Co-operative Asset Management, has suggested that chairmen of remuneration committees should subject their jobs to an annual shareholder vote in order to achieve fairer remuneration policies for directors and high ranking employees.

Interest Rates

On 7 May, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the programme of asset purchases, but that this would be increased by £50 billion to £125 billion (both of these proposals were unanimously agreed by the Monetary Policy Committee). On 4 June, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the £125 billion programme of asset purchases (both of these proposals were again unanimously agreed by the Monetary Policy Committee).

On 4 June, the European Central Bank held interest rates at 1.00% across the euro-zone.

World Markets

According to estimates released by the National Institute of Economic and Social Research, the UK economy's gross domestic product grew by 0.1% in May, following on from a similar increase in April. The Office for National Statistics data also showed that manufacturing output increased by 0.2% in March and industrial output increased by 0.3% in April (this was the first increase in 14 months). These data seem to indicate that the economy is stabilising. This was backed up by a statement, at the beginning of May, from

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the Organisation for Economic Co-operation and Development (OECD) that the country is experiencing a pause in the economic slowdown. The International Monetary Fund (IMF) has also stated that there are hopeful signs the UK economic slump is easing but cautions that the economy remains vulnerable and that recovery is likely to be slow.

Money market rates have also fallen over the last few months and the overnight index swap spread between three month LIBOR and risk free overnight market rates has fallen to levels not seen since the collapse of Lehman Brothers last September. However, this may not give an accurate picture, as the rates at which banks can borrow varies from institution to institution and small banks (which are considered to have a greater counterparty risk) are likely to still be facing higher borrowing costs.

The LPX UK Index (which tracks listed private equity stocks) rose 47% between the end of March and the end of May and the FTSE All Share index rose by 16% in the same period, indicating that confidence may be starting to return to the private equity sector. However, according to Experian, UK shopping numbers fell by 2.4% in May compared with May 2008.

Globally, official figures have shown that Europe as a whole is in its deepest recession since the Second World War, with gross domestic product shrinking significantly in Germany, Italy, Austria, Spain and the Netherlands in particular. In light of these figures, the IMF has warned that the global recession is far from over. In the US, new Federal Reserve forecasts have predicted that the US economy may contract by up to 2% this year (this is an increase on earlier predictions of a 1.3% contraction).

Finally, there continues to be widespread talk of reform nationally and internationally in relation to financial supervision, with numerous consultation papers being published and much debate centring round this issue.

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General Finance Cases

Appropriation of Shares

The case of *(1) Cukurova Finance International Ltd (2) Cukurova Holding AS v Alfa Telecom Turkey Ltd* [2009] UKPC was heard on appeal, from the Court of Appeal of the British Virgin Islands, by the Judicial Committee of the Privy Council. (For a summary of the facts of this case see the [July 2008 Finance Update](#) and the [January 2009 Finance Update](#)).

In this case it was held that under English law a pragmatic approach to the interpretation of the right of 'appropriation' in Directive 2002/47 and the Financial Collateral Arrangements (No.2) Regulations 2003 should be taken. It was noted that the Directive itself did not have direct effect and member states were required to transpose it into national law so as to provide 'rapid and non-formalistic enforcement procedures' with reference to concepts of law familiar in each member state. The judges commented that the Treasury 'seems to have thought that appropriation was an already familiar remedy in the United Kingdom, so that it was not necessary to define it or give any detailed guidance as to how a power of appropriation was to be exercised.'

It was concluded that it was not necessary for a valid appropriation to take place that the collateral taker becomes registered holder of the shares as this would go against the 'rapid and non-formalistic enforcement procedures' envisaged by the Directive. However, neither can the power of appropriation be exercised 'merely by taking thought' i.e. without taking any form of action at all. There needs to be an overt act, communicated to the collateral-provider, evidencing the intention to exercise the power of appropriation. In this case the letter from the collateral-taker to the collateral-provider stating its intention was an effective exercise of this power.

Guarantees

In the case of *Bank of Scotland plc v (1) Constantine Makris (2) Ben O'Sullivan* (2009) Ch D 15/5/2009 it was held there was no basis on which to show that a significant reduction in the facilities provided was a material variation sufficient to discharge the bank's security.

Facts: B financed, by way of an overdraft facility, the funding of a pub. In relation to the provision of this overdraft, M and O gave B an unsecured joint and several guarantee for £50k (plus interest and costs). This guarantee was executed and dated. B then reduced the amount of the overdraft by £20,000, as the other guarantees and security being provided were found to be of a lesser value than expected and a revised facility letter was issued for this amount. The business failed and went into creditors voluntary liquidation. B claimed under their guarantee. M claimed that the guarantee had been discharged as a result of the reduction in the overdraft facility after the guarantee had been signed and O claimed that he had signed the guarantee as a result of the undue influence of their third business partner (S).

Decision: In the circumstances, i.e. the fact that one of the signatories on the facility letter itself had been M, M could not challenge the validity of second facility letter and there was no basis for concluding that the execution of the guarantee or any of the circumstances around it supported O's allegation of undue

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influence on the part of S. S, O and M were all close friends and there was no reason for B to be put on notice that there was any abuse of trust between the three.

Real Estate Finance

Real Estate Finance News

Land Registry

The Land Registry launched a consultation to amend the Land Registration Rules 2003 in response to the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009. Minor changes to the Commonhold (Land Registration) Rules 2004 have also been proposed to reflect the changes introduced by the Companies Act 2006. The consultation period ended on 12 June.

Real Estate Finance Market

According to the latest CBRE monthly index, UK commercial property values fell 1.5% in May. This fall is less than the 2.1% drop in April and the 2.8% drop in March. However, according to April's IPD UK Monthly Index, commercial property rental values fell 3.21% in April, the largest fall since December 1992. Commercial property lending has also remained subdued in the first quarter of 2009 with banks lending £1.9bn, down 80% on the same period last year, however, this is higher than the £1.5bn figure for the fourth quarter of 2008.

According to figures from Nationwide, house prices rose by 1.2% in May (but are 11.3% lower than a year ago). Land Registry figures for house prices in April show that the rate of falls in house prices has slowed. According to RICS, there is an increased level of confidence in the housing market and the average number of properties sold per estate agent rose to 11.8 (averaged over the last three months), up from 10.6. According to the British Bankers' Association, the number of mortgages approved for new home purchases rose by 4% between March and April, also indicating some stability is entering the housing market. However, during the same period the number of re-mortgages fell as home owners chose to go onto their lender's variable rates rather than applying for and taking up new mortgage deals.

According to the Council of Mortgage Lenders, the number of home repossessions has increased by 50% in the past year. Figures for the first quarter of 2009 showed that 12,800 homes were repossessed, up from 10,400 in the fourth quarter of 2008 and from 8,500 for the same period last year. At the same time questions have been raised over the mortgage rescue plan launched by the government at the start of the year to stop repossessions, with certain commentators stating that it has been ineffective, accepting only two households so far.

Structured Finance

Structured Finance News

Film Finance

According to Screen Finance, production investment has fallen by 8% in the first quarter of this year to £238.4m and the number of new starts has nearly halved compared with the comparable period last year, from 19 in the first quarter of 2008 to just 11 in the first quarter of 2009. This is backed by the figures from a BDO Stoy Hayward survey, in which just 38% of technology, media and telecoms businesses said it was easy to get access to new funding, compared with a figure of 73% in 2008.

Hedge Funds

According to Hedge Fund Research, hedge funds had their best month in April since February 2000. Hedge funds gained 3.8% over the course of the month, taking their gains this year to 4.2%, taking advantage of increases in the stock markets and opportunities in the fixed income and energy markets.

Islamic Finance

The Islamic Financial Services Board's sixth annual summit met in May in Singapore. This summit looked at the current position of the Islamic financial services industry, ways of raising the competitive elements of institutions offering Islamic financial services and the infrastructure required to support the further growth of this industry, amongst other things.

Walker Guidance

On 30 April, the Guidelines Monitoring Group published an **updated report** on compliance with the Walker Guidelines along with recommendations for changes to these guidelines. According to the report, all private equity firms subject to the guidelines have now fully complied, although five portfolio companies are yet to fully meet the required standards. The Guidelines Monitoring Group aims to publish a further report into compliance at the end of 2009.

Restructuring and Insolvency

Restructuring and Insolvency News

Insolvency Legislation

Several pieces of insolvency legislation have been published, including the following:

- the **Financial Markets and Insolvency Regulations 2009** - these regulations make amendments to the insolvency regime for recognised clearing houses and recognised foreign investment exchanges and came into force on 15 June 2009; and
- the draft **Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2009** – this is intended to amend the Insolvency Act 1986 to reduce burdens to benefit creditors of insolvent companies, members of solvent companies and other interested parties through increased dividends.

Restructuring and Insolvency Market

According to the Ministry of Justice, in the first quarter of 2009 the following number of petitions were issued:

- 3,461 company winding up petitions – an increase of 13% on the first quarter of 2008 and a 2% increase on the fourth quarter of 2008;
- 4,535 creditors' bankruptcy petitions – an decrease of 5% on the first quarter of 2008 and a 4% decrease on the fourth quarter of 2008; and
- 16,775 debtors' bankruptcy petitions – an increase of 29% on the first quarter of 2008 and a 9% increase on the fourth quarter of 2008.

Distressed debt trading rose during May as many bankers and investors sold on difficult or non-performing positions due to the rise in loan and bond prices, European loan prices rose by a third from the low figures seen in the last quarter of 2008, to levels last seen before the collapse of Lehman Brothers, according to Standard & Poor's. However, many in the industry are speculating that the price increase is unlikely to last, according to the Financial Times.

Restructuring and Insolvency

Restructuring and Insolvency Cases

Administration – administrator's release from liability

The case of *Mark Hardy v Michael Vincent McLoughlin and Allan Watson Graham* [2009] EWHC 944 (Ch) considered an application to set aside an administrator's release from liability, under s20 of the Insolvency Act 1986.

Facts: H applied, under s20 of the Insolvency Act, to set aside an order releasing the administrators from liability as administrators of a company in liquidation. Under s20, such an order can be made if the relevant administration, or the application granting the release from liability, is subject to fraudulent activity. In this case it was alleged that the original application for release of liability had been obtained by fraud and false accounting and that the administrators owed H damages for breach of duty.

Decision: The application was rejected. The court held that H had only shown irregularities in the application for release made by the administrators, rather than actual fraud. It was also held that H lacked standing to bring such application, the administrators owed fiduciary and common law duties to the company over which they were appointed, they did not owe a duty of care to the creditors, shareholders or officers of that company. The administrators did not intend that individuals should rely on any representations made by them, therefore H could not claim misrepresentation in relation to these.

Bankruptcy

The case of *Re Hamid Dehdashti Haghighat (a bankrupt)* [2009] EWHC 934 (Ch) considered an application for a review of a previous decision, under s375 of the Insolvency Act 1986. (The previous decision was summarised in the [February 2009 Finance Update](#).)

Facts: H applied for a re-hearing on the basis that documents (primarily a trust deed) which should have been considered at the previous hearing in support of his position were not considered by the court. H argued that these documents made a material difference to his position and also that he had not attended to the previous hearing to make submissions on his own behalf.

Decision: It was held that H had made a case which was worthy of consideration for the preliminary issue to be reopened and for there to be a re-hearing, under section 375 of the Insolvency Act 1986. However, the court declined to make an order for a re-hearing as H had not shown that there was any prospect of a different outcome resulting from such re-hearing.

It appears that in order for such an application to succeed, an applicant is required to illustrate that any re-hearing has a reasonable chance of reaching a different conclusion from that made at the previous hearing.

The information in this update is intended as a general overview only of the subjects covered. Detailed specialist advice should always be taken before taking or refraining from taking any action. For more guidance on the changes and their application, please get in touch with your usual Olswang contact.

About Olswang

Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, our Firm has grown to a team of over 600, including 90 partners, across four European offices. In addition, Olswang has a formal alliance with a major US firm Greenberg Traurig LLP and a long-established best friends network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2008 at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last four years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

From world-class businesses to entrepreneurial startups, the rich diversity of our client base ensures a broader perspective and, as a result, deeper commercial insight. Transactional work is the most obvious feature of the role we perform. However, ongoing non-transactional support is an integral part of our business, and we focus on creating long-term relationships with our clients. We employ a range of proactive initiatives such as client care programmes, secondments, client training and feedback sessions to ensure our client relationships are strong.

At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

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