



Corporate Turnaround and Insolvency

November 2011

Destiny 1 – making the case for care in negotiations

Care needed to avoid negotiations becoming binding commitments

Why this is important

In many negotiations involving the refinancing or restructuring of debt, the principal players can often focus on the end result to the exclusion of the preservation of existing rights.

The recent Court of Appeal decision in *Destiny 1 Limited v Lloyds TSB Bank plc* [2011] EWCA Civ 831 highlights why it's important to keep your mind on where you are, as well as where you want to be.

Facts

In *Destiny 1 Limited v Lloyds TSB Bank plc* a shop owner, Destiny1 Limited ("Destiny") and its principal shareholder, Mr Kalid, wanted to refinance his existing debt with HSBC and to open a second shop. This involved negotiating with Destiny's existing supplier, NISA, to supply the second shop for which NISA required a bank guarantee as security for all future supplies.

Negotiations were opened with Lloyds. An offer letter was issued to provide £240,000 to refinance Mr Kalid's borrowings, £10,000 as a overdraft facility and a guarantee in favour of NISA on behalf of Destiny for £30,000. Lloyds sought security in the form of charges over Mr Kalid's properties, a debenture from Destiny and a personal guarantee from Mr Kalid in respect of Destiny's liabilities.

Mr Kalid countersigned the offer letter accepting its terms. A second letter regarding the bank guarantee was also counter signed and returned together with Mr Kalid's personal guarantee and the debenture from Destiny.

Relations then broke down. No facility agreements were signed. The second shop venture did not proceed. Destiny then sued Lloyds claiming that it had fulfilled Lloyds requirements by executing the debenture and that therefore Lloyds was bound to provide the bank guarantee.

Decision of the Court of Appeal

In spite of protracted written and oral negotiations no common intention to provide the guarantee could be established.

The bank guarantee was only one part of a large package of facilities. The evidence did not establish a commitment to provide the guarantee in the absence of the remainder of the package. Even though Mr Kalid and Destiny had executed security, that was not conclusive.

Comment

Protracted negotiations of this sort and a somewhat piecemeal approach where parts of the package are agreed, documented and parked pending agreement on the whole are typical of the types of situations we are currently seeing.

This case shows the importance of careful recording of what is actually agreed and also that agreement of part is subject to agreement of the whole when a package of measures is being negotiated.

Although Lloyds won the case, it had to go to the Court of Appeal to do so and therefore incurred a great deal of management time and expense.

Practical Steps to Take

- Ensure that oral communications are followed up by a summarising email or contemporaneous file note.
- Mark all correspondence (including emails) with a "subject to contract" heading to make it explicit that all negotiations are subject to signature of final, binding terms.
- Remind the borrower periodically in writing, that agreement on individual points is in principle only, and remains subject to the conclusion of the wider negotiations.
- Where negotiations concern restructuring following default, ensure that negotiations are prefaced by an appropriately worded default notice and reservation of rights letter.
- Where negotiations become protracted, the reissue of periodic reminders in written correspondence to put down a marker that negotiations have not been finally concluded, and (in restructuring scenarios) that the borrower remains in breach and the lender is still looking to rely on its rights under its documentation.

For further information please contact:



Patrick Cook
Partner

+44(0)117 307 6807
patrick.cook@burgess-salmon.com



Richard Clark
Senior Associate

+44(0)117 902 6626
richard.clark@burgess-salmon.com

Burgess Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
Chancery Exchange, 10 Furnival Street, London EC4A 1AB Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

www.burgess-salmon.com

Burgess Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is authorised and regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.

© Burgess Salmon LLP 2011. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burgess-salmon.com.