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Good News for Agents, but be Aware

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Introduction

In *Torre Asset Funding Ltd v Royal Bank of Scotland Plc [2013] EWHC 2670 (Ch)*, the claimant ("Torre") was a lender in a financing structure which included super senior, senior, senior mezzanine, junior mezzanine B1 ("B1") and junior mezzanine B2 ("B2") debt. The B1 and B2 financing was documented in a junior mezzanine facility agreement ("MFA") as well as an intercreditor deed ("ICD"). Torre participated in the B1 loans. Shortly after Torre's participation, the borrower, Dunedin Property Industrial Fund (Holdings) Limited ("Dunedin") started to experience financial difficulties and so approached one of its B2 lenders to discuss the financing structure. A Royal Bank of Scotland ("RBS") entity was the B2 lender and also had multiple other roles including: (i) B1 agent; (ii) B2 agent; and (iii) equity participant under the loan notes at the bottom of the financing structure.

As part of its discussions, Dunedin provided RBS with a draft business plan and cashflow statements. The cashflow statements indicated that Dunedin would not be able to meet its interest covenant and pay interest on the relevant due dates. Consent for the interest to be "rolled up" was not obtained from all lenders so Dunedin was forced to give notice to the lenders of a possible event of default ("**EoD**") on the basis of insufficient funds to pay interest due under the junior facilities. Dunedin subsequently went into administration. In the resulting winding up, Torre as B1 lender did not receive any funds and so sought to recover its losses from RBS on the basis that RBS had breached its duty as agent and on the basis of negligent misstatement by RBS. Torre made the following claims:

1. discussions between Dunedin and RBS in 2007 constituted an EoD under the MFA and that RBS, as B1 agent under the MFA, was under a duty to inform Torre about the EoD (the "EoD Claim");

2. the delivery of the business plan and related cashflow statements by Dunedin to RBS triggered an obligation for RBS to provide those materials to Torre (the "Business Plan Claim"); and

3. in the course of the discussions relating to the consent process, when Torre asked for the background to the request, it did not receive a full picture of the fact that Dunedin would have insufficient cash to meet interest obligations without the roll up of the B2 interest payments. Accordingly, Torre alleged that the agent made negligent misstatements to it as to the reasons for the consent (the "Negligent Misstatement Claim").

Summary of the Court's Conclusion

The court held that each of the claims made by Torre failed – as described in detail below.

In summary, the court's decision relied heavily upon a detailed examination of the terms of the MFA and the ICD and the reasoning that, since these documents were so well negotiated between experienced parties, no additional duties of the agent could be implied. The court held that the agent's duties were mechanical in nature and, accordingly, were not breached by RBS in this case.

EoD Claim

The court held that the anticipated financial difficulties experienced by Dunedin did come within the ambit of an EoD under the MFA. However, the relevant provision in the ICD stated that "*each [A]gent shall promptly notify each other agent on becoming aware of any [D]efault*". The court held that RBS was not aware that the events in question constituted a default under the ICD and therefore the obligation to notify the other agents was not triggered. On the evidence, the court held that RBS viewed Dunedin's presentation of its business plan and cashflow statements as merely representing an approach to them as B2 lender for the interest to be rolled up.

Torre argued that RBS had an implied duty as agent to keep the other lenders informed about these events. However, the court held that since the credit agreement contained detailed provisions relating to such duties of the agent, there was no scope for the court to imply additional duties on the agent.

Business Plan Claim

Torre argued that RBS should have passed on the business plan and cashflow statements received from Dunedin. However, the relevant provision in the MFA only required that Dunedin supply its annual budget to the agent, who must then pass the annual budget on to the lenders. The court held that Dunedin did not hold the business plan and cashflow statements out to be its annual budget, so RBS as agent was under no obligation to hand these over to the lenders. Again, the court held that there was no implied duty on RBS to forward all information to the lenders since it was unnecessary to read implied terms into such a "*carefully and comprehensively drafted agreement*" as the MFA.

Negligent Misstatement Claim

The court noted that RBS did assume responsibility for the accuracy of the explanation they gave in relation to the reasons for the consent request. As a result, RBS owed a duty of care in tort to each of the lenders. However, the court held that Torre's claim for negligent misstatement in this regard failed because the query from Torre was limited to the reason for the consent request (and not the wider financial issues faced by Dunedin) and as a result there was no breach of the duty of care by RBS. Further, it was noted that Torre did not suffer any loss as a result of this explanation because of the fact that the consent request was ultimately unsuccessful.

Interestingly, the court stated that in providing this explanation, RBS was acting in its capacity as B2 lender and not as agent. Therefore, if a duty of care had been established, RBS would not have been able to rely on the detailed exclusion of liability provisions in the MFA which applied to the agent.

Further Protection for the Agent

Three further issues discussed in this case confirm the mechanical nature of the duties of the agent in transactions such as these. Firstly, the court observed that, even if Torre had been successful in bringing any of its claims, these would still have failed by reason of the express exclusion of liability clauses in the MFA. Also, the court confirmed the absence of gross negligence or wilful misconduct on the part of the agent because the agent did not demonstrate serious disregard or indifference to an obvious risk towards the lenders. The court further noted the provisions in the MFA which stated that

each lender was solely responsible for investigating risk and making its own financial assessments in connection with the MFA.

The court's decision is a welcome result for banks acting in the agent role under such leveraged finance documentation. Traditionally, banks are reluctant to take on such an agent role if there is any risk of additional liability based on an exercise of its judgement. However, interestingly the judge noted in this case that while RBS was not in breach of its obligations, "*this might have been more by luck than by judgment*". Therefore, it is important for a bank acting as agent to:

1. be aware of the specific duties owed under each tranche of financing, as set out in the relevant facility/facilities agreements and re-examine these duties if needed, particularly if a borrower experiences financial difficulties or there is a risk of an EoD; and

2. be aware of issues involving the same entity or bank acting in multiple roles on a transaction such as this, including potential conflicts of interest and duties that the same entity may technically owe to itself and/or other parties involved in the financing.