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Quest for control of leading London hotels: Real estate finance and enforcement points of interest

By Katie Hillier, Jonathan Lawrence

Introduction

Two related cases have recently ruled on points of interest to those involved in loan management and enforcement. Both cases relate to Patrick McKillen's quest for control of three leading London hotels and both challenge steps taken to bring the company which owned those hotels, Coroin Limited (**"Coroin"**), within the control of two prominent hoteliers, by way of companies and trusts controlled by them (the **"Buyer's interests"**). First, the Court of Appeal ruled in *McKillen v Maybourne Finance Limited and National Asset Loan Management Limited* [2012] EWCA Civ 864, and secondly, the High Court gave judgment in *McKillen v Misland (Cyprus) Investments Ltd (a company registered in Cyprus) and others* [2012] EWHC 2343 (Ch).

McKillen v Maybourne Finance Limited and National Asset Loan Management Limited

The National Asset Loan Management Limited transferred a loan to Maybourne Finance Limited (**"MFL"**), a company within the Buyer's interests. National Asset Loan Management Limited is a subsidiary of the National Asset Management Agency (both **"NAMA"**). Coroin had received loans from Anglo Irish Bank and Bank of Ireland. These were transferred into NAMA in June 2010. On 1 April 2011, such facilities together with a new facility from NAMA (the **"Facilities"**), were consolidated so as to be governed by the terms of a new facility agreement between Coroin, Anglo Irish Bank, Bank of Ireland and NAMA (the **"Facility Agreement"**). On 27 September 2011, NAMA, Anglo Irish Bank and Bank of Ireland transferred all their rights in relation to the Facilities to MFL. Mr McKillen challenged the validity of the transfer.

Provisions in the Facility Agreement

Clause 24 of the Facility Agreement, relating to assignment or transfer by the lenders, imposed a restriction on the class of transferee (which, if applicable, would have prevented a transfer to MFL) and required certain procedural steps to be followed in order for an assignment/transfer to be effective. Clause 40.3(b) of the Facility Agreement sought to exclude the application of certain of the restrictions and procedural requirements in clause 24 in relation to the *"…exercise of rights, power and discretions by NAMA or its Affiliates under the Finance Documents in place of any Lender…"*. Mr McKillen's case, based upon the details of the drafting, was that clause 40.3(b) should be interpreted in a restrictive manner. For example, the words *"in place of any Lender"* meant that clause 40.3(b) did not operate with respect to the September 2011 transfer as this was made by NAMA and the two banks together, not by NAMA in place of the banks. Therefore, Mr McKillen argued, clause 24 did apply to NAMA's purported transfer. He argued that the transfer breached clause 24 for two reasons: (i) MFL did not fall within the class of permitted transferee; and (ii) the requirement for consultation with Coroin had not been complied with. In the High Court, the judge found in favour of Mr McKillen.

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Commercial and statutory background

By contrast with the High Court's decision, the Court of Appeal took a purposive approach to interpreting clause 40.3(b), focussing primarily on the commercial purpose of the clause. In doing so, NAMA's statutory purpose and powers were considered. It was argued for NAMA and MFL that certain provisions of the National Asset Management Agency Act 2009 (pursuant to which NAMA was established) would override restrictions on transfer in the Facility Agreement. In his judgment, the Master of the Rolls commented very favourably on such submissions, but was reluctant to allow the appeal on those grounds, because the argument was not discussed in great detail.

However, when considering the terms of the Facility Agreement itself, the Master of the Rolls could not reconcile the restrictive interpretation of clause 40.3(b) argued for by Mr McKillen with the commercial and statutory background of the disputed transfer. Indeed, the judgment is frequently dismissive of the detailed analysis of drafting which was submitted for either side, saying that *"…detailed sophisticated analysis of every implication arising from the inter-relationship between the clause under discussion and other provisions can serve to obscure the wood for the trees."* The judge emphasised that NAMA's purpose was to deal with its portfolio of loans in order to achieve the best possible return for the Irish state and to do so as soon as commercially practicable. As a result, the court thought it was implausible in this case that NAMA would have intended to restrict its ability to assign the loan. Consequently, the court found that a purposive interpretation of clause 40.3(b) gave it the wider scope for which NAMA and MFL had argued. Its purpose was to remove the fetters which clause 24 would otherwise have placed on NAMA's ability to transfer its rights in relation to the Facilities. Therefore, the fact that the transfer was not undertaken in compliance with clause 24 did not affect its validity.

Comment

The emphasis on a purposive interpretation of contractual provisions in this case is of interest, both more generally as an indication of the courts' approach to contractual interpretation and particularly to those involved with NAMA and its efforts to dispose of any of its loan portfolio. Anyone seeking to challenge transfers by NAMA by reference to restrictions in a facility document has to prove, not only that the documentation intended to restrict such transfers, but also that statutory provisions do not override restrictions. Conversely, if contractual provisions are to restrict NAMA's ability to transfer its interests in loans that it has acquired, they must be or have been drafted unambiguously.

McKillen v Misland (Cyprus) Investments Ltd and others

This High Court case was a very involved hearing covering many points of company law relevant to those involved as directors and shareholders of companies. One of the points discussed related to shares in Coroin held by Derek Quinlan and charged to Bank of Scotland (Ireland) Limited (**"BOSI"**). A part of Mr McKillen's case was that certain transfer and pre-emption provisions of the Coroin shareholder's agreement were triggered by security over Mr Quinlan's shares becoming enforceable. Mr McKillen argued that such transfer and pre-emption provisions had not been complied with and, therefore, the shareholder's agreement had been breached. Before considering the provisions of the shareholder's agreement, the court addressed the question of whether the security in question had become enforceable.

Was security enforceable?

Mr Quinlan had borrowed loans from BOSI in order to finance his investments in Coroin and charged his Coroin shares in BOSI's favour. The following documents were considered by the court. On 14 May 2004 Mr Quinlan granted a charge in favour of BOSI, securing all sums due under a facility letter dated 6 April 2004, as amended by a letter dated 21 April 2004 (the **"2004**

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charge"). During the course of 2004 and early 2005, Mr Quinlan entered into a number of supplemental facility letters and supplemental deeds pursuant to which additional funds were advanced and the terms of the 2004 charge extended to secure such additional liabilities. On 17 October 2005 Mr Quinlan entered into one such facility letter, but the corresponding security document was not expressed to be a supplemental deed as had been the case previously. Instead a new charge was executed (the **"2005 charge"**), charging exactly the same property as the 2004 charge. The court first considered whether the 2005 charge replaced the 2004 charge and then considered whether either had become enforceable.

Did the 2005 charge replace the 2004 charge?

Mr Quinlan argued, as part of his defence to the claim that security over his shares had become enforceable, that the 2005 charge had replaced the 2004 charge. He cited various clauses of the 2005 charge in support of this argument, but none expressly stated that it was to replace the 2004 charge. Mr McKillen countered this argument by reference to two provisions in the 2005 charge:

1. clause 14.1(a) which stated that the 2005 charge "shall be in addition and not in substitution for…nor shall it prejudice or affect, any other security" of BOSI; and
2. clause 17.1 which stated that "No prior security held by [BOSI] over the whole or any part of the Charged Property shall merge in the security hereby constituted".

The judge found these provisions much more conclusive than those cited by Mr Quinlan, concluding that they showed a clear intention between the parties that the 2004 charge was to be unaffected by the 2005 charge. He also commented that this conclusion was consistent with the fact that banks typically seek to preserve pre-existing security, on account of the courts' powers under insolvency laws to set aside transactions within specified periods before the onset of bankruptcy.

Had either charge become enforceable?

The 2005 charge:

The 2005 charge became enforceable only upon *"any failure by [Mr Quinlan] to pay, on written demand by [BOSI] any sums which are due and payable to [BOSI] by [Mr Quinlan]"*. During 2009 Mr Quinlan failed to make three interest payments under a loan agreement dated 28 August 2006. BOSI wrote to Mr Quinlan on 10 September 2009, demanding that Mr Quinlan either settle the outstanding interest payments *"immediately"* or remedy the payment default within 60 days of the date of the letter in the manner specified in the loan agreement (substitution of borrowers). Mr Quinlan paid the amount demanded on or around 4 November 2009. BOSI had not exercised and did not proceed to exercise any further rights under either the 2006 loan agreement or the 2005 charge.

The key question addressed by the court was whether, at any point between 10 September 2009 and receipt of payment, BOSI was entitled to enforce the 2005 charge. Mr McKillen, arguing that BOSI was so entitled, relied on the use of the words 'forthwith' and 'immediately' in BOSI's letter of demand. He submitted that the payment was not made forthwith or immediately and, therefore, BOSI could have enforced its security. Significantly, those words were not used in the 2005 charge which referred only to failure to pay *"on written demand"*. The judge was not persuaded by Mr McKillen's arguments. Although Mr Quinlan did not make his payment immediately, the letter alternatively gave him 60 days to remedy the payment default by substitution of borrowers. Therefore, BOSI had to wait until the expiry of that period before it could proceed to exercise any further rights. Both BOSI and Mr Quinlan had proceeded on the basis that payment on 4 November 2009 had remedied the default and had done so within the required time period. The court found, therefore, that the 2005 charge had never become enforceable.

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The 2004 charge:

The 2004 charge provided that powers of enforcement arose on an *"Event of Default"*, which was defined as the events of default set out in the facility letter of 6 April 2004. That letter did not expressly set out any events of default, but it did incorporate BOSI's standard loan conditions. Condition 9 set out twenty events of default. It went on to state that, on the occurrence of such an event or at any time thereafter, BOSI could at its discretion take certain steps, one of which was to declare that security documents had become enforceable.

Mr Quinlan and Mr McKillen both agreed that a number of the events of default set out in the loan conditions had occurred during 2010-11 and that, despite such events, BOSI had never made a declaration that security had become enforceable. The question for the court was whether, as suggested by condition 9, a declaration from BOSI was required in order for security to become enforceable or whether, as suggested in the charge itself, it became enforceable merely on the happening of an event of default, without the need for any declaration. In deciding this point, the judge emphasised the need to consider all relevant documents together and consistently with one another. The standard conditions would apply unless a term of the 2004 charge or the facility letter was inconsistent with them. He could find no term of either document which was sufficiently inconsistent with the standard conditions so as to negate the need for a declaration to make security enforceable. As no such declaration had ever been made, the judge concluded that the 2004 charge had not become enforceable.

Comment

These matters are relevant to anyone involved in taking security, reviewing its terms and dealing with enforcement. Many lenders will be pleased to hear that clauses designed to preserve prior security are not easily undermined. However, the decisions relating to enforceability are a reminder to anyone involved in enforcement to check thoroughly the terms of all relevant documents and to be sure to follow all steps required for security to become enforceable.

Authors:

Katie Hillier
katie.hillier@klgates.com
+44.(0).20.7360.8230

Jonathan Lawrence
Jonathan.lawrence@klgates.com
+44.(0).20.7360.8242