

UK Syndicated Loans: Practical Experience in Interpreting UK Loan Documents

BY KEITH WILSON AND NORMAN FRASER

One of the fundamental principles of English law in relation to the interpretation of contracts is that the task of the court is to identify the intentions of the parties to the contract and apply an interpretation that is consistent with that intention. What had, to some extent, been thrown into doubt over recent years was the extent to which a court, in seeking to interpret a contract, was entitled to look at factual evidence outside the “four square walls” of the contract itself. Various decisions had suggested that, in order to establish the “factual matrix,” there may be cases where the court might look to evidence such as earlier drafts of documents illustrating by way of the changes between those drafts and the final signed version the intentions of one or both parties behind changes made and adopted. The House of Lords in England (which is the supreme court for civil matters in England) recently considered this case law in the case *Chartbrook Ltd v Persimmon Homes Ltd & Others* [2009] UKHL 38 (1 July 2009).

In that decision the House of Lords expressly rejected introducing extrinsic evidence other than in exceptional cases and confirmed that it was an established principle of English law that the court confine itself to inferring the parties’ intentions from the terms and conditions of the final contract. The court appeared also to indicate that a departure from this principle of law would be better achieved by legislation by Parliament rather than as a matter of developing case law. Part of the court’s reasoning was the need to give parties relying on a contract certainty of the terms and conditions on which they were contracting. Any recourse to other evidence that might indicate a different interpretation from that which would be obvious from the contract itself would render reliance on the final terms of contracts uncertain and make business difficult to conduct. When looked at in these terms the decision is not a surprising one – perhaps it is more surprising that there have been instances of cases in recent years suggesting that the “factual matrix” could extend beyond the terms and conditions of the contract itself.

Paul Hastings recently advised on an example of application of the principle in the context of a syndicated loan transaction where the question was whether the effect of a term of the facility agreement could be changed by obtaining Majority Lender ($66\frac{2}{3}\%$) consent or whether unanimous lender consent was required. Such questions are very common at present with borrowers often seeking relaxation of covenants or restrictions in facility agreements.

In this recent example Paul Hastings was acting for Addax Petroleum Corporation who were the subject of a recommended bid from Sinopec to acquire the entire share capital of Addax Petroleum. Addax has two major syndicated loan facilities amounting to more than \$2 billion. The facilities contained “change of control” provisions that would, without waiver or amendment, require a prepayment of the facilities on completion of the offer. The problem related to one of the facilities under which the terms of the “change of control” prepayment event were such that a waiver would require unanimous lender consent and, if the event were actually to occur, consent

to an amendment would also require unanimous consent. Addax believed that they would be able to obtain majority lender consent to the "change of control" but not unanimous consent. It was therefore crucial to how the acquisition was structured as to whether the Majority Lender or unanimous consent applied.

On the basis that a waiver required unanimous consent and an amendment after occurrence of the "change of control" would require unanimous consent, it might have been assumed that an amendment to the definition of "change of control" before the occurrence of the "change of control" event would also require unanimous consent. Careful review of the facility agreement, however, showed a number of indicators that this would not be the case and applying the principle that the parties' intentions are to be inferred from the express terms of the contract, Paul Hastings was able to advise the clients that an amendment to the definition of "change of control" would only require Majority Lender consent. This position was ultimately accepted by the syndicate of lenders. Majority Lender consent was then obtained, allowing the transaction to proceed.

Sinopec obtained the requisite acceptances, and the acquisition was completed and announced on August 18, 2009.

The *Chartbrook* case is a very useful and clear restatement of the law that will greatly assist in contract interpretation questions bringing greater certainty to transacting parties. As such it is to be welcomed.

The Sinopec Group acquisition of Addax Petroleum Corporation group is a matter of public record.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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