The Financial List: first judgment adopts commercial approach to the meaning of Loan Market Association standard terms

This article, written by **Shane Sibbel**, was first published in the Practical Law blog, (Friday 5 March 2016).

The Financial List was established in October 2015 as a single specialist list comprised of judges drawn from both the Commercial Court and the Chancery Division, with particular expertise and experience in financial markets disputes. The procedure for cases assigned to the List is governed by CPR 63A, the associated Practice Direction, and a Guide issued on 1 October 2015.

The List is available primarily for cases that either:

- Relate to financial markets disputes of over £50 million.
- Require particular market expertise.
- Raise issues of general importance to the financial markets.

The judgment in GSO Credit – *A Partners LP & Ors v Barclays Bank plc v HCC International Insurance Company plc* [2016] ECHW 146 is the first decision to be issued by a judge on the Financial List since its inception.

Facts

Under a surety bonds facility, HCC as "lender" had issued a series of surety bonds to various public authorities in Spain and Italy at the behest of Codere SA, one of the "borrowers" under the facility.

Under the bonds, HCC had a contingent liability to pay certain sums to the recipient public authorities if and when they made a demand for such sums. HCC, in turn, had a right under the facility to be reimbursed by Codere for whatever sums it paid out.

By trades agreed orally over the telephone, GSO agreed to buy from Barclays, and Barclays agreed to buy (back to back) from HCC, the "commitment" of HCC under the facility. The trades were expressed as being a purchase of HCC's "exposure" at "76 cents on the euro".

The oral trades were confirmed in signed "trade confirmations", in a standard form provided by the Loan Markets Association (LMA), and were subject to the Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims) of the LMA, dated 14 May 2012.

The Dispute

As it transpired, the parties fundamentally disagreed in their understandings of the trades. GSO believed it had assumed both HCC's rights against Codere under the facility and HCC's contingent liabilities to the public authorities under the bonds. In GSO's view, the

reference to "76 cents on the euro" meant that it was purchasing those rights and obligations at a negative price of 24% of the total contingent liability under the bonds (roughly EUR5.7m). GSO accordingly claimed that sum (less Barclays' commission) from HCC. GSO therefore believed HCC to be paying to escape its contingent liabilities (and the risk that Codere would not be able to reimburse).

HCC's contended that it had only sold its rights (against Codere) under the facility, and not its contingent liabilities to the public authorities under the bonds. The "76 cents on the euro" price meant that GSO owed HCC 76% of the total amount that might be called for by the public authorities, which GSO could then claim from Codere under the facility (roughly EUR18.34m, less Barclays' commission).

HCC therefore thought that GSO was paying EURO18.34m as part of a bet that (i) demands would be made under the bonds for a higher sum and (ii) Codere could reimburse those demands.

The signed trade confirmations (and standard terms) provided no definitive answer on their face.

Judgment

Knowles J found for GSO. The case aptly illustrates the advantages of ensuring that specialised judges deal with financial market disputes. The judgment is crisp and concise, notwithstanding the underlying complexities. The relevant authorities on interpretation are recited (including the recent case of *Arnold v Britton & Ors* [2015] UKSC 36) and the judge summarised the correct approach as seeking:

> "to respect the parties' choice, to understand the commercial context, and to provide certainty and consistency in matters of business."

The analysis proceeds from the view that GSO's understanding was "a more commercial representation" of "a trade of a position" under a surety bonds facility than HCC's understanding. It was more commercial to read such a trade as encompassing both rights and connected obligations under bonds issued pursuant to the facility.

Knowles J thereafter dismissed all of HCC's arguments that such an understanding was precluded by the wording of the relevant terms. In doing so, the judge adopted a fairly expansive reading of (amongst other terms) the word "interest", so as to include "contingent obligations" within "Purchased Assets" in a settlement calculation. Finally, any temptation to declare that no agreement had been reached was avoided.

The case stands as a useful authority for the interpretation of standard terms by reference to their (more likely) commercial context, and will be especially relevant in all cases involving trades on LMA standard terms.