



Welcome to the latest edition of the Mason Hayes+Curran Banking Bulletin which covers recent developments in the Financial Services industry. An important decision in respect of fixed charges over book debts and bank accounts has been handed down in recent weeks by the English House of Lords, that of *Spectrum Plus Limited*. A full analysis will appear in the next Banking Update, but if you are relying on fixed charges over book debts or bank accounts at the moment then they should be reviewed by your legal advisors in light of this decision.

Kevin Hoy
Head of Banking

Court Watch

In *Marubeui Hong Kong and South China Limited v The Mongolian Government* the English Court of Appeal was asked to decide if a letter of guarantee from the Government of Mongolia, which included an on demand clause, was in fact an on demand bond or its equivalent. If it was a demand bond then the letter would create a primary obligation on the Government and the beneficiary would be able to call for payment. If the letter was a guarantee then the Government would have no liability because the underlying agreement under which the liability to be guaranteed arose was amended. The Court held that the letter was a guarantee in the traditional sense because:

- ¥ it was described as a guarantee on its face and in the supporting documents, which although not conclusive did raise a presumption (which was not rebutted on the facts) that it was a guarantee; and
- ¥ the wording of the document was appropriate to a guarantee because, although the obligations were described as an unconditional pledge and the beneficiary was only required to serve a simple demand, the obligations only arose when the amounts payable under the agreement [are] not paid when due .

This case highlights the fact that unless it is clear that a document is creating a primary obligation then a court may on the evidence hold that the obligation created is a secondary obligation. Banks often describe documents as guarantees when an indemnity is required as well. Making a distinction can seem to be lawyer nonsense but *Marubeui* shows that there are practical consequences.

Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations, 2005 (SI 190/2005) (the Regulation)

The Regulation (effective from 1st April 2005) has expanded the definition of consumer , for access to the Financial Services Ombudsman (the Ombudsman). The Ombudsman provides a complaint procedure for consumers in respect of financial services providers regulated by the Irish Financial Services Regulatory Authority (IFSRA) and can award damages. The Regulation has extended the definition of consumer to include:





- a) all unincorporated bodies including partnerships and bodies such as clubs, charities and trusts; and
- b) incorporated bodies having an annual turnover of €3 million or less (provided that such a body is not a member of a group of companies having a combined turnover greater than €3 million).

A consultation process is currently underway to consider the possibility of expanding the definition of consumer in similar situations, e.g. the Consumer Credit Act.

Wind Energy Seminar

In February, Mason Hayes+Curran brought together leading experts and bankers for a discussion on the fast developing wind energy sector.

Kevin Hoy analysed the recent High Court decision in the McDowell planning extension case. In general, planning permissions have a five year lifespan although the period can be extended if substantial works have been completed. As wind farms can take a long time to get to the construction stage the clarification provided in the McDowell decision should be of great assistance.

Andrew Garrad of Garrad Hassan, the global wind energy consultancy, described the practicalities of measuring average wind speeds, the power curve ratio and the profitability of projects. Andrew demystified many technicalities for the attendees. Paul Gardner, also of Garrad Hassan, highlighted that grid connection as opposed to construction tends to be the major risk factor.

Alan Bissett of Carson McDowell Solicitors in Belfast spoke about wind farm development issues in the Northern Irish electricity market with particular emphasis on the recently introduced Renewable Obligation Certificate regime. Eoin Greene of Coyle Hamilton had a detailed presentation on insurance aspects of wind farm financing.

The Residential Tenancies Act 2004 (the Act)

The Act is a landmark piece of legislation in the private rented residential sector. Its effects should be taken into account where any security package includes tenanted residential property. The Private Residential Tenancies Board is the new registration entity. It will determine disputes concerning issues such as deposit refunds, market rent (which can now be adjusted downwards) and complaints by neighbours regarding tenant behaviour. The Act imposes extra burdens on private sector landlords e.g. for repairs, security of tenure and the enforcement of tenant obligations.

For full information and advice on all matters relating to banking, contact any member of Mason Hayes+Curran dedicated Banking Unit.



Kevin Hoy, Mason Hayes+Curran and Andrew Garrad of Garrad Hassan.



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