

Payments for creditors to vote for proposals held not to be bribes

A facilitation payment to encourage creditors to vote through the restructuring proposals of creditors' debts has been held by the High Court not to be an illegal bribe. The court had regard to the fact that the offer of payment was made openly to all relevant creditors, none of whom were prevented from voting on the proposal. As such, where a creditor consented and received the facilitation payment, this was not contrary to the *pari passu* principle.

The facts

The case heard last week by the court involved a claim against Brazilian, Uruguayan and Cayman companies (the “**Defendants**”) by claimant loan note holders (the “**Claimant**”). The Cayman Defendant was the issuer of bonds in the form of loan notes (having been substituted for the Uruguayan Defendant, which had originally issued the bonds). A restructuring plan was drafted, which contained three proposals. These proposals were sent to all loan note holders as consent solicitations: if consent to the proposals was provided, the loan note holder would receive a payment.

The Claimant consented to, and received the payment relating to, the first two proposals, but refused to consent to the third. However, all three proposals were voted through by the requisite three-quarters majority of the loan note holders and the Brazilian courts approved the restructuring.

The Claimant claimed repayment under the loan notes plus damages for repudiatory breach of the loan note purchase contract on the ground that the payments offered to loan note holders constituted an illegal bribe and were contrary to the *pari passu* principle. The Defendants applied to strike out the claimant's claim as the trust deed governing the bonds contained a clause

specifically precluding direct action against the issuer. In reply, the Claimant asserted that both the Uruguayan and Cayman Defendants were liable and that the Defendants could not rely on the clause precluding direct action against the issuer because it had repudiated the contract by its breach.

The decision

The court refused the Claimant's claim and granted the Defendant's cross-application. The court held that payments offered as consent solicitations were not illegal bribes when offered openly to all creditors and none was incapacitated from voting¹. The court also considered a decision of the court in Delaware² (in the absence of English authority on the point), in which the Delaware court recognised that consent solicitation was commonly used to facilitate restructurings. The Delaware court also emphasised the importance of any consent solicitation being made openly.

The court noted that: (a) all note holders were informed repeatedly in documents provided to them about the consent payments offered by the Defendants, (b) the payment could be made legally; and (c) each loan note holder could decide freely how to vote; the payments did not have the characteristics of a bribe and were not contrary to the *pari passu* rule. The court also noted that the payments were not prohibited by the trust deed or the notes themselves.

The court held that the Claimant had acknowledged that the payments were legal by voting in favour of the first two proposals and accepting the associated payments. The restructuring was voted through by an overwhelming majority of the loan note holders and was sanctioned by the Brazilian court and therefore, the Claimant's claim had no real prospect of success.

¹ Following *Goodfellow v Nelson Line (Liverpool) Limited* (1912) 2 Ch 324 and *British American Nickel Corp Ltd v MJ O'Brien Ltd* (1927) AC 369
² *Kass v Eastern Airlines Inc* (1986) WL 13008 (Del Ch)

In respect of the potential liability of the Defendants, the court held that the Uruguayan defendant had been released from liability when it was substituted by the Cayman Defendant issuer because there was no need to obtain the consent of the loan note holders before substitution took place and there was no evidence that any necessary steps to effect it were outstanding. In any event, the claim arose from the consent solicitations, with which the Uruguayan Defendant had had no involvement, so again there was no real prospect of success of the Claimant's claim.

Comment

This decision is interesting because the court was willing to consider a decision of the court in Delaware in order to fill a gap in English legal authority. The outcome appears reasonable, as it is in the public interest for any incentives to support a restructuring to be open and acknowledged to ensure transparency of the process for all creditors and other stakeholders affected.

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