Briefing
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Saying what you mean and meaning what you say

The case of *Carlyle v Royal Bank of Scotland* centred on whether the bank could enforce repayment of loans advanced to Carlyle to buy plots of land. Carlyle asserted that because the bank was legally obliged to provide both development and acquisition finance, it could not enforce repayment of the latter when only the former had been provided.

The case dates back to the 2008 financial crisis and litigation has been ongoing since that time.

It is understood that the borrower's intervening sequestration was the cause of some of the delay in progressing this litigation to its present stage.

The factual background is as follows:

- The borrower was a property developer who, in 2007, had the opportunity to acquire two plots of development land from Gleneagles Hotel. He submitted a proposal to the bank seeking funding and demonstrating how this would be secured and repaid from the sale of these properties once developed and from the sale of other properties. The lending was to be a mixture of personal lending to the borrower as an individual by the private bank and lending to the borrower's company by the commercial bank.

- The borrower was adamant, and this was supported by the evidence the Court heard from the banks' employee, that due to the buy-back provisions included in the sale contract by Gleneagles Hotel (no doubt to avoid unsightly partial development prior to the staging of the Ryder Cup), that he made it clear to the bank that he was looking for a commitment to provide both the acquisition finance and the development finance.

- Against that background there was a critical phone call between the borrower and the bank in mid June 2007 where the borrower was told by the bank employee "it's all approved" and the borrower then proceeded to pay the deposits to secure the two plots and conclude the contract to acquire them.

- Approximately 12 months later, once the plots had been acquired but before development work on the plots had been commenced, the management of borrower's banking affairs were transferred to a specialist unit within the bank, and two months later, the borrower was advised that the bank would not be providing the development finance.

- The bank took steps to recover the acquisition finance loan and the borrower defended the claim on the basis that as the bank had not honoured its legal obligations in terms of the contract, it was not entitled to hold the borrower to his.

- On the evidence heard, the judge at first instance found that the bank had a collateral obligation to fund the development.

- That decision was reversed on appeal by the bank to the Inner House and the borrower appealed to the Supreme Court.

Summary

The Supreme Court found in favour of the borrower by applying the law which sets out the limited basis on which an appellate court can overturn the findings of fact made by the first instance judge. In examining

the findings of fact which had been made by the first instance judge, and which were challenged by the bank, the Supreme Court determined that the judge was entitled to reach the conclusions that he did and it was not a case where the judge had got it "plainly wrong".

It will be of cold comfort to the bank that Lord Hodge, who delivered the Supreme Court's decision, indicated that, had he been hearing the evidence he might have reached the conclusion that no legally binding obligation to provide the development finance had been created, but in this case he felt the judge at first instance was entitled to interpret the evidence in a manner which favoured the borrower. Despite the fact that key terms in relation to the development finance loan were not finalised as between the parties, the Supreme Court held that, having concluded that the bank made a legally binding promise to provide the development funding, the court was required to look for ways to give effect to that promise.

Significance of decision

The decision will be of interest to lawyers as regards the limited powers of the appeal courts to come to different conclusions on the evidence heard at proof. Of more significant practical importance however, is the impact that the decision has on communications between a bank and its customers. In a competitive banking environment there will always be cases where the front line relationship managers are keen to keep the customer on side and present a positive impression of the bank's lending appetite. The reality is that until the appropriate credit sanction has been obtained (which might include recurring covenant obligations) the bank will not want to be bound or committed to provide any finance. Agreements made at this early stage must:

- Always be expressed to be subject to the necessary internal approval processes.
- If there are conditions precedent to be met or if there are various stages to the approval process or for the approval of tranches of the finance sought, this must be made clear to a customer to avoid a situation where an "in principle" decision is interpreted by the customer, or worse by the Court, as a legally binding promise to provide funding.

The position was noted by the Court to be even more acute in Scotland because of the absence of the requirement for consideration which means that a unilateral undertaking which is intended to have legal effect will be binding on the parties without any consideration passing between the parties.

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