11 March 2015

PRESS SUMMARY

Tael One Partners Limited (Appellant) v Morgan Stanley & Co International PLC (Respondent) [2015] UKSC 12
On appeal from [2013] EWCA Civ 473

JUSTICES: Lord Neuberger (President), Lord Kerr, Lord Reed, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

This appeal raises a question of contractual interpretation that is of significance because the condition in question forms part of the Loan Market Association ("LMA") standard terms for par trade transactions. It concerns payment by a borrower to a lender of a lump sum at the time when a loan is repaid, sometimes known as a payment premium. The appellant, Tael One Partners Limited ("Tael"), was one of a number of lenders under an agreement concluded in 2009 by which US $100m was advanced to the borrower. From 30 November 2009, Tael's contribution to the loan was US $32m (known as its "participation"). During the currency of the loan, it assigned its rights in respect of US $11m of its participation to the respondent, Morgan Stanley, under a contract incorporating the LMA terms. Morgan Stanley in turn sold its participation in the loan agreement to a third party. The loan was subsequently repaid by the borrower, together with the payment premium. Tael claims that, under the terms of the transfer to Morgan Stanley, it is entitled to be paid the part of the payment premium which relates to the amount transferred, to the extent that (as Tael argues) it pertains to the period prior to the date of the transfer. The purchase price letter did not provide expressly for any payment to be made by Morgan Stanley in respect of the payment premium. Condition 11 of the LMA terms deals with interest and fees. Conditions 11.2, 11.3, 11.5 and 11.6 deal with the payment of interest or fees by the buyer to the seller, and with each of the four bases on which the parties can agree that the transfer should be settled. In the present case, the agreed basis was "paid on settlement date", addressed in condition 11.3.

Tael relied on Condition 11.9(a) of the LMA terms. Condition 11.9, "Allocation of interest and fees" states: "Unless these Conditions otherwise provide …

(a) Any interest or fees (other than PIK Interest) which are payable under the Credit Agreement in respect of the Purchased Assets and which are expressed to accrue by reference to the lapse of time shall, to the extent they accrue in respect of the period before (and not including) the Settlement Date, be for the account of the Seller and, to the extent they accrue in respect of the period after (and including) the Settlement Date, be for the account of the Buyer

(b) All other fees shall, to the extent attributable to the Purchased Assets and payable after the Trade Date, be for the account of the Buyer."

Tael applied for summary judgment against Morgan Stanley, who responded by also applying for summary judgment. Popplewell J granted Tael's application and dismissed Morgan Stanley's. An appeal against that decision was allowed by the Court of Appeal. Tael appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Reed gives a judgment with which Lord Neuberger, Lord Kerr, Lord Toulson and Lord Hodge agree.

REASONS FOR THE JUDGMENT

The starting point is the words the parties used in condition 11.9(a). There is room for argument as to whether the payment premium would be "interest or fees" or whether it might fall within the definition of PIK interest. It is clear, however, that it is not "expressed to accrue by reference to the lapse of time". It is true that a period of time is one of the elements that enter into the calculation of the amount of the premium, but condition 11.9(a) does not say, "calculated by reference to the lapse of time" and that is not its natural meaning. **[41]**

The word "accrue" is generally used to describe the coming into being of a right or an obligation. The amount to which there is an entitlement may not be payable until a future date, but an entitlement may nevertheless have accrued. Situations can readily be envisaged in which interest or fees might accrue, in that sense, by reference to the lapse of time. This is not however such a situation. An entitlement to a payment premium under the loan agreement accrues on a defined event. **[42]** The payment premium is expressed as an amount equal to the difference between the total of several other amounts, on the one hand, and an amount equal to interest calculated at a given rate, on the other hand, so it might be said that part of the premium relates to the period before the settlement date. That does not however mean that the premium can be regarded, retrospectively, as having notionally accrued over that period. The method of calculation of the premium should not be confused with the accrual of the right to it. **[43]**

The textual conclusion is reinforced by the commercial context. The LMA terms are intended for use in a market in which loans are traded: a loan may be traded many times, between many parties, over a number of years. One would not readily infer that a contract for the sale of a loan in a market of that nature was intended to create continuing rights and obligations between the parties to that contract. Further, the LMA terms do not make provision for any mechanism enabling the holder of the putative right to a payment premium, following the sale of his interest in the loan, to know when his right has vested or in what amount. Unless he happened to have retained some participation in the loan, as in the present case, he would not normally know when he had become entitled to payment, or how much he was entitled to be paid. Therefore, it would be more natural to expect the potential value of the right to receive the premium to be reflected in the consideration for which the loan was transferred. **[44]**

Though that conclusion is sufficient to dispose of the appeal it leaves open two related questions. First, does this construction of condition 11.9(a) render it redundant? It does not: condition 11.9(a) can be seen to have a purpose if read together with the provision made as to the payment of interest and fees in conditions 11.2, 11.3 and 11.9(b). **[45]** Second, does condition 11.9(a) provide a right to payment additional to that conferred by the other provisions of condition 11? It does not. The language used elsewhere in condition 11.9 suggests that it is not intended to confer an additional right to payment. Rather it allocates interest and fees as being "for the account of" one party or the other, and other conditions then impose an obligation to "pay" in accordance with that account. **[45, 50]**

References in square brackets are to paragraphs in the judgment