

Finance  
Case Law Update  
Rosling King LLP



It is standard market terms for a lender to have the express right to transfer its loan. In particular, English law governed syndicated loan documents will usually incorporate the Loan Market Association (LMA) wording (or similar) to this effect. Interestingly, the Court of Appeal has recently had to consider the scope for implying terms into such LMA-style language and whether to restrict a lender's right to market the sale of the loan under those standard terms. In considering the application, the Court upheld the established principle that implied terms will only be imported into a contract where necessary to give business efficacy to it.

### The Background

In February 2013, Irish Bank Resolution Corporation Limited ("IBRC") was placed into special liquidation. KPMG, acting as special liquidators, began marketing IBRC's extensive loan book pursuant to an order of the Irish Minister of Finance and this process still continues.

Included in IBRC's book was a loan totalling £195m to Camden Market Holdings Corporation ("CMHC") for the redevelopment of Camden Market, London. The loan was governed by a facility agreement and various amendment and restatement and supplemental deeds. In the last supplemental deed in 2012, the parties agreed to extend the final maturity date of the loan to allow CMHC to obtain planning permission to develop the site and thereby maximise the potential return on sale. At the same time, a further £10 million facility was granted by IBRC and exit strategy provisions included. However, the supplemental deed did not amend the existing loan terms relating to IBRC's right to transfer the loan. Under these terms, IBRC could assign its rights to another lender with the consent of CMHC and, importantly, was permitted to disclose any information about CMHC which it considers appropriate in order to market the loan (subject to recipients entering into confidentiality undertakings). The consent of CMHC was not required in relation to IBRC's right to disclose information.

At the same time as CMHC was in the process of marketing its properties at Camden Market, the special liquidators were marketing the loan book. As is common in loan book sales, various loans were packaged up together and marketed as a portfolio. CMHC's loan was included in one such portfolio which also included other distressed loans, despite the fact that CMHC's loan was itself performing. CMHC argued that packaging its performing loan with other distressed loans gave rise to the market opinion that its loan was itself in default. It claimed that some potential buyers of the property had stated that they would acquire the loan from IBRC instead of purchasing the property itself and adopt a "vulture fund" approach, whereby the property is obtained for less than market value via enforcement of the security. This uncertainty, CMHC felt, meant that its own sale of Camden Market was hindered and that, ultimately, a lower sale price was achieved as a result.

### The Court of Appeal Decision

CMHC commenced proceedings against IBRC, who in turn applied to the High Court for summary judgment to have CMHC's claim struck out on the grounds it had no real prospect of success. CMHC claimed that the terms of the loan contained an implied term that IBRC would not do anything which hindered CMHC's ability to market the properties at Camden Market. The Judge at first instance decided that the argument brought by CMHC needed to be determined at trial and so IBRC's application was dismissed.

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IBRC appealed on a number of grounds, arguing that the implied term relied on by CMHC was inconsistent with and contradictory to the express terms of the loan. IBRC argued that the Court at first instance has erred by not first considering the express terms of the loan, which it said was the default starting position when approaching the question of whether the implied term should be incorporated.

The Court of Appeal agreed with IBRC and held that the case advanced by CMHC was bound to fail as a matter of law. It stated that, when a Court is implying terms, it has to consider two types of inconsistency with the express terms of a contract; direct linguistic consistency and substantive inconsistency. The Court of Appeal said that the High Court should have considered the effect the implied term would have on the express terms of the loan which would have shown that the implied term was substantively inconsistent with the terms of the loan.

Implying an obligation on IBRC not to do anything which hindered CMHC's marketing of Camden Market would run contrary to the express and unfettered right of IBRC to market the loan by disclosing information to interested parties. Such a constraining term was not incorporated when the terms were loan terms were restated. The Court of Appeal therefore allowed IBRC's appeal and entered summary judgment in its favour.

### Conclusion

The case highlights the Courts' continued reluctance to imply terms into effective and coherent contracts. The case makes clear that this is the case even where the implied term itself does not conflict with the express terms of the contract.

The case reiterates the need for comprehensive drafting to cover the intentions of the parties and to ensure that all considerations are fully addressed; in particular, in scenarios where positions are being renegotiated.

For further information, please contact [Alex Pelopidas](#) or the Partner with whom you usually deal.