

Finance  
Case Law Update  
Rosling King LLP



## Background

The borrower and the bank had entered into various loan facilities, which had been secured by a charge over the borrower's property in France. The borrower subsequently brought proceedings against the bank challenging the validity of the facilities. The parties ended up settling the dispute and a Court order was granted under which the bank agreed to continue a loan facility for a new five year term. The order amended the terms of the facility agreement by inserting the following provision: "*If with the prior approval of the bank (such approval not to be unreasonably withheld or delayed) the Property is sold, you shall immediately repay to the bank the net proceeds of sale*".

The borrower sought to reduce the amount owing under the loan facility and took steps to sell the property. The borrower received an offer of €4.1 million net of commission and fees. This was in excess of valuations at the time. Although the bank said that this was an agreeable offer, it refused to approve any sale unless the borrower provided further security for the balance of the amount due on the loan, which was in the region of €1.7 million. No further security was provided and the sale was lost.

## The Issue and Decision

At issue was the interpretation of the consent provision in the facility agreement and what was meant by "*such approval not to be unreasonably withheld or delayed*". The borrower did not accept that the bank's requirement for further security as a condition of consent to be a legitimate or a reasonable basis for its refusal. The borrower argued that the question of reasonable consent must be determined by reference to the proposed sale price of the property. It was therefore the borrower's argument that if the sale price is a reasonable price in the sense that it approximates to market value or fair market value, then they should be free to sell it and the bank must give consent.

The Court held that the bank's refusal to consent to the sale of the Property was unreasonable. The Court applied an objective test of reasonableness on the basis that it could not see how the scope of terms of the facility agreement could go any further than permitting the disposal of the Property at a proper price.

Although the Court accepted that the sale would have left a shortfall (€1.7 million), the value of the Property was considerably less than the outstanding indebtedness at the time the amendments were entered into and there was no prospect of the value increasing. The Court added that had the bank wanted security to cover such shortfall, it would have asked for it before entering into the amendments. The Court therefore concluded that the bank's reasons for refusing the sale had no connection with the aim of obtaining a sale at a proper value, but was to reduce the bank's shortfall.

The Court did, however, state the bank might reasonably have wished to postpone the sale, where it was clear that a delayed sale was bound to achieve a much better price. An example of such a situation which the Court gave is where a very lucrative planning permission was

about to be granted; but the Court noted that this was not relevant in the present case.

### Commentary

It is standard in finance documents for a lender's consent to be required on a variety of matters (such as disposals of assets) and the qualification for that consent "*not to be unreasonably withheld or delayed*" is a common qualification that borrowers may insert. What this decision highlights is that lenders should be wary of any qualification of their rights that are pegged to reasonableness. The Courts have made clear that whilst the facts of each case will be different, the Court's approach will be to apply an objective test for reasonableness. This means that a borrower could challenge a lender's decision to refuse consent. Furthermore, the case shows that if a lender wants to refuse consent on specific grounds (or for certain pre-conditions to be met first), then it would be best for these grounds (or pre-conditions) to be expressly incorporated prior to execution of the document.

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