lacking two of these three attributes. This was taken for granted by all concerned in the present case.

The issue of most interest was not pursued before the Court of Appeal. Section 14(3) not only requires that the buyer should make known to the seller, expressly or by implication, the particular purpose for which the goods are being bought, but also that the buyer should rely on the seller's skill and judgment. (In fact the onus of proof is reversed, the burden being on the seller to show that the buyer did not so rely, but nothing turns on this for present purposes.) Here Messer, the seller, had exercised no skill or judgment at all: *both* parties had relied on *Terra* not to have permitted its product to be contaminated. In Tomlinson J.'s view, this was sufficient. Messer was in breach of section 14(3) because Britvic had relied on the skill and judgment of Terra, the person from whom the seller had acquired the goods. Plainly this ruling makes good commercial sense, however much it departs from the literal meaning of the section, at least in situations where the product passes down the chain of sales and subsales with none of the intermediate parties being able to make an independent assessment of its quality. But it will not be so easy in many other cases to attribute to the producer of the goods knowledge of the "particular purpose" of the eventual end user—herring meal is not necessarily fed to mink, or plastic pails sent to Kuwait. So this innovatory ruling is likely to be of limited application.

L.S. Sealy

SYNDICATED CREDIT AGREEMENT: MAJORITY VOTING

In *Redwood Master Fund Ltd.* v. *TD Bank Europe Ltd.* [2002] EWHC 2703(Ch), [2002] All E.R. (D) 141 (Chancery Division, Rimer J.) the court upheld a clause in a syndicated bank credit agreement empowering a majority to bind a dissentient minority even though the minority were placed in a worse position than the majority.

The effect in summary of the case law on creditor voting clauses—mainly in the context of bond issues—when combined with the case law on shareholder voting, voting on corporate schemes of arrangement and the like, is that the clauses are valid provided that (1) the decision was clearly within the terms of the power, (2) the majority were in good faith, *i.e.* not motivated solely by malice or vindictiveness, (3) there were no secret advantages to some creditors to procure their votes, *e.g.* bribes, and (4) most difficult of all, there was no unjust oppression of the minority so as to constitute a fraud

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on the minority, *e.g.* by a discriminatory decision denying the minority an advantage granted to the majority. This has sometimes been stated as a test that the power conferred on majorities must be exercised bona fide for the purpose of benefiting the class as a whole—a kind of pale fiduciary altruism. It is this test of overall benefit which was particularly examined in *Redwood.*

The facts were that an international syndicate of banks agreed to make a syndicated credit of Euro 4 billion to a Dutch telecoms group. The credit agreement contained the usual provision entitling the majority lenders—in this case two-thirds by value—to amend the credit agreement, subject to entrenched provisions requiring unanimity, notably an extension of due dates for principal, a reduction in the margin of interest and an increase in a lender's commitment. The borrower (there were two of them in fact) got into serious financial difficulties and an event of default occurred. The main creditors were the syndicate of banks and also bondholders (for several billions of euros) who endeavoured to work out a restructuring plan to keep the group afloat. So far as relevant, the syndicated credit agreement contemplated two types of facility: the A facility which was a revolving credit and a B facility which was a fixed term loan. When the crisis struck, the A facility was wholly undrawn but the B facility was almost fully drawn.

The upshot of the bank negotiations with the borrower was that the bank lenders agreed a waiver letter whereby the facilities were to be reduced. Most of the reduction was to be achieved by the borrower drawing on the undrawn A facility—the revolving credit—to pay back part of the B Facility—the term loan. This arrangement involved a lifting of the draw-stop caused by the default and a relaxation of financial covenants.

When the syndicated credit was signed, the lenders participated in both the facilities pro rata and so it would not have mattered that one was drawn to repay the other. But some of the original lenders had transferred their commitments to lend under the A facility (pursuant presumably to usual novation clauses in the credit agreement) to various hedge funds and had paid the funds to take over their commitments, *e.g.* Euro 35 for a Euro 100 commitment. These transfers had taken place after the default and when the terms of the waiver were being negotiated. Presumably the hedge funds gambled on the chance that the commitments they had taken over would be reduced by the waiver when finally agreed and that the sum they were paid for the transfers plus recoveries on any reduced loans they might have to make would exceed their losses on those loans. Secondary market trading of distressed loans is common.

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The funds had just over 2 per cent. of the exposures and the amending waiver letter was passed by a majority of nearly 82 per cent. The funds objected that the majority decision was invalid, mainly on the ground that their commitments under the A facility were being used to pay back the loans of the holders of the B facility who were in fact those voting for the majority decision, *i.e.* the majority were enriching themselves at the expense of the minority and this was a fraud on the minority.

The court held that the majority lender decision was valid. There was no bad faith in the sense of injurious ill-will or malice towards the minority. Further, although the funds in the minority were disadvantaged because they had to pay out to the term lenders, this was a commercial decision which the majority were entitled to take, and not manifestly unfair and an oppression of the minority because (amongst other things) there were benefits for all lenders, *e.g.* the potential survival of the group, the payment of a waiver fee and an increased interest rate. The majority had not intended to discriminate against the minority: the allocation of the reductions between the facilities was required by the borrower to improve its cash flow.

The court stressed that, in cases where there were conflicts of interest between classes of creditors, one object of the voting clause was to resolve the conflicts by majority voting and it was unrealistic for lenders to have to educate themselves about the position of other lenders. If all classes had to be treated equally or the majority had to show that the decision benefited each member of the class, then the voting clause would often be paralysed and a small minority could veto the majority.

In political democracies the majority can vote out of vindictiveness and they can also vote for a government which will vengefully redistribute the wealth of the minority rich to the majority poor. In financial democracies the law requires higher standards of fair dealing. While each case will depend on the facts and the motives, the *Redwood* case pitches the standard at a more realistic level.

PHILIP R. WOOD

EXPLAINING *RE ROSE*: THE SEARCH GOES ON?

IT is often stated that equity will not perfect an imperfect gift: failed donative intent will not be construed as a declaration of trust (*Milroy* v. *Lord* (1862) 4 De G.F. & J. 264). The justification, as

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