

## Alert

### UK Supreme Court Clarifies Allocation of Prepayment Premiums for Debt Traders

20 April 2015

Following High Court and Court of Appeal decisions, the UK Supreme Court ('Supreme Court') in *Tael One Partners Limited v. Morgan Stanley & Co International PLC* [2015] UKSC 12 ('Tael') has clarified the position regarding the treatment of one-off payments that are not interest or recurring fees payable, in accordance with the provisions in the Loan Market Association Standard Terms and Conditions for Par Trade Transactions ('Standard Terms').<sup>1</sup> In *Tael* the Supreme Court held that a loan prepayment premium paid after the settlement date is for the account of the buyer and not for the account of the seller or the seller's predecessor-in-title. The basis for the Supreme Court's decision is that a payment premium does not accrue over the lifetime of a loan but only becomes due and payable on a defined event. Debt traders should take comfort that the Supreme Court's decision confirms the general market consensus and a commercial operation of the Standard Terms.

#### Case Summary

Tael was a lender in a syndicated loan facility and sold part of its position to Morgan Stanley. The trade was documented on the Standard Terms. Morgan Stanley then on-sold the position to Spinnaker Global Strategic Fund Limited.

The underlying facility agreement contained a provision regarding an interest payment premium being due and payable in the event of prepayment of the loan. However, prepayment had not been made prior to the settlement date of the trade (and therefore no payment premium had been made).

Following the settlement date the borrower prepaid the loan and as a consequence paid the payment premium to the then-current lenders. Tael requested that Morgan Stanley pay it a portion of the payment premium received, arguing that Tael was entitled to the fee for the period of its ownership due to the interest payment provisions in the Standard Terms.<sup>2</sup>

The Tael case centres around the interpretation of clauses 11.3 (Paid on Settlement Date) and 11.9 (Allocation of Interest and Fees) of the Standard Terms that were in effect on 5 Jan. 2009.<sup>3</sup> Specifically,

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<sup>1</sup> Currently LMA Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims).

<sup>2</sup> For a detailed account of the facts of the case, please see the SRZ Alert '[English High Court Clarifies Post-Settlement Treatment of Interest and Fees for Secondary Market Participants](#)'.

<sup>3</sup> Now clauses 15.3 and 15.9 of the current LMA Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims).

the UK Supreme Court considered whether payment of an interest payment premium (or similar payments) received by the buyer after the settlement date needed to be paid back to the seller.

### **Decision**

Unanimously dismissing Tael's appeal, the Supreme Court ruled that prepayment premiums (which are paid and only accrue after the settlement date) are for the account of the buyer. In doing so, the Supreme Court rejected Tael's argument that a payment premium accrued over time (part of which could be during a seller's ownership), instead holding that the right to receive a payment premium only accrued on the occurrence of a defined event, which in this case occurred after the settlement date.

Furthermore, the Supreme Court noted that loans can be traded multiple times but the Standard Terms placed no obligations on buyers to inform sellers that the loan had been prepaid or been repaid and the payment premium due. Therefore, unless a seller retained a position in the loan, it 'would not know when he could claim for payment premium'. This supported Longmore LJ's commercial context conclusion, in the Court of Appeal decision, that 'one might not readily infer that ... the sale of a loan ... was intended to create continuing rights and obligations between the parties ... in respect of payment, which might exist over a substantial period of time'.

### **Investor Takeaway**

Sellers and buyers will need to pay close attention to any prepayment premiums or similar payments that are potentially payable after the settlement date under the terms of a loan agreement. If parties want to agree for allocation of a payment premium outside of the scope of the Supreme Court's judgment, they will need to specifically state this at time of trade and include it as an additional term of trade in the trade confirmation.

*Authored by [David J. Karp](#), [Anthony Lombardi](#) and [Alexia Petrou](#).*

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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