HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 27

on appeal from: [2004]EWCA Civ 1001

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Concord Trust (Original Appellants and Cross-respondents)
v.
Law Debenture Trust Corporation plc (Original Respondents and Cross-appellants)

ON
THURSDAY 28 APRIL 2005

The Appellate Committee comprised:

Lord Steyn
Lord Hoffmann
Lord Hutton
Lord Scott of Foscote
Lord Walker of Gestingthorpe

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LORD STEYN

My Lords,

1. I have had the advantage of reading the opinion of my noble and learned friend Lord Scott of Foscote. I agree with it. For the reasons given by Lord Scott I would make the order which he proposes.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. For the reasons he gives, with which I agree, I would make the order which he proposes.

LORD HUTTON

My Lords,

3. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. I agree with it and for the reasons which he gives I would make the order which he proposes.

LORD SCOTT OF FOSCOTE

My Lords,

The Issues

4. This appeal requires two issues to be decided. The first is a short point of construction of Condition 12 of the terms ("the Bond Terms") applicable to a Eurobond issue of €510 million 2 per cent bonds ('the Bonds') which fall due for payment in December 2005. The Bonds were issued in 1999 by Elektrim Finance BV ("Elektrim Finance") and guaranteed by Elektrim Finance's parent company, Elektrim SA. When it is not necessary to distinguish between the two companies I will, for convenience, refer to them together as "Elektrim". In November 2002 the Bonds were restructured, the principal sum outstanding being increased to the €510 million. The Bond Terms, as amended, were set out in the 2nd Schedule to a Trust Deed dated 15 November 2002. The parties to this Trust Deed were Elektrim and the Law Debenture Trust Corporation plc ("the Trustee"). The Bonds are marketable securities, traded internationally. There is no contractual privity between Elektrim on the one hand and the bondholders on the other hand. The covenants by Elektrim for payment of the principal sum and interest due on the Bonds were covenants entered into with the Trustee (see clauses 2, 7 and 8 of the Trust Deed). Concord Trust holds some 10 per cent in value of the Bonds.

5. Condition 12 of the Bond Terms provides that:

> "The Bond Trustee at its discretion may, and if so requested in writing by the holders of at least thirty per cent in principal amount outstanding of the Bonds or if so directed by an Extraordinary Resolution of the Bondholders shall (subject in each case to being indemnified to its satisfaction), give notice to the Issuer and the Guarantor that the Bonds are, and they shall immediately become, due and repayable at their relevant redemption value, together with the accrued Interest Amount as provided in the Bond Trust Deed, upon the occurrence of any of the following events ("Events of Default") … ".

6. Fourteen potential "Events of Default" were described. The second of them included a failure by Elektrim "to perform or observe" any of its obligations under the Bonds or the Trust Deed (see para.(ii) of Condition 12). However a proviso to Condition 12 has the result that a paragraph (ii) failure does not qualify as an Event of Default unless the Trustee has certified that the failure "is materially prejudicial to the interests of the Bondholders."

7. The first issue is whether, on the true construction of Condition 12 and in the events which have happened (which I will later describe), the Trustee is obliged (subject to its indemnity rights) to give a Condition 12 notice of acceleration to Elektrim. On this issue Concord is the appellant and the Trustee is the respondent. The Trustee's contention is that it cannot come under an obligation to give a notice of acceleration if Elektrim challenge the existence of the Event of Default proposed to be relied on.

8. The second issue bears upon the first. The Trustee and Concord agree that the Trustee can insist on being "indemnified to its satisfaction" against the costs of meeting a challenge by Elektrim to the existence of the Event of Default in reliance on which the proposed notice of acceleration would be given, or indeed, a challenge by Elektrim to the validity of the notice of acceleration on any other ground. But the Trustee contends that it is entitled also to be indemnified to its satisfaction against its possible liability in damages to Elektrim if it should transpire that the notice of acceleration was invalid and that the service of the notice on Elektrim has caused Elektrim to suffer commercial or financial loss. Concord, however, contends that a cause of action in damages for loss caused to Elektrim by the giving of an invalid notice of acceleration is a mirage. Absent fraud or bad faith, which no one has suggested, the feared cause of action could not, in law, arise. So the second issue is whether the Trustee is entitled to insist on an indemnity to cover its possible exposure to an action by Elektrim for damages.

9. Both issues have been presented as issues of some public importance. Your Lordships were told that the Bond Terms and the Trust Deed were in a form fairly standard for bond issues. The extent of the obligation resting on a bond trustee where an event of default is thought by the trustee and the bondholders to have occurred but the existence of which is disputed by the issuer may arise, and perhaps has already arisen, in relation to other bond issues. Similar issues might arise in relation to syndicate bank loans. Certainty as to the extent of the

rights and obligations of the various participants in these important commercial transactions is highly desirable. I would respectfully agree.

The facts

10. Neither of the two issues, at least in the present case, is a complex one. The relevant facts have been fully set out both in the judgment at first instance of the Vice-Chancellor, Sir Andrew Morritt, and in the judgment of Jonathan Parker LJ in the Court of Appeal and it is unnecessary for me to do more than refer to the essentials.

11. The importance to the bondholders of the financial substance and stability of Elektrim SA, the guarantor under the Trust Deed of Elektrim Finance's obligations, is obvious. So it is not a matter of surprise that Condition 10(d) of the Bond Terms entitled the Trustee in certain circumstances to require the supervisory board of Elektrim SA to appoint to its management board a person nominated by the holders of not less than 25 per cent in value of the Bonds. Condition 10(d) has elaborate provision as to the status of this nominated director and as to what steps Elektrim SA can take if it considers his performance on the board to be unsatisfactory. It is unnecessary to refer to any details other than an express provision that:

> "Material decisions of [Elektrim SA] and all financial decisions relating to amounts exceeding €25,000 may only be taken with the consensus of the entire Management Board."

12. Pursuant to Condition 10(d) a Mr Piotr Rymaszewski was nominated by the bondholders and appointed to Elektrim SA's management board. But in June 2003 Elektrim SA suspended Mr Rymaszewski and invited the bondholders to nominate someone else for appointment. The bondholders took the view that Elektrim SA had had no right to suspend Mr Rymaszewski, and that his suspension constituted a breach of the obligations of Elektrim SA under Condition 10(d). The Trustee presumably agreed with this view for it gave notice to Elektrim SA on 24 July 2003 requiring Elektrim SA to remedy the breach. Elektrim SA did not do so and Mr Rymaszewski has remained suspended. Subsequent to Mr Rymaszewski's suspension Elektrim SA entered into transactions that, under Condition 10(d), required the consensus of the whole of the management board. But the suspended

Mr Rymaszewski was unable to, and did not, participate in the decisions approving these transactions.

13. It is evident that the Trustee was not sure whether the continued suspension of Mr Rymaszewski from Elektrim's board of management constituted an Event of Default "materially prejudicial" to the interests of the bondholders for Condition 12 purposes. A committee of bondholders, including Concord and representing some 40 per cent in value of the bondholders, contended that it was and that the Trustee should certify an Event of Default. So the Trustee commenced proceedings in the Chancery Division asking for directions and a declaration as to whether it was entitled to certify that the suspension of Mr Rymaszewski was an Event of Default that was materially prejudicial. Three bondholders, one of them Concord, were joined as representative defendants.

14. The Trustee's action was heard by Peter Smith J. He gave judgment on 16 February 2004 and held that the suspension of Mr Rymaszewski was a breach of Condition 10(d) materially prejudicial to the interests of the bondholders and that the Trustee could so certify without the need for any further factual investigation. Peter Smith J made a declaration to that effect. It is important to be clear as to the effect of Peter Smith J's declaration. The declaration settled, as between the Trustee and the bondholders, the question whether the suspension of Mr Rymaszewski was a breach of Condition 10(d), the question whether that breach was an Event of Default within paragraph (ii) of Condition 12 and the question whether that Event of Default was "materially prejudicial to the interests of the bondholders." Peter Smith J's declaration gave an affirmative answer to each of these questions. But on none of these questions did Peter Smith J's declaration bind Elektrim. Elektrim had not been party to the proceedings.

15. On 17 February 2004 the Trustee notified Elektrim that Mr Rymaszewski's suspension constituted a Condition 12(ii) Event of Default and certified that the Event was materially prejudicial to the bondholders. The Trustee was then requested by the holders of more than 30 per cent in value of the Bonds (in due course some 71 per cent in value of bondholders joined in the request) to give Elektrim a Condition 12 notice of acceleration. The Trustee said that before giving such a notice it required to be "indemnified to its satisfaction".

16. Discussions between the Trustee and the bondholders about the quantum of the indemnity then followed. While these discussions were taking place Elektrim made clear its contention that there had been no breach of Condition 10(d), and therefore no Event of Default under Condition 12(ii). If there had been no Event of Default the Trustee's certificate about material prejudice was, of course, writ in water and a notice of acceleration would have been invalid. Moreover Elektrim contended, in a letter dated 2 April 2004 from their solicitors to the Trustee, that a notice of acceleration would cause them substantial loss by the effect it would have on third parties with whom they had, or might otherwise have had, financial or commercial dealings. In the face of these contentions the Trustee was unwilling to give notice of acceleration under Condition 12 without first receiving an indemnity against its possible exposure to damages claims by Elektrim for loss caused by the notice. Other points of objection to the indemnity being offered by the bondholders were also taken by the Trustee but these objections were relatively trivial. The sticking point was the Trustee's fear of incurring a damages liability to Elektrim if it gave the notice of acceleration and its consequent insistence on a very substantial indemnity to protect itself against that possible liability. The bondholders were not willing to incur the expense of providing an indemnity against a risk they thought to be grossly exaggerated. In this impasse Concord issued proceedings against the Trustee seeking a declaration that the Trustee was obliged by Condition 12 to give a notice of acceleration.

The decisions in the courts below

17. In a judgment given on 28 May 2004 the Vice-Chancellor dismissed Concord's application. He held that the Trustee's refusal to accept the limited indemnity the bondholders had offered was not "*Wednesbury* unreasonable." The Vice-Chancellor recorded the Trustee's contention that "Elektrim had an arguable claim against the Trustee for damages for breach of contract in the event of a wrongful acceleration of the bonds which could well amount to an award of €1 billion or thereabouts" (para.38 of the judgment). He then examined that proposition, noted that Elektrim was not bound by Peter Smith J's order and said (at para.41) that it was

> " … necessary to consider what level of award might be made against the Trustee in the event of Elektrim successfully alleging that there was no event of default entitling the Trustee to accelerate the bonds."

He concluded that the loss that might be caused to Elektrim by a wrongful acceleration of the Bonds and be recoverable from the Trustee could be extremely high. He declined to regard as absurd the contention that the potential liability might be in the region of €1 billion and said that "on a worst case scenario a wrongful acceleration could give rise to a claim by Elektrim against the Trustee for damages in the region of €876 million or thereabouts." (para.49). He gave leave to Concord to appeal.

18. In the Court of Appeal judgment was given on 24 July 2004. Peter Gibson LJ and Laddie J both agreed with the judgment given by Jonathan Parker LJ. Jonathan Parker LJ held, first, that in seeking an indemnity in the region of €1 billion the Trustee had fundamentally misconceived the scale of the risk which it would face if it were to give an invalid notice of acceleration. He pointed out that an invalid notice of acceleration would, from a contractual point of view, accelerate nothing. A notice of acceleration where no Event of Default had occurred would be of no contractual effect. It could not, therefore, constitute the basis of an action for breach of contract against the Trustee (paras.75 and 78).

19. The possibility that the giving of an invalid notice of acceleration might give rise to a cause of action in tort had not been raised before the Vice-Chancellor. Before the Court of Appeal Mr Robert Miles QC, counsel for the Trustee, mentioned the possibility of a defamation action by Elektrim (see para.82 of Jonathan Parker LJ's judgment) but did not develop the possibility. Jonathan Parker LJ commented that he was "unable to see what cause of action in tort Elektrim could possibly have against the Trustee in such circumstances." The possibility of a tort action has, however, been developed by Mr Howard QC, counsel for the Trustee before your Lordships. I must deal later with his submissions. They were not put to the Court of Appeal.

20. Notwithstanding that the Court of Appeal wholly discounted the Trustee's professed fears of a liability in damages to Elektrim arising out of an invalid notice of acceleration, the Court of Appeal did not grant Concord the relief it was seeking, namely, a declaration that the Trustee was obliged forthwith to give notice of acceleration under Condition 12. The reason for this was that the Court of Appeal took the view, per Jonathan Parker LJ, that

> " … such a declaration would only be appropriate where it is established that all the conditions prescribed by Condition 12 have been met; in particular, that an 'Event of Default' has occurred" (para.88).

Jonathan Parker LJ held that Elektrim should be given the opportunity to present its arguments to the court in support of its contention that no Event of Default had occurred (para.90). So an order was made that the Trustee, on receiving an appropriate indemnity from the bondholders to cover the costs of the litigation, should commence proceedings, joining Elektrim SA, Elektrim Finance and Concord as defendants, to determine, in effect, whether an acceleration notice given on the footing that the suspension of Mr Rymaszewski was a Condition 12 para.(ii) Event of Default would be a valid notice of acceleration. The order said, also, that until that issue had been determined, the Trustee was not obliged to serve an acceleration notice.

21. In the end, therefore, save as to the costs of the proceedings, the Court of Appeal, by a quite different route, produced exactly the same result as had been produced by the Vice-Chancellor. A notice of acceleration did not have to be served by the Trustee until the issue as to whether Mr Rymaszewski's suspension constituted a Condition 12 para.(ii) Event of Default had been settled as between the Trustee and Elektrim. In these circumstances it is not surprising that both Concord and the Trustee have appealed. Concord challenges the correctness of what appears to have been very much of a postscript, dealt with in paragraphs 88 and 90 of Jonathan Parker LJ's judgment. The Trustee renews its contention, successful before the Vice-Chancellor but unsuccessful before the Court of Appeal, that Elektrim may suffer serious financial loss as a consequence of the service of an invalid notice of acceleration and that Elektrim might have an arguable cause of action in damages to recover that loss from the Trustee.

The first issue: is the Trustee under an obligation to the bondholders to give the notice of acceleration?

22. This is, as Ms Susan Prevezer QC, counsel for Concord, acknowledged at the outset of her submissions to your Lordships, a very short point of construction of Condition 12 of the Bond Terms. Condition 12 must, of course, be construed in context. It is an integral part of the Trust Deed and there are other provisions of the Trust Deed

to which I should refer in order to enable Condition 12 to be considered in its proper setting.

23. Clause 9.3 of the Trust Deed, part of a section headed "Enforcement", and clauses 10.1 and 10.3 under the heading "Proceedings, Action and Indemnification", place enforcement obligations on the Trustee in much the same terms as are to be found in Condition 12. The issue of construction which has arisen in respect of Condition 12 could arise also in respect of these comparable provisions.

24. The structure of the Trust Deed, including the 2nd Schedule, in relation to action taken by the Trustee to protect or to enforce the bondholders' rights is, first, that the Trustee has broad discretionary powers to take such action, including but not limited to the commencement of legal proceedings, as it thinks fit (see clause 9.1). Secondly, however, the Trustee is placed under an obligation to take action either if so requested in writing by at least 30 per cent in value of the bondholders or if so directed by an Extraordinary Resolution of the bondholders (see para.20 of the 4th Schedule). If the Trustee were to exercise its discretionary power to take action, whether by commencing legal proceedings against Elektrim under clause 9.1 or by giving the direction to the Security Agent referred to in clause 9.3 or by giving Elektrim a notice of acceleration under Condition 12, Elektrim could challenge the action on the ground that an Event of Default, the necessary trigger, had not in fact occurred. It could challenge the validity of the action that had been taken but could not, otherwise than by successfully applying for an interim injunction, prevent the action from being taken in the first place. A request in writing to the Trustee by the requisite number of bondholders or a direction given to the Trustee by an Extraordinary Resolution overrides the Trustee's discretion and obliges the Trustee (subject always to satisfactory indemnities being given) to do that which it would anyway have had the discretionary power to do. The proposition that the mandatory obligation on the Trustee to take the action in question does not arise unless the issuer and/or the guarantor have accepted, or are unable to challenge, the existence of the triggering Event of Default cannot, in my opinion, be right.

25. The wellspring of the Court of Appeal's conclusion that the issue as to the existence of the Event of Default trigger had to be settled as between the Trustee and Elektrim before the Trustee's mandatory obligation to give the acceleration notice could arise was, I think, a feeling of sympathy for Elektrim. Having held that Elektrim would

have no cause of action against the Trustee to recover loss caused to it by the giving of an invalid notice, Jonathan Parker LJ then moved to the conclusion that the issue as the validity of the notice should be settled before it was given. But this, in my respectful opinion, involved a confusion between two issues. The issue as to whether the Trustee had come under a mandatory obligation to give Elektrim the notice of acceleration was an issue as between the Trustee and the bondholders. The obligation, if it had arisen, would have been owed to the bondholders, not to Elektrim. It would make no difference to Elektrim whether the notice were given by the Trustee because in its discretion it had decided to do so or because it had come under a mandatory obligation to the bondholders to do so.

26. Elektrim's concern is that an invalid notice of acceleration, whether given in the exercise of a discretion or in discharge of a mandatory obligation, should not be given. If the Trustee is proposing to serve a notice of acceleration, an issue may arise between Elektrim and the Trustee as to whether the Trustee should be allowed to do so. That, I repeat, would be an issue between Elektrim and the Trustee. If Elektrim had a reasonably arguable case that the notice would be invalid and that, if given, it might cause Elektrim damage, Elektrim could seek an interim injunction to restrain the giving of the notice until the issue had been settled. If Elektrim could satisfy the court, on the usual balance of convenience grounds, that an interim injunction should be granted, Elektrim could postpone the giving of the notice of acceleration until the issue as to its validity, if given, had been settled. But, in the present case, Elektrim have not sought any such injunction. They have not submitted to judicial scrutiny their contention that the notice, if given, would be invalid and would be likely to cause them serious damage. Instead they have terrified the Trustee into declining to accept the apparently mandatory obligation to the bondholders imposed by Condition 12 and into acting as, in effect, their surrogate in the current proceedings. It is the Trustee that, in these proceedings, has argued the case that, on an application for an interim injunction, Elektrim would have had to have argued.

27. In my opinion, Jonathan Parker LJ fell into error when, at the end of his judgment, he treated the mandatory obligation imposed by Condition 12 as being dependant on the ability of the Trustee to uphold against Elektrim the validity of the proposed notice of acceleration. But the proceedings before Peter Smith J had settled, once and for all as between the bondholders and the Trustee, that a materially prejudicial Event of Default had occurred. It follows that as between the Trustee and the bondholders it was not open to the Trustee to argue that an

Event of Default had not happened, or might not have happened, or that anything more needed to happen before the mandatory obligation on the Trustee, imposed by Condition 12, to give Elektrim the notice of acceleration arose.

28. Any other construction of Condition 12, or, for that matter of clauses 9.3 and 10.3 of the Trust Deed, would make little sense of the indemnity provision. Why would the Trustee need an indemnity before responding to the written request, or to the Extraordinary Resolution, if the Trustee's obligation to take the action in question did not arise until the validity of the proposed action had been accepted by or established against the issuer and/or the guarantor? The reason for the indemnity provision was, surely, in case the issuer or guarantor were to mount a challenge to the proposed action.

29. In my opinion, on the true construction of Condition 12 and once the question whether a materially prejudicial Event of Default had occurred had been settled as between the Trustee and the bondholders and the bondholders had made the requisite written request, the Trustee, subject to the indemnity point, came under a mandatory obligation, owed to the bondholders, to give Elektrim the Condition 12 notice of acceleration. I would accordingly allow Concord's appeal on the first issue and set aside the directions given by the Court of Appeal in paragraphs 2 and 3 of its order of 28 July 2004.

The second issue: what liability can the Trustee reasonably require to be indemnified against?

30. The second issue is based on four premises: first, that the Trustee will give Elektrim a Condition 12 notice of acceleration in reliance on the suspension of Mr Rymaszewski as an Event of Default and on its own "materially prejudicial" certificate; second, that the notice of acceleration would become public knowledge and that the reaction to it by third parties might lead to Elektrim suffering serious financial or commercial loss; third, that Elektrim challenges the validity of the notice and institutes legal proceedings against the Trustee claiming damages; and, fourth, that Elektrim succeeds in the legal proceedings in establishing against the Trustee the invalidity of the notice.

31. The first premise must be accepted. It is a consequence of the conclusion that the Trustee is under a mandatory obligation owed to the

bondholders to give the notice. The second premise was accepted by the Vice-Chancellor. He thought the loss suffered by Elektrim as a result of a notice of acceleration might, on a worst case scenario, be as high as €846 million. Jonathan Parker LJ thought that the potential loss was greatly exaggerated (see para.86 of his judgment). In my opinion, your Lordships are not in a position to speculate about this. There are many too many imponderables. I would, for my part, without in any way endorsing the figures that have been suggested, be prepared to accept the second premise as formulated above.

32. The third premise must be accepted. Indeed, on 7 January 2005 Elektrim served on the Trustee a Notice of Arbitration that (a) challenged the Trustee's declaration that the suspension of Mr Rymaszewski, as well as certain other subsequent events, constituted Events of Default; (b) claimed a declaration that the Trustee was not entitled to accelerate the Bonds on the basis of any of these alleged Events of Default; and (c) claimed damages in respect of, among other things, the Trustee's declarations of Events of Default.

33. As to the fourth premise, your Lordships have no means of judging, any more than had the Vice-Chancellor or the Court of Appeal, the extent of the risk that a tribunal of fact, whether a court or an arbitrator, might disagree with the conclusions of Peter Smith J and hold that the suspension of Mr Rymaszewski did not constitute an Event of Default and that a valid notice of acceleration in reliance on the suspension as an Event of Default could not be given. The Trustee is entitled under Condition 12 to be "indemnified to its satisfaction" before it gives the notice of acceleration and, unless it is certain that a challenge by Elektrim to the validity of the notice would fail, the Trustee is entitled to be indemnified on the footing that the challenge might succeed. I would, therefore, be prepared to accept the fourth premise.

34. The issue, however, is what, on a worst case scenario, the consequence of a successful challenge by Elektrim to the notice of acceleration might be. It is common ground that the Trustee is entitled to an indemnity at least sufficient to cover the legal costs incurred by the Trustee in an unsuccessful defence of the notice. Your Lordships have not been addressed as to the sufficiency for that purpose of the indemnity that has already been offered by Concord. The critical issue is whether the Trustee is at risk not simply of incurring a liability in costs but also of a liability to Elektrim in damages for loss caused by the giving of an invalid notice. It is, or should be, common ground that the

Trustee cannot reasonably insist on an indemnity to cover the latter risk unless the risk is more than a merely fanciful one.

35. The Trustee's printed case, expanded upon by Mr Howard in his submissions to your Lordships, identified four possible causes of action in damages that might face the Trustee. These were:

(i) breach of an express or implied term of the contract;
(ii) breach of a tortious duty of care;
(iii) conspiring with the bondholders to cause Elektrim injury by unlawful means; and
(iv) interfering by unlawful means with Elektrim's business.

I must deal with each of these suggested causes of action in turn but in relation to each it is necessary to keep in mind that the Trustee does not have to, and does not, contend that the cause of action would lie. The Trustee simply contends that it is reasonably arguable that the cause of action might lie. I agree that that is the correct approach.

36. *Breach of contract:* The act that would have to constitute the breach of contract is the giving of an invalid notice of acceleration, or, perhaps, having regard to the claims apparently made in the arbitration, the unjustified assertion of the occurrence of an Event of Default. There is nowhere in the Trust Deed any express undertaking by the Trustee not to do either of those things. So a suitable implied term would have to be read into the Trust Deed.

37. Various tests for the implication of terms into a contract have been formulated in various well-known cases. In particular, a term will be implied if it is necessary to give business efficacy to the contract (*The Moorcock* [1889] 14 PD 64 at 68). The proposed implied term cannot satisfy this test. The Trust Deed works perfectly well without the implied term. It is open to Elektrim to challenge the existence of an alleged Event of Default or the validity of a notice of acceleration. If the challenge succeeds neither the alleged Event nor the invalid notice will be of any contractual significance. I am in respectful and complete agreement with Jonathan Parker LJ on this point (see para.71 of his judgment). The implied term is not necessary to give business efficacy

to the Trust Deed. Nor are any of the other tests that have from time to time been formulated for the implication of terms into a contract any more apt. In my opinion, it is not reasonably arguable that the unjustified assertion by the Trustee of an Event of Default or the giving by the Trustee of an invalid notice of acceleration exposes the Trustee to the risk of being found liable in damages for breach of contract.

38. *Negligence:* The relationship between Elektrim and the Trustee is a contractual one. If there is no contractual duty of care owed by the Trustee to Elektrim in relation to the assertion of an Event of Default or the giving of a notice of acceleration, and in my opinion there is not, I find it very difficult to understand how it could be arguable that the Trustee owed a tortious duty of care. But, in any event, an action against the Trustee for damages based on a breach by the Trustee of a tortious duty of care would, in my opinion, be hopeless. Peter Smith J held that the suspension of Mr Rymaszewski was a breach of Condition 10(d) that was "materially prejudicial" and that the Trustee was entitled to certify to that effect "without any further enquiry or investigation". The Trustee did so. The Trustee's obligation to give the notice of acceleration thereupon (subject to the indemnity point) arose. In these circumstances it is not remotely arguable that the Trustee's actions in declaring there had been an Event of Default and giving the notice of acceleration could be categorised as negligent.

39. *Conspiracy to cause Elektrim injury by unlawful means.* This tort was not raised in either of the courts below as a possible vehicle for a damages claim by Elektrim against the Trustee. Your Lordships do not, therefore, have the advantage of knowing what the Court of Appeal would have thought about the proposition. In my opinion, however, the possibility of the Trustee being found liable in damages in a conspiracy action can properly be described as fanciful. First, the tort of conspiracy requires proof of an intention to cause injury to the victim. No such intention could be suggested here. It is evident that the Trustee's concern has been to discharge its obligations to the bondholders. It went to Peter Smith J to elucidate what the extent of its obligations were. To categorise its conduct in following through the conclusions of Peter Smith J as conduct done with the intention of causing injury to Elektrim seems to me grotesque. Moreover, there is the problem of "unlawful means". What are the "unlawful means" that the Trustee will have employed? Mr Howard's answer is that the giving of an invalid notice of acceleration might be held to constitute "unlawful means" notwithstanding a *bona fide* belief by the Trustee in the validity of the notice. This proposition, too, I would reject as unarguable. A landlord, in the *bona fide* belief that his tenant has committed a breach of

covenant, may give notice to the tenant to remedy the believed breach and, if the notice is not complied with, may serve a forfeiture notice and institute proceedings for possession. The tenant can challenge the forfeiture and deny that any breach of covenant has occurred. This challenge may succeed. But I have never heard it suggested that the *bona fide* giving of the invalid notice could, without more, found a cause of action against the landlord for one of the economic torts. I would reject as unarguable the contention that Elektrim could get off the ground a claim for damages against the Trustee based on the conspiracy tort.

40. *Interference by unlawful means with Elektrim's business:* The objections to this tort are much the same as those I have referred to when considering the conspiracy tort. The giving by the Trustee of a notice of acceleration believed by the Trustee to be valid could not, in my opinion, constitute unlawful means. An invalid notice to quit served by a landlord in the *bona fide* belief that it is valid does not, in my opinion, expose the landlord to a cause of action in tort for interference by unlawful means with the tenant's business. Nor here.

41. Mr Howard's written Case (para.80) placed reliance on statements to the contrary which he said were to be found in leading textbooks on banking law.

(1) Paragraph 3404 of *Butterworths Encyclopedia of Banking Law* is headed "Wrongful acceleration and cancellation". The text reads

> "Where the bank wrongfully cancels a facility, the bank may be liable in damages … The borrower may ignore the acceleration. However, if the acceleration is public, the bank may be liable for substantial damages …"

This passage does not assist. It is dealing with a case where the bank had entered into a contractual commitment to allow a certain level of borrowing. If, in breach of that commitment, the bank withdraws the facility the bank is, of course, at risk of liability in damages for breach of contract.

(2) Chapter 11 of *Commercial Law and Commercial Practice* (2003) discusses Material Adverse Change Clauses (MAC clauses). The author, Professor Richard Hooley, refers at page 307 to the situation in which an MAC clause is invalidly invoked:

> "What if the bank relied on the MAC clause, refused to lend or declared an event of default, and was later held to have got it wrong?"

At page 327, Professor Hooley makes this comment:

> "… the Bank may rely on the MAC clause to declare an event of default, terminate its commitment to make further advances and accelerate repayment of the loan. In each case, should the bank get it wrong, and find itself in breach of the loan agreement, it will be liable to the borrower for such damages as are necessary to put the borrower in the position that it would have been in if the advance had been made or continued within the terms of the agreement. There is a risk that substantial damages may be awarded against the bank."

Just so. The author is speaking of a contractual liability where the acceleration, the withdrawal of the facility, deprives the bank's customer of a borrowing facility to which the customer has a contractual entitlement. This goes nowhere towards establishing a tortious liability.

(3) Finally, reference is made to the International Law Financial Review (1998) where the following passages are to be found:

> "The MAC event of default can have more serious consequences for a borrower, because it permits lenders to terminate lending commitments permanently and to accelerate the maturity of loans" (p 17)

and

> "For the lenders, an incorrect determination under some circumstances could result in a large damage award" (p 19)

Here, too, it is clear that the author is referring to a damages award for breach of a contractual lending commitment.

42. None of these academic authorities advances the Trustee's case that it is at risk of a successful tort claim by Elektrim. Indeed the

reverse is the case. If any of the learned authors had thought that the invalid invocation of an MAC clause might give rise to a tortious claim in damages by the borrower against the bank, or other lender, it is to be expected that there would have been some mention of such a claim. But there is none.

43. In my opinion, it is not reasonably arguable that the giving by the Trustee of a Condition 12 notice of acceleration based upon the Event of Default held by Peter Smith J to have been constituted by the suspension of Mr Rymaszewski could give rise to a tortious cause of action in damages by Elektrim against the Trustee. I would, therefore, dismiss the Trustee's cross-appeal.

44. In considering the possibilities of a tortious claim in damages by Elektrim against the Trustee I have been assuming that the proper law of the tort would be English law. This seems to me a realistic assumption for clause 29.1 of the Trust Deed and Condition 19 of Bond Terms say that the Trust Deed and the Bonds are governed by English law. It was suggested by Mr Howard, rather faintly I think, that a tort claim might be governed by the law of a foreign country in which Elektrim had suffered the damage. He had Poland particularly in mind as Elektrim SA and Elektrim Finance are Polish companies and carry on business in Poland. Mr Howard said that the civil liability of the Trustee to Elektrim under the Polish law of tort might be quite different from its liability, or non-liability, under English law and suggested that it was reasonable for the Trustee to seek an indemnity against the uncertainties of an action brought against it in Poland. The Trustee's fear of liability under the law of Poland, or some other foreign law, was not mentioned at all in the courts below. No evidence at all was adduced as to the causes of action in damages that might under Polish law or any other foreign law be available to Elektrim. I quite accept that the Trustee could not be expected to show that a cause of action in damages under some identified foreign law would clearly lie but it could at least be expected to show sufficient differences between the foreign law and English law to give some substance to the expressed fear that such a cause of action might lie. In the circumstances, and in the absence of any evidence to the contrary, your Lordships are, in my opinion, bound to presume that there is no significant difference for present purposes between the law of Poland, or the law of any other country in which Elektrim might suffer damage, and the law of England.

45. In the result I would allow Concord's appeal, set aside paragraphs 2 to 4 of the order of the Court of Appeal and declare that the Trustee

(subject to receiving a satisfactory costs indemnity) is forthwith obliged to give a Condition 12 notice to Elektrim that the Bonds are accelerated. If there is any outstanding issue as to the costs indemnity to which the Trustee is entitled, the parties must apply at first instance. The parties may make written submissions as to the costs in the courts below and before your Lordships.

LORD WALKER OF GESTINGTHORPE

My Lords,

46. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. I am in full agreement with it. I too would allow the appeal, dismiss the cross-appeal and make the order which Lord Scott proposes.