KEY POINTS
- Privity of contract continues to be a fundamental feature of the medium-term loan market where relationships continue to be important.
- The form of sub-participation agreement originally developed transferred only an economic interest in a loan and was never intended to impact privity between the borrower and its lenders.
- Various Loan Market Association (LMA) forms of sub-participation currently used in the market contemplate extensive "voting rights" being granted to the sub-participant giving it effective indirect control over the lender's rights in circumstances where the borrower is unaware the lender is acting under the direction and control of an undisclosed third party.
- Additionally, upon the occurrence of an event of default, LMA forms give the sub-participant an immediate and unfettered right to "elevate" its status to that of lender of record and thereby establish privity with the borrower.
- These developments undermine privity of contract between the borrower and its lenders and many of the fundamental terms the borrower has bargained for and, arguably, violate the borrower's freedom of contract.
- A borrower can seek to protect itself by extending transfer restrictions to include all derivative and economic risk transfers, but these will be of limited effect and will adversely impact liquidity in both the primary and secondary loan markets.

Spotlight

Author Graham Penn[1]

A wolf in sheep's clothing: are transfers of economic interests undermining privity of contract in the medium-term loan market?

In this Spotlight article Graham Penn considers how recent changes to the form and legal substance of sub-participation agreements (and other more conventional credit derivatives) are undermining privity of contract between the borrower and its lenders and creating a form of privity with the sub-participant.

INTRODUCTION

This is a summary of a much longer paper[2] which argues that privity of contract, that only the parties to a contract have the right to enforce its terms, which continues to be a fundamental feature of loan contracts in the medium-term loan market, is being undermined by new features that are increasingly included in certain types of derivate instruments used in the market. Those instruments were originally intended to transfer only an economic interest in the underlying loan or reference asset, not some form of legal or beneficial interest, and they were never intended to create privity of contract with the underlying debtor. This article will argue that is now changing, specifically with reference to one of the earliest, and still most frequently used, derivative contracts, the sub-participation agreement, however, many of the issues raised apply equally to other more conventional forms of OTC credit derivative contracts used in the market, including credit default swaps and total return swaps, and reference will also be made to some of those. This article argues that sub-participation agreements should no longer be viewed as derivative style agreements which transfer only an economic interest, but rather as contracts that potentially impact the rights and obligations the parties to the underlying loan contract bargain for, and thereby violate the borrower's freedom of contract by creating a form of privity between the borrower and the sub-participant and undermine privity between lender and borrower.

This article proceeds on the basis that the loan will be syndicated immediately upon the loan agreement being executed by the parties, as is often the case, so there will be multiple lenders who agree to make their respective "commitment" in the relevant facilities to a single borrower and also an agent bank (Agent), acting as agent for the syndicate of lenders, however, the principles will be the same in the case of a bilateral loan.

PRIVITY CONTINUES TO BE A FUNDAMENTAL PRINCIPLE IN THE MEDIUM-TERM LOAN MARKET

Notwithstanding considerable criticism and regular talk of its demise by judges, academics and law reform bodies for almost a century, the doctrine of privity of contract, that only the parties to a contract have the right to enforce its terms, continues to be an important principle of English law. The Contracts (Rights of Third Parties) Act 1999 (CRTPA) fundamentally changed the privity doctrine by allowing contracting parties to confer enforceable rights on third parties, but it did not, as some commentators have suggested,[3] abolish it. Where contracting parties do not intend to confer such rights on third parties, which is frequently the case, they can expressly exclude the CRTPA completely, which is the approach taken in precedent form loan agreements developed by the Loan Market Association (LMA),[4] in which case the privity doctrine will continue to apply to the contract, and the rights of third parties will continue to be governed by the common law rules and techniques that have been developed to enable a person who is not a party to a contract to enforce its terms.

The precedent form agreements developed by the LMA are both long, often running to many hundreds of pages, and complex, and include a combination of rights (which may be absolute or discretionary) and obligations (which may be absolute, conditional, or discretionary) applicable to both the lenders and the borrower. Empirical research[5] has confirmed what many debt finance lawyers have long recognised, namely that such contracts will frequently need to be renegotiated, varied and/or amended, often numerous times, during their term and are, therefore, "dynamic" and "incomplete" in the sense that the parties impliedly recognise, when they enter into the agreement, the terms will need to be renegotiated. Because of their complex, dynamic and incomplete nature, relationships continue to play an important role in such contracts since it will be one's respective counterparty who will control or influence the exercise of the various rights or discretions, or be subject to the corresponding duties and obligations, for which the parties bargain when they execute the contract. The importance of those relationships has also increased over recent years with the increased involvement, in both the primary and secondary loan markets, of so-called "shadow banks",[6] which has resulted in increased focus on the changes to the lenders' clause which is included in LMA form loan agreements and potentially extends privity of contract to a limited category of new lenders. That clause sets out the procedure and conditions applicable to the assignment of a lender's rights or the transfer, by way of novation, of a lender's rights and obligations in the various facilities made available to the borrower. The most important feature of those conditions, for the purpose of this article, is the requirement for the borrower's consent to be given unless the assignment or transfer is to a restricted class of permitted assignees and transferees. Strong investment grade borrowers will typically seek to limit that class to existing lenders and their affiliates, or possibly to lenders with a minimum credit rating, but in the leveraged loan market it is often extended to include a pre-approved lender list, often referred to as a "white list",[7] of named entities to which a lender may transfer or assign all or part of its commitment in the loan. LMA style loan agreements also typically disapply any consent right of the borrower following an event of default that is continuing. As we shall see, it is the unfettered right of the lenders to transfer or assign the loan following an event of default that, together with the transfer of voting rights in the underlying loan, undermines privity of contract between the lenders and the borrower and potentially establishes privity between the borrower and the sub-participant.

THE ORIGINAL FORM OF ENGLISH LAW GOVERNED SUB-PARTICIPATION AGREEMENT TRANSFERRED ONLY AN ECONOMIC INTEREST AND DID NOT IMPACT PRIVITY BETWEEN LENDER AND BORROWER

The original form of English law governed sub-participation agreement was developed in the late 1970s and based on a form of contract known as a "participation" that had been used in the US for many years. That form was very familiar to the relatively small number of large, primarily US, banks which dominated the European term loan market at the time. Those banks enjoyed a near monopoly over lending relationships with many of the strongest, investment grade, European corporate borrowers who were able to access the primary term loan market at that time. However, although those banks were willing to allow others to share in the risk and reward of their prized relationship borrowers, they did not wish to do that in a way that might jeopardise those relationships and their dominance of the primary term loan market. That required a different approach to that taken in the US market because US style participation agreements, typically entered into under New York law, transferred to the sub-participant a beneficial interest in the loan or its proceeds. In some cases that interest was characterised as a partial assignment and in others as a trust over the loan or its proceeds but, crucially, in all cases it was recognised the agreement created an interest in the underlying loan and/or its proceeds in favour of the sub-participant and some form of privity with the borrower. That was not the intention of the banks which dominated the European primary term loan market, their intention was to transfer only an economic interest in the loan, not one that gave the sub-participation any beneficial or legal interest and certainly not one that created privity of contract between the sub-participant and the borrower. Their objective was achieved by the lender and the sub-participant entering into an entirely separate "back-to-back" contract which, although linked to the underlying loan and its proceeds, was legally and beneficially independent. Early forms of the agreement were remarkably simple; the sub-participant placed a deposit, essentially representing a back-to-back loan with the lender, in an amount equal to or part of its participation in the underlying loan, and the lender agreed to pay the sub-participant amounts equal to the participant's share of amounts representing principal and interest received by the lender from the borrower, if and only to the extend those amounts were received.

The form of sub-participation agreement originally developed created a purely contractual relationship between the lender and the sub-participant and the nature of their relationship was that of debtor and creditor. No relationship, either direct or indirect, was intended to be created between the sub-participant and the borrower. The sub-participation was intended to mimic the economic effect of the underlying loan. It was a classic derivative contract in the sense that its value was derived entirely from the underlying loan, but it did not create or transfer any interest in that loan or its proceeds.

One important aspect of sub-participation agreements, which was established at inception and distinguished it from many other types of derivative contract was the requirement for the lender to own the reference asset, the underlying loan, upon which the derivative sub-participation agreement was based. Comprehensive representations relating to ownership were included in the earlies forms of the agreement and those now typically extend to extensive impairment, alienability, bad acts, set off, and predecessor in title representations.

The characterisation of the original form of funded sub-participation as a separate debtor-creditor relationship in which the sub-participant does not acquire any legal or beneficial interest in the underlying loan nor any privity with the borrower was recognised by the lead regulator at the time (the Bank of England) as an effective means of transferring the loan to the sub-participant for regulatory capital purposes. It was also recognised by the Privy Council in one of the few English law cases on sub-participation.[8] In distinguishing a sub-participation from an assignment or a trust, the Privy Council focussed on the source of funds from which the sub-participant was to be paid. The obligation of the lender to pay the sub-participant was triggered only when the borrower made a payment of principal or interest, however, that payment by the borrower was only the measure of the payment to be made to the sub-participant, not the source of that payment: "[the lender] shall remit to the [sub-] participant such amount … such amount being equal to the amount so received or recovered by [the lender]".[9] That wording established the arrangement "as being a sub-participation as commonly understood and established a classic debtor-creditor relationship without giving the [sub-] participant any interest in the underlying loan", and, therefore, no privity of contract with the borrower.[10] Since the original form of sub-participation created only an economic interest in favour of the sub-participant and no privity of contract between the sub-participant and the borrower, it was largely ignored by borrowers in the context of transfer restrictions they sought to include in loan agreements.[11]

CHANGES IN THE FORM AND LEGAL SUBSTANCE OF SUB-PARTICIPATION AGREEMENTS

The various forms of sub-participation currently used in the secondary market are almost unrecognisable from the form of agreement originally developed. As with the primary loan market the forms used are typically based on one of the recommended form agreements produced by the LMA and for the purpose of this article we will focus only on the provisions that potentially impact privity of contract with the borrower.

CONTROL OVER VOTING RIGHTS IN THE UNDERLYING LOAN

As previously mentioned, the original form of sub-participation gave the sub-participant no rights of control, either direct or indirect, over the loan to protect its economic interest, such rights were retained and exercised at the discretion of the lender. Some agreements did provide limited protection in respect of material amendments or waivers, for example, to postpone or reduce payments of principal or interest, extending the maturity or releasing security, but those rarely required sub-participant consent. That relatively benign approach to control over voting rights started to change in the mid 1990s when distressed loans were increasingly traded in the secondary market. The buyers of such loans, which increasingly included specialist debt traders and so-called "vulture funds", often focussed on a different business strategy to extract value from the loan. That strategy typically included a more aggressive approach to the enforcement of the lender's rights and the exercise of its discretions under the loan agreement and, to achieve the desired objectives, required control by the sub-participant of the exercise of those rights and discretions. The extent of that control has increased over the years not only in respect of sub-participations but also other more conventional derivative instruments including total return swaps, credit default swaps and credit insurance which increasingly require lenders to transfer voting and subrogation rights, and sometimes physical settlement of the reference loan following an event of default, to the protection seller/credit insurer.

Current LMA forms of sub-participation contemplate, in the context of a "distressed trade", extensive "voting rights" being granted to the sub-participant. Since the sub-participant enjoys no proprietary interest in, or rights over, the underlying loan and no contractual relationship with the borrower, it is not possible for such voting rights to be exercised directly by the sub-participant, they can only be exercised indirectly via the lender which acts as an undisclosed intermediary. Where voting rights are transferred under an LMA form of agreement the sub-participant enjoys complete indirect control over all the rights and discretions of the lender who is not able to exercise or refrain from exercising *any* of its rights; agree *any* variation or waiver; or perform *any* actions, without the prior consent of the sub-participant. Although current LMA form agreements contemplate such voting rights being granted only in respect of a distressed trade, its "User's Guide" recognises such rights may also be granted on a par trade.

The "granting" of voting rights creates potentially significant problems in respect of the legal and commercial relationship between the lender and the borrower. Those parties may technically continue to enjoy privity of contract but it has no substance. The lender may formally continue to exercise, or refrain from exercising, the various rights, powers and discretions under the loan but effective control rests with the sub-participant, upon whose instructions the lender will be required to act. This raises some interesting questions about the purpose for which the rights and discretions are granted to a lender in the context of a complex, dynamic and incomplete term loan agreement which are beyond the scope of this article. The exercise of those rights and discretions may be "rationally connected to [the lender's] commercial interests",[12] but did the original parties, particularly the borrower, who bargained for extensive restrictions to be imposed on the ability of a third party to exercise them, intend the purpose to include exercising them at the direction and under the control of an unknown sub-participant in order to protect her economic interest?

Spotlight

The "granting" of voting rights also raises serious issues for the borrower in the context of the bargained for terms it agreed with the lender because it will not typically be aware a sub-participation has been entered into, sub-participations are rarely disclosed, so the instructions of the sub-participant will be implemented in circumstances where the borrower is unaware the lender is acting under the direction and control of an undisclosed third party. Such an arrangement mirrors many of the elements of the doctrine of undisclosed principal which is well established within English law. The doctrine, which is recognised as another exception to the privity doctrine, allows an undisclosed principal to take the benefit and be subject to the obligations of a contract which was entered into by an agent, acting on the authority of the principal, and a third party who, being unaware of the principal's involvement, dealt with the agent as principal to the contract. Such a construction was applied to various English law governed sub-participation agreements by the US Court of Appeals, Second Circuit, in *Commercial Bank of Kuwait v Rafidain Bank and Commercial Bank of Iraq*.[13] In that case the court held the syndicate lenders had entered into the syndicated loan agreements with the Iraqi banks as undisclosed agents of the sub-participants. The US Court of Appeals found it "hard to believe the Iraqi banks [the borrowers] did not know the syndicated loans were the subject of sub-participation agreements and that they, as borrowers, were potentially liable to the sub-participants (as principals). Such sub-participations are common practice". The judgment makes no reference to the terms typically included in English law governed sub-participation agreements, which expressly exclude the lender acting as agent, trustee, or custodian for the sub-participant, nor does the court appear to have considered the significance of the syndicated loans being entered into some time before the sub-participations. The Privy Council made no reference to the decision of the US Court of Appeals in the leading English law case[14] on sub-participation and its construction is unlikely to be followed by the English courts. However, the conceptual basis upon which the doctrine is justified may be appropriate to apply to sub-participation and we shall consider that later.

ELEVATION OF THE SUB-PARTICIPANT'S ECONOMIC INTEREST TO A LEGAL OR EQUITABLE INTEREST

Another significant change to the original form of sub-participation which has potentially far-reaching effect on its commercial nature and legal effect, particularly in the context of its impact on privity of contract, is the inclusion in the LMA style participation agreements of a provision known as "elevation". As its name suggests, this mechanism contemplates the future "elevation" of the sub-participant's status to that of lender of record. Since any such elevation would be subject to the transfer restrictions typically included in LMA style loan agreements an alternative mechanism is included if those restrictions apply. In such a situation the sub-participant can require the lender's interest to be transferred to a third party which is not caught by the restrictions and the sub-participant will enter into a new back-to-back sub-participation with that third party in order to maintain its economic interest in the loan.

The elevation mechanism is expressed to be available "on request" by either the sub-participant or the lender. The relevant clause provides that "subject to the terms … of [the loan agreement] … upon the request of either party, each party shall use its commercially reasonable efforts to, as soon as reasonably practicable … cause the [sub-] participant (or [a third party as] directed by the [sub-] participant) to become a Lender under the [underlying loan agreement in respect of any sub-participated commitment]". The proviso, limiting elevation by reference to terms in the underlying loan agreement, recognises one of the main drivers for its use is because sub-participation is not typically caught by transfer restrictions which focus only on transfers by way of novation and assignment. The result is an undermining of privity of contract between the borrower and the lender, and the contingent creation of privity between the sub-participant and the borrower, immediately upon the sub-participation being executed. This is because any borrower consent restrictions cease to apply immediately upon the occurrence of an event of default at which time the sub-participant will have an unfettered right to terminate its economic interest in the loan and replace it with a legal or equitable interest, either of which create privity with the borrower. Initially that privity will be established only in respect of the sub-participated commitment in the underlying loan, however, the consequences are potentially far more significant for the borrower because once a sub-participant is "elevated", and thereby becomes a lender of record, no further borrower consent restrictions will typically apply to its capacity as a new lender to acquire further interests in the loan.

DO THE CHANGES MADE TO THE FORM OF SUB-PARTICIPATION ALTER ITS LEGAL CHARACTERISATION?

The current form of sub-participation used in the market, although based on the approach originally developed, is significantly more complex and no longer intended to operate purely as a derivative contract that transfers only an economic interest in the loan. If the sub-participation includes the granting of voting rights and elevation the sub-participant will effectively control the exercise of all rights and discretions, and the discharge of the various obligations, of the lender immediately upon the sub-participation being executed.[15] Immediately upon those rights including the ability of the lender to exercise the various "self-help" remedies available following an event of default (the triggering of which the sub-participant may have influenced or controlled via its control over voting rights), the sub-participant has an immediate and unfettered right to "elevate" and require the transfer to it of legal or equitable ownership of those enforcement remedies. This right, to require a legal or equitable transfer of the lender's interest in the loan, fundamentally changes the legal nature of the sub-participation which is no longer intended always to create only an economic interest, indeed, it is contemplated the sub-participant may ultimately hold an ownership interest in the loan and enjoy full privity of contract with the borrower.

The combination of the sub-participant's control over voting rights and its right to "elevate" its economic interest into a legal or equitable interest mean that, immediately upon the execution of the sub-participation agreement, the sub-participant effectively controls the exercise of all rights, powers and discretions of the lender whenever those rights, powers and discretions are capable of being exercised. This is because any enforcement rights will only be capable of being exercised following an event of default, at which time the sub-participant will have an unfettered right to "elevate" its economic interest into a legal or equitable interest. Formal privity of contract between the lender and the borrower may continue to exist, at least until the sub-participant elevates its position, but it is commercially hollow at all times and has no legal substance when it matters most, ie when the lender is able to exercise enforcement rights against the borrower. At that time, unbeknown to the borrower, there are no restrictions to formal privity of contract being established between the sub-participant and the borrower. Entering into such a sub-participation undermines many of the fundamental terms the borrower has bargained for and, arguably, violates its freedom of contract. The closest analogy to this arrangement is the doctrine of the undisclosed principal which allows an undisclosed principal to enforce a contract entered into by and in the name of another party (the agent), who concealed from the third party that she was acting in such capacity. By this doctrine, either the agent or the undisclosed principal (once disclosed to the third party) may enforce the contract or be subject to enforcement by the third party. Various attempts have been made to reconcile this doctrine with the doctrine of privity, but none has garnered much support and the better view seems to be that the undisclosed principal enjoys an independent right to enforce against the third party, as another exception to the doctrine of privity, in the interests of commercial utility and convenience.[16] However, the undisclosed principal doctrine is subject to some important limitations and safeguards which seek to prevent injustice to the third party who was unaware of the principal's involvement and thought she was dealing only with the agent. First, the authority of the agent to act for the principal must have existed at the time the agent contracted with the third party; this will rarely be the case in a sub-participation. Second, and most importantly for the purpose of our analysis by analogy, the intervention of the principal must be consistent with the terms of the contract and not cause injustice to the third party. Most of the cases dealing with this exception focus on the way the agent describes herself and whether that precludes the intervention of the principal,[17] or where there are circumstances that should lead the agent to realise the third party was not willing to contract with the principal.[18] A number of commentators suggest the identity of the principal is irrelevant,[19] and while that may be correct in many of the examples given, it is submitted an undisclosed principal should not be permitted to intervene in a contract if she is aware the third party has restricted her right to do so, which is the case in LMA style loan agreements, and often the reason why the lender transfers its interest by way of sub-participation.

Unlike the situation in a sub-participation, privity between an undisclosed principal and the third party is created immediately upon the agent contracting with the third party and, therefore, the principal is at all times liable to the third party, whether disclosed or undisclosed.

And finally, unlike the situation in a sub-participation, the rights of the undisclosed principal against the third party are subject to any defences, or equities, which the third party can assert against the agent, including rights of set-off even if it arose after the contract was entered into provided it did so before the third party became aware of the principal's existence. This rule again seeks to ensure the third party is not prejudiced by being unaware she is contracting with an undisclosed agent.

CONCLUSION

This article has raised some important questions about the nature of privity of contract in complex term loan agreements, particularly from the perspective of the borrower. It also raises important questions about the legal nature of sub-participation agreements, which can no longer be classified as purely derivative contracts that transfer only an economic interest in the underlying loan,[20] and the potential risks to which they give rise for borrowers. Those risks potentially adversely impact the terms originally bargained for by the borrower; undermine privity of contract with its lenders; violate its freedom of contract; and cause it material injustice. English law provides no defences to a borrower against such injustices, as it does, for example, under the doctrine of undisclosed principal. Indeed, one might argue the injustices are potentially far greater in the case of sub-participation and they are difficult to justify on the basis of "commercial utility and business convenience". The only way in which a borrower can currently seek to protect itself against such injustices is to extend transfer restrictions in the underlying loan to include all derivative, economic or synthetic risk transfers, especially those which include the transfer of voting rights and a contingent future legal or beneficial interest in the loan. However, there are doubts about the effectiveness of such restrictions since they are unlikely to invalidate the transfer of an economic interest in the loan as between the lender and the sub-participant. They would give rise to a breach of contract by the lender, and potentially enable the borrower to seek an injunction preventing the lender from proceeding with the sub-participation, provided the borrower has notice of the threatened breach,[21] and, potentially, a claim against the sub-participant for the tort of inducing breach of contract provided the conditions stated by Lord Hoffman in *OBG Ltd v Allen; Douglas v Hello! Ltd; Mainstream Properties Ltd v Young*[22] are satisfied. However, neither of those remedies would be optimal for the borrower and would present additional challenges in the context of the availability and liquidity of medium-term debt finance. ■

Spotlight

Biog box
Graham Penn is Professor of International Finance Law at University College London.
Email: g.penn@ucl.ac.uk

1 The views expressed here are purely personal and need not reflect those of any third party that the author may or may not be associated with in a professional capacity.
2 The longer paper, which will be published later this year, was delivered at a conference organised by the UCL Centre for Commercial Law and Private Law Group, involving leading academics, legal practitioners, and members of the judiciary, in May 2023.
3 R Merkin ed., *Privity of Contract*, (Lloyds Commercial Law Library 2000).
4 Limited enforcement rights may be given in some cases, for example, to enable officers and employees of the Agent to rely on exclusion clauses in the loan agreement.
5 See S Sanga, 'Incomplete Contracts: An Empirical Approach', Journal of Law, Economics and Organisation (2018) 34(4) 650; and M Roberts, 'The role of dynamic renegotiation and asymmetric information in financial contracting', Journal of Financial Economics 116 92015), 61.
6 See G Penn, 'Promoting Liquidity in the Secondary Loan Market: Is Sub-Participation Still Fit for Purpose?', (2022) 37 JIBLR 3, 85 at pp 91-92.
7 An alternative, that is also commonly used, is a prohibited lender list, often referred to as a "blacklist", see G Penn, 'Promoting Liquidity in the Secondary Loan Market: Is Sub-Participation Still Fit for Purpose?' (2022) 37 JIBLR 3, 85 at pp 99-102.
8 *Lloyds TSB Bank Plc v Clarke* [2002] UKPC 27.
9 *Lloyds TSB Bank Plc v Clarke* [2002] UKPC 27, at [22]
10 That construction was also recently applied in *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1212 (Comm); "a [sub] participant sits outside the primary structure in a way that transfers economic impact without involving legal privity with the primary obligor" (per Houseman KC at [1]).
11 That may now be changing, see F Khan and others, 'Transfer Restrictions in Leveraged Lending Transactions: time for a re-assessment', JIBFL 4 (2022) 251.
12 Per Kerr J at first instance, *Morley (t/a Morley Estates) v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch) [160] aff'd [2021] EWCA Civ 338 [71].
13 15 F.3d 238 (2nd Cir.,1994).
14 *Lloyds TSB Bank Plc v Clarke* [2002] UKPC 27.
15 Neither of these provisions are included in the standard form sub-participation agreement recommended by the Bankers Association for Finance and Trade (see www.baft.org), which was the subject of the recent judgment of S Houseman KC (sitting as a judge in the High Court) in *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1212 (Comm).
16 *Siu Yun Kwan v Eastern Ins Co Ltd* [1994] A.C. 199 [207].
17 *Humble v Hunter* (1848) IZ QB 310 at 317; *Formby Bros of Formby* (1910) 10Z LT 116.
18 *Said v Butt* [1920] 3 K.B. 497.
19 Tan Cheng-Han, 'Undisclosed Principals and Contract' (2004) 120 LQR 480.
20 Similar issues arise in respect of other more conventional derivative instruments which transfer voting rights and require physical delivery of the underlying loan asset to the credit protection seller following an event of default.
21 *Doherty v Allman* (1878) 3 App Cas 709.
22 [2007] UKHL 21.

Further Reading:

- Transfer restrictions in leveraged lending transactions: time for a re-assessment? (2022) 4 JIBFL 251.
- The new breed of transfer restrictions in leveraged lending transactions: a new paradigm or just a sign of the times? (2018) 4 JIBFL 222.
- Lexis+® UK: Banking & Finance: Practice Note: Key issues in loan transfers.