



What funders expect from Construction Contractors and Surveyors on Development and Project Financings

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15 May 2019

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Introduction

- **Why development and project finance as today's topic?**
- **What we are going to cover?**
 1. Overview of a financing
 2. Specific concerns for lenders on development or project financing
 3. Collateral warranties and duty of care agreements

What is Development Finance ?

- **A party borrows money to finance:**
 - (i) the purchase of the site/property (single drawdown) and (ii) the building or redevelopment of the property (multiple drawdowns).
- **A development finance facility usually covers:**
 - (i) the construction phase and
 - (ii) the investment phase – post Practical Completion.
- **Transaction-specific**
The facility agreement must be tailored to the particular transaction structure and commercial objectives of parties

What are Lenders particularly interested in?

Value: *SPV/Greenfield site*

- Value of the undeveloped or partially developed site.
- Valuation: Loan to GDV (assumptions to size loan)
- Additional credit support ? Third party security or guarantees.

Cost: *The cost of developing the property*

Lender will want to ensure that the actual cost of designing and building the property to practical completion is within budget

1. Budgeted Costs.
2. Projected Costs
3. Actual Costs

Control/Security: *The ability to step in*

- During the construction period, there will be significant risk for the Lenders.
- Security package should enable the Lenders to take over the development in place of the Borrower if required.

What is Project Finance ?

- **A party borrows money to finance/refinance:**
the construction and development of a project such as an onshore wind farm or PPP project such as social infrastructure (schools/roads/primary care centres).
- **A project finance facility usually covers:**
(i) the construction phase and
(ii) the operational phase – post Commercial Operation Date.
- **Transaction-specific**
The facility agreement must be tailored to the particular transaction structure and commercial objectives of parties

What are Lenders particularly interested in?

Contracted Cashflows: *sufficient to meet debt service*

- Power purchase agreement/concession agreement
- Regulatory issues/permitting risk
- Additional credit support: from offtaker/turbine supplier/authority?

Construction phase: *The cost/timing for developing the project*

Lender will want to ensure that the actual cost of designing and constructing the project to commercial operation is within budget and all necessary licences/permits/access rights have been obtained

Control/Security: *The ability to step in*

- During the construction period, there will be significant risk for the Lenders.
- Security package should enable the Lenders to take over the project in place of the Borrower if required.

Structure / Parties



**BORROWER
(ALSO DEVELOPER)**

SPV Entity



**DEVELOPER MANAGER /
PROPERTY MANAGER /
ASSET MANAGER**

Duty of Care Agreements



CONTRACTOR

Collateral warranties



**SUB-CONTRACTOR
(LEVEL OF CONTROL)**

*These additional parties all
feed into the potential
complexity of step-in rights.*



**KEY
PROFESSIONALS**



**PROJECT MONITOR OR
TECHNICAL ADVISOR
(appointed by Lenders)**



**SUBORDINATED
PARTIES**



**PROJECT
COUNTERPARTIES**

1. **Limited Recourse as SPV borrower**

2. **Property: Mortgage over property/development site** (common areas of development, security subject to easements etc.)

3. **Timing of enforcement:** right of sale not particularly attractive until PC or COD has been achieved

4. **Development Documents:** Assignment of the Borrower's rights in respect of the Development Documents/Project Documents

- If the underlying documents are assignable
- Legal Assignment v Equitable Assignment

5. **Other Assets:** Insurances, bank accounts, plant & machinery, hedging, other equity commitments (undertakings to fund etc.)

6. **Share Security:** ability to sell the shares in the borrower as opposed to the underlying property

6. **Collateral Warranties/Direct Agreements**

Development Undertakings

- **Relevant Provisions (LMA real estate development facility agreement): Clause 23 (*Development undertakings*), Clause 25.14 (*Abandonment*) and Clause 25.16 (*Completion*)**

Requirements regarding the Development:

- Specifications and workmanship
- Obtaining consents and complying with industry codes

Development Documents:

- exercise rights and comply with obligations
- no waivers/amendments
- security assignment in favour of Lenders

Information undertakings:

- [monthly] updates as to costs/expenses against Budgeted Costs (to date and forecasted)
- progress against Milestones (if any)
- delivery of information to Project Monitor to enable its reporting
- provision of management accounts

Development Undertakings

- **Relevant Provisions (LMA real estate development facility agreement): Clause 23 (Development undertakings), Clause 25.14 (Abandonment) and Clause 25.16 (Completion)**

Inspections/meetings:

- provide access to the Agent, Project Monitor and Lenders generally
- allow attendance at site meetings and access to books/records
- organise review meetings on a monthly basis

Development Parties:

- not to be appointed without the prior consent of the Agent
- requirement for Development Parties to enter into collateral warranties and acknowledge security
- requirement to replace defaulting Development Parties

Procedure for completion:

- provide sufficient notice to Agent and Project Monitor of any proposed inspection of Development prior to PC
- allow Agent and Project Monitor to make representations prior to issue of PC certificate

Collateral warranties and duty of care agreements

- **Relevant Provisions (LMA real estate development facility agreement): Clauses 23.9 (Contractor and Consultants), 24.9 (Managing Agents) and 24.10 (Asset Managers) and Schedule 2 (Conditions precedent)**

Collateral agreements (collateral warranties, duty of care agreements, direct agreements):

- Extend duty of care to Lenders and/or give them certain rights under a primary contract (direct contractual nexus)
- Collateral Warranties to be provided by each Contractor and Consultant
- Duty of Care Agreement to be provided by Managing Agents and Asset Manager
- Agreed level of professional indemnity insurance to be required in relation to Contractors/Consultants for the duration of liability under the relevant Collateral Warranty
- Royalty-free and irrevocable copyright licence to intellectual property to be provided to Lenders

Collateral warranties and duty of care agreements

- **Relevant Provisions (LMA real estate development facility agreement): Clauses 23.9 (Contractor and Consultants), 24.9 (Managing Agents) and 24.10 (Asset Managers) and Schedule 2 (Conditions precedent)**

Step-in rights

- allow Lenders assume the responsibilities of the relevant Obligor against the counterparty, pending substitution of that Obligor
- may negotiate the duration of the step-in decision period and/or any conditions to the appointment of a substitute
- important to ensure consistency of terms across collateral agreements.

Termination of appointments

- appropriate trigger under the Finance Documents?
- position of “related party” Asset Managers in a default scenario?

Collateral warranties and duty of care agreements

- **Limitation on liability provisions**
 - **Check primary agreement**
 - **Net Contribution Clause**
 - Limits the liability of the warranting party to that element of the loss or damage for which it is responsible.
 - **No greater liability**
 - Limits the liability of the warranting party to that contained within the 'primary agreement'.
 - **Equivalent rights of defence clause**
 - Gives the warranting party the right to rely on the defences it has against the original contracting party in the 'primary agreement' in any claim under the collateral agreement.
 - **Monetary cap on liability (usually linked to PI level)**

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