

## Loan repayment—application of the ‘prevention principle’ (TMF Trustee Ltd v Fire Navigation Inc)

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**Banking & Finance analysis:** The court refused to grant summary judgment to lenders seeking repayment of a loan even though the agreement had included a no set-off clause. So where borrowers are able to plead the ‘prevention principle’, and that plea has a real prospect of success, lenders will not be able to obtain summary judgment (unless, possibly, they have an express clause that bars the operation of this principle). James Collins QC, a barrister at Essex Court Chambers, explains the decision.

*TMF Trustee Ltd and other companies v Fire Navigation Inc and others* [2019] EWHC 2910 (Comm)

### What are the practical implications of this judgment?

With carefully drafted documents, commercial lenders can usually be confident that, if the borrower does not pay on time, the lender can commence proceedings and move quickly to summary judgment. Disputes about the lender’s conduct may give rise to counterclaims, but standard form ‘no set-off’ clauses mean that the lenders get judgment on their claims early in the process, while the counterclaims (if continued) are subsequently resolved at trial.

The practical implications of this judgment are that, where borrowers are able to plead the ‘prevention principle’, and that plea has a real prospect of success, lenders will not be able to obtain summary judgment (unless, possibly, they have an express clause that bars the operation of this principle).

Whether or not the defendants are able to establish that the ‘prevention principle’ applies in this case will have to be determined at trial. But the fact that the ‘no set-off’ clause did not exclude the operation of this principle has already been established (at the summary judgment hearing).

### What was the background?

In this case the borrowers alleged that it was the lenders’ conduct—including breaches of contract by the lenders—that had caused the borrowers to be unable to pay. They relied on various matters including the (alleged) wrongful arrest of one of the vessels. It was argued that there was a common law principle that, where one party (in this case the lender) breaches a contract, the other party (in this case the borrower) is excused its own breach (in this case non-payment) if that breach was caused by the prior breach by the first party. This is the ‘prevention principle’.

The lenders sought to rely on a ‘no set-off’ clause that required amounts to be paid ‘without any form of set-off, cross-claim or condition...’.

### What did the court decide?

The court found that there was such a principle and that because it operated as a defence (rather than cross-claim and set off) the standard ‘no set-off’ clause in the loan documentation did not exclude the operation of the principle.

- Court: High Court (Commercial Court)
- Judge: Mr Justice Phillips
- Date of Judgment: 1 November 2019

*James Collins QC is instructed by UK and international clients to handle a wide range of commercial disputes, with a particular emphasis on commercial contracts, financial services, fraud, insurance, international trade, joint-ventures and shareholder and share purchase disputes. Most of these disputes are substantial and complex—many are multi-jurisdictional and involve foreign law. In TMF, he was leading counsel for the successful first to third defendants.*

*Interviewed by Kate Beaumont.*

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