



Neutral Citation Number: [2024] EWCA Civ 886

Case No: CA-2023-001703

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)

Simon Gleeson sitting as a Deputy High Court Judge
[2023] EWHC 1732 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

Between :

BANCA GENERALI SPA

**Claimant/
Respondent**

- and -

(1) SOVEREIGN CREDIT OPPORTUNITIES SA
(2) CFE ADVISORY SERVICES

**Defendants/
Appellants**

Conall Patton KC and Adam Rushworth (instructed by Macfarlanes LLP) for the
Appellants
Andrew de Mestre KC and Andrew Rose (instructed by Mayer Brown International LLP)
for the Respondent

Hearing date : 23 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. This is an appeal by the Defendants against an order made by Simon Gleeson sitting as a Deputy High Court Judge on 10 August 2023 for the reasons given in his judgment dated 11 July 2023 [2023] EWHC 1732 (Ch). The issue is whether, on the correct interpretation of the relevant contractual provisions, the Senior Noteholders in three securitisation transactions have the power, following default, to remove and replace the Fiscal Agent without the consent of the Issuer. The judge answered that question in the affirmative and granted the Claimant, which represents the Senior Noteholders (or at least did at the time), declarations to that effect. The Defendants, who are respectively the Issuer and the existing Fiscal Agent, appeal with permission granted by Newey LJ.

The Schemes

2. The Issuer is a securitisation vehicle. It is the issuer of Notes for three separate securitisations, referred to as TFI, TFII and TFIII (“the Schemes”). The Terms and Conditions of the Notes (“the Conditions”) provide for English law and the exclusive jurisdiction of the English courts. The Schemes have passed their redemption date without the relevant liabilities being fully discharged.
3. The assets securitised are trade finance receivables. They comprise claims and other monetary rights arising under payment instruments and other forms of financing, or under insurance policies granted by export credit agencies, issued in connection with the provision of export finance.
4. As a broad overview of the Schemes:
 - i) CFE (Suisse) SA (“CFE(S)”) originates receivables (“the Receivables”) and sells them to the Issuer.
 - ii) CFE(S) is appointed Collection Agent by the Issuer, and undertakes the administration, management and collection of the Receivables.
 - iii) The Issuer issues Senior and Junior Notes to the Noteholders. Senior Notes were purchased by the Claimant and then sold on (in the case of TFI and TFII) or placed (in the case of TFIII), while Junior Notes were retained by CFE(S).
 - iv) The Issuer agrees to apply all collections received or recovered from the Receivables to pay the obligations due to the Noteholders.
5. There are some differences between the different Schemes in terms of their documentation, but it is common ground that these differences do not matter for present purposes. The case has been argued by reference to the documentation for TFII. It is also common ground that the various different documents concerning each Scheme are to be read together.

The Agents

6. Four agents are appointed by the Issuer:

- i) the Paying Agent;
 - ii) the Collection Agent;
 - iii) the Calculation Agent; and
 - iv) the Fiscal Agent.
7. *The Paying Agent.* The Paying Agent is appointed under the Paying Agency Agreement for the purpose of, *inter alia*, providing directions as to the payment of interest and the repayment of principal in respect of the Notes.
8. *The Collection Agent.* The Collection Agent is appointed under clause 11 of the Master Transfer Agreement. It is, in essence, the Issuer's agent in charge of all the activities related to the administration, management and collection of the Receivables. In particular:
- i) The Collection Agent shall act on behalf of the Issuer, but also in the interests of the Noteholders.
 - ii) The Collection Agent undertakes to carry out, directly or through its delegates, all the activities related to the administration, management and collection of the Receivables ("the Collection Services"). There is a long list of non-exclusive obligations owed by the Collection Agent including, *inter alia*, managing the Receivables, initiating judicial proceedings on behalf of the Issuer to recover them and negotiating settlement agreements.
 - iii) The Issuer may terminate the appointment of the Collection Agent only where (a) there has been a Collection Agent Termination Event; and (b) there is the prior consent of the Organisation of the Noteholders or the Issuer has been directed to terminate the appointment by the Organisation of Noteholders.
9. *The Calculation Agent.* The Calculation Agent is appointed under the Fiscal and Calculation Agreement (or, in TFIII, the Intercreditor Agreement). It is, in essence, the Issuer's agent for calculating its payment obligations (which are then paid by the Paying Agent). Its core duties are set out in clause 6 of that Agreement. In summary, on or prior to each Calculation Date, the Calculation Agent shall determine:
- i) the amount of Issuer Available Funds;
 - ii) the principal payment (if any) due on the Notes on the immediately following Payment Date;
 - iii) the Principal Amount Outstanding of each Note on the immediately following Payment Date; and
 - iv) the amount of any Premium (if any) payable on the Junior Notes.
10. The Calculation Agent is obliged to notify these determinations by means of a payments report which it should deliver to various parties including the Issuer and the Paying Agent, and procure that the report is notified to the Noteholders.

11. *The Fiscal Agent.* The Fiscal Agent is also appointed under the Fiscal and Calculation Agreement (or, in TFIII, the Intercréditor Agreement). It is, in essence, the Issuer's agent in respect of its organisational dealings with the Noteholders. Its core duties prior to the service of a Trigger Notice are set out in clause 5. In summary:
- i) The Fiscal Agent is the agent of the Issuer, and not the Noteholders.
 - ii) Where the Issuer and/or the Fiscal Agent is required to act upon a Resolution of the Organisation of the Noteholders or Most Senior Class of Noteholders, the Fiscal Agent shall comply with such Resolutions and with the directions contained therein.
 - iii) The Fiscal Agent shall perform the activities it is required to perform under the Rules of the Organisation of the Noteholders including issuing certificates and instructions in relation to Meetings.
 - iv) Upon the receipt of a demand or notice from any Noteholder, the Fiscal Agent shall forward a copy of the demand or notice to the Issuer.
 - v) The Fiscal Agent shall cause to be published all notices required to be given by the Issuer under the Conditions.
 - vi) The Fiscal Agent shall hold a copy of the transaction documents to be available for inspection at its office.

The Trigger Notices

12. It is common ground that the failure of the TFI, TFII and TFIII transactions to redeem in full on their final maturity dates constituted "Trigger Events" under Condition 11 of their respective Conditions. This entitled the Senior Noteholders to serve "Trigger Notices" on the Issuer. Following service of the Trigger Notices, the Notes became immediately due and repayable in accordance with the applicable payment waterfall.

The key provisions

13. Clause 9 of the Fiscal and Calculation Agreement contains provisions relating to the removal and replacement of the Fiscal Agent and the Calculation Agent as follows:
- i) Clause 9.1.1 provides:

"The Issuer may at any time, with the prior consent of the Organisation of Noteholders, revoke the appointment of any of the Calculation Agent or Fiscal Agent by giving not less than 30 (thirty) days prior written notice to the relevant Agent, with a copy to the Fiscal Agent, where appropriate (the **Revocation Notice**), regardless of whether a Termination Event has occurred, without being requested to give any reason for such revocation and without being responsible for any liabilities, damages, costs, expenses or losses incurred by any Party as a result of such revocation save in case of gross negligence or wilful misconduct of the Issuer."

- ii) Clause 9.2.1 sets out seven Termination Events (i) to (vii), and clause 9.2.2 provides:

“If a Termination Event occurs the Issuer may (or shall if so requested by the Organisation of Noteholders or in any case if the events under numbers (iv) and (vi) above occur) forthwith terminate the appointment of the Agent by giving a written notice to the relevant Agent, with a copy to the other parties and to the Noteholders (the **Termination Notice**).”

- iii) Clause 9.4.1 provides:

“Save as provided by Clause 9.4.2 below, following any termination or resignation pursuant to this Clause 9, the Issuer shall appoint, with the prior consent of the Organisation of Noteholders and the prior notice to the other Parties, a successor Agent.”

14. Condition 12.1 of the Notes provides:

“Proceedings: At any time following the delivery of a Trigger Notice, the Issuer shall comply with all directions of the Most Senior Class of Noteholders set out in a dully [sic] passed Ordinary Resolution in relation to the management and administration of the Receivables pursuant to the Fiscal and Calculation Agreement, including, without limitation, any direction to sell or otherwise dispose of the Receivables according to the provisions of the Fiscal and Calculation Agreement.”

15. Clause 14.1 of the Fiscal and Calculation Agreement provides:

“Withdrawals

Following the delivery of a Trigger Notice, the Issuer shall, subject to mandatory provisions of Luxembourg insolvency laws, comply with all directions of the Organisation of the Noteholders in relation to the management and administration of the Receivables, including, without limitation, any direction to dispose of the Receivables pursuant to clause 14.2 below, and no monies may be withdrawn or liquidated, as the case may be, from the Accounts, except to the extent that any such monies are applied in accordance with the applicable Priority of Payments or as otherwise provided for by Clause 15 below.”

16. It is common ground that it makes no difference whether the issue is analysed by reference to Condition 12 of the Notes or to clause 14.1 of the Fiscal and Calculation Agreement. For convenience I shall follow the parties' example of concentrating on clause 14.1. It is also common ground that the Claimant represents the Senior Noteholders and the Organisation of Noteholders in relation to TFII and TFIII (as a

result of events since the judge's judgment, this may no longer be the case in respect of TFI, but that can be ignored for present purposes).

17. Clause 14.3 of the Fiscal and Calculation Agreement provides:

“14.3 Other actions following the delivery of a Trigger Notice

Without limitation to the generality of the foregoing, subject to mandatory provisions of Luxembourg insolvency laws, following the delivery of a Trigger Notice, the Fiscal Agent shall also be entitled, until the Notes have been redeemed in full or cancelled in accordance with the Terms and Conditions:

- (a) upon request of the Organisation of the Noteholders, to request the Account Bank to transfer all monies standing to the credit of the Account held with the same into one or more accounts opened for such purpose by the Fiscal Agent in the interest of the Noteholders and the Other Issuer Creditors, provided that the Fiscal Agent shall keep at all times the monies transferred separate from the monies and separate from all other sums which may, at any time and for whatsoever reason, be in its possession;
- (b) upon request of the Organisation of the Noteholders, to request any party to the Transaction Documents to transfer any monies to be paid or delivered to the Issuer into an account opened pursuant to paragraph (a) above;
- (c) to require performance by each Other Issuer Creditor of its obligations under the Transaction Documents to which such Other Issuer Creditor is a party, to bring any legal actions and, in case of failure by the relevant Other Issuer Creditor to perform its obligations, to pursue any remedies which are available to the Issuer under any relevant Transaction Document against such Other Issuer Creditor, in the name and on behalf of the Issuer, and generally to take such action in the name and on behalf of the Issuer as the Fiscal Agent may deem necessary to protect the interests of the Issuer, the Noteholders and the Other Issuer Creditors in respect of the Receivables and the rights and powers of the Issuer under the Transaction Documents; and
- (d) to pay or cause to be paid, on behalf of the Issuer, all sums due and payable by the Issuer to the Noteholders, the Other Issuer Creditors and any other creditors of the Issuer in respect of fees, costs and expenses incurred in relation to the Securitisation in accordance with the applicable Priority of Payments.”

Applicable principles

18. There is no dispute as to the applicable principles of contractual interpretation. These are very familiar and there is no need to set them out. There is no evidence as to the factual matrix in this case.

The judge's judgment

19. The judge held that, following the service of the Trigger Notices, the Senior Noteholders had the power under Condition 12 of the Notes and clause 14.1 of the Fiscal and Calculation Agreement to direct the Issuer to remove and replace the Fiscal Agent under clauses 9.1.1 and 9.4.1 of the Fiscal and Calculation Agreement. He also held that they did not have power to remove and replace the Calculation Agent without cause. There is no challenge by the Claimant to the latter conclusion.

The Defendants' arguments in summary

20. The Defendants contend that the removal and replacement of the Fiscal Agent is governed by clause 9 of the Fiscal and Calculation Agreement. This sets out a carefully calibrated scheme which has two aspects. First, clause 9.1.1 enables the Issuer to remove the Fiscal Agent without cause. This requires the consent of the Noteholders. Secondly, clause 9.2 provides for removal of the Fiscal Agent for cause. Clause 9.2.1 specifies seven events (i) to (vii) that constitute Termination Events. These variously involve either some form of misconduct (in the broadest sense) on the part of the Fiscal Agent or an inability on the part of the Fiscal Agent to carry out its duties (e.g. because of insolvency or illegality). In the case of two of the specified Termination Events ((iv) and (vi) – insolvency and illegality), the removal of the Fiscal Agent is mandatory, irrespective of the views of the Issuer and irrespective of any request by the Noteholders. In respect of all other Termination Events, the removal of the Fiscal Agent is mandatory, if requested by the Noteholders, but at the discretion of the Issuer in the absence of such a request. Once the Fiscal Agent has been validly removed, clause 9.4.1 provides for a replacement to be appointed by the Issuer with the consent of the Noteholders.
21. The Defendants argue that it is a natural inference that this detailed and elaborate scheme was intended to operate as a complete code regarding the removal and replacement of the Fiscal Agent. Had the parties intended the Noteholders to have a further right following service of a Trigger Notice – to remove the Fiscal Agent, unilaterally and without cause, and to select its successor, again unilaterally – one would expect that right to be set out expressly in clause 9, but it is not. It is inherently unlikely that the parties should have intended such a right to arise, by a sidewind, from a completely different set of provisions which say nothing at all about the removal and replacement of agents.
22. Furthermore, the Defendants point out that clause 14.1 of the Fiscal and Calculation Agreement requires the Issuer to comply with Noteholders' directions "in relation to the management and administration of the Receivables", with the specific example of a direction for the Receivables to be disposed of. The Defendants contend that a direction to remove and replace the Fiscal Agent does not relate to the management and administration of the Receivables. The duties of the Fiscal Agent prior to service of a Trigger Notice are focused on organisational dealings with the Noteholders.

Furthermore, clause 11.3.1 of the Master Transfer Agreement provides that the Collection Agent is to carry out “all the activities related to the administration, management and collection of the Receivables”, including any decision to sell or dispose of the Receivables. The scope of the power to give directions under clause 14.1 is thus coterminous with the activities which, under the transaction documentation, are to be performed exclusively by the Collection Agent. The Defendants argue that it makes no sense to suppose that the clause 14.1 power, which is formulated by reference to activities to be performed by the Collection Agent, should entitle the Noteholders to compel the removal of the Fiscal Agent. It is paradoxical, they say, that the judge concluded that clause 14.1 could be used by the Noteholders to remove and replace the Fiscal Agent but not the Collection Agent.

23. The Defendants also contend that further support for their construction is provided by the fact that the Fiscal Agent’s powers under clause 14.3 include the power to bring legal action against the Other Issuer Creditors, including the Claimant. The Defendants argue that it is very unlikely that the parties intended the Claimant to have the power unilaterally to decide on the identity of the person with the power to take legal proceedings against the Claimant. Under clause 9.4.1, the assent of both parties to the successor Fiscal Agent is required.

The Claimant’s arguments in summary

24. The Claimant contends that (i) clause 9 is not an exhaustive code governing the removal and replacement of the Fiscal Agent and (ii) that a direction by the Noteholders to the Issuer to remove and replace the Fiscal Agent is a direction “in relation to the management and administration of the Receivables” within clause 14.1 of the Fiscal and Calculation Agreement.
25. So far as point (i) is concerned, the Claimant argues that the mere fact that clause 9 deals with the removal and replacement of the Fiscal Agent does not mean there is no other provision which is relevant to that subject. There is nothing in the language of clause 9 to indicate that it is a complete code. The scheme contained in clause 9 is intended to deal, as between the Issuer and the Fiscal Agent, with the ability of the Issuer to remove the Fiscal Agent in two scenarios – before and after a Termination Event – hence the distinction between clause 9.1 which operates “at any time” and clause 9.2.1 which applies only after a Termination Event. It does not deal with, or purport to deal with, the entirety of the relationship between the Issuer and the Senior Noteholders which is in issue here.
26. As such, the conclusion that, following a Trigger Notice, the Senior Noteholders have a power to direct the Issuer to remove and replace the Fiscal Agent does not make the references in clause 9 to the Organisation of Noteholders giving their consent or making a request otiose. The purpose of those provisions is to protect the position of the Noteholders in relation to the termination of the Fiscal Agent in the period before the Senior Noteholders assume the power to direct the Issuer following a Trigger Notice, when they become able to protect their own interests using the power to direct.
27. Clause 9 also reflects the fact that the Issuer must always be involved in the appointment and removal of the Fiscal Agent, since the holder of that position acts as

the agent of the Issuer, and it is the Issuer that makes the actual appointment or effects the actual removal.

28. As to point (ii), the Conditions provide for two distinct stages in the Transactions. In the “pre-enforcement” period, prior to the service of a Trigger Notice, the Issuer holds the Receivables to be used in the interests of the Noteholders and Other Issuer Creditors, but there is no ability on the part of the Noteholders to dictate how those Receivables are dealt with. In practice, the management of the Receivables is delegated by the Issuer to one of its agents – the Collection Agent – under the Master Transfer Agreements.
29. After the service of a Trigger Notice, however, in the “post-enforcement” period, two things happen. First, the Senior Noteholders are given the power to give directions “in relation to the management and administration of the Receivables” which the Issuer – and therefore any agent appointed by the Issuer – must comply with. Secondly, the role of the Fiscal Agent becomes materially more significant pursuant to clause 14.3 of the Fiscal and Calculation Agreement set out above. In particular, the Fiscal Agent can:
 - i) take control of the monies previously held by the Issuer with the Account Bank and transfer them to new accounts in the name of the Fiscal Agent (clause 14.3(a));
 - ii) require other parties to the Transaction Documents to pay monies not to the Issuer but to the Fiscal Agent (clause 14.3(b));
 - iii) make payments on behalf of the Issuer (clause 14.3(d)); and
 - iv) take such action in the name and on behalf of the Issuer as the Fiscal Agent may deem necessary to protect the interests of the Issuer, the Noteholders and the Other Issuer Creditors in respect of the Receivables (clause 14.3(c)).
30. The Claimant argues that the change which arises on the service of a Trigger Notice is therefore a fundamental shift in the operation of the Schemes. The power of the Senior Noteholders to give mandatory directions “in relation to the management and administration of the Receivables” is not just a broad power on its own terms, but one which goes to the heart of the Schemes, which are concerned with the purchase and management of portfolios of Receivables as the source from which the Noteholders can be paid. Moreover, the Fiscal Agent moves from being a peripheral figure in the Schemes with relatively limited functions (set out in clause 5 of the Fiscal and Calculation Agreement), to one where it, in effect, steps into the shoes of the Issuer and has wide-ranging powers, including in respect of the Receivables. Thus the Fiscal Agent becomes involved in the management and administration of the Receivables.
31. The Claimant does not dispute that the Collection Agent is involved in the management and administration of the Receivables under clause 11.3.1 of the Master Transfer Agreement, but argues that it does not follow that the Fiscal Agent cannot be involved in such activities. Clause 14.1 itself provides a clear example of the subordination after a Trigger Notice of the role of the Collection Agent in that the Issuer can be directed by the Senior Noteholders to dispose of the entirety of the

Receivables whatever the views of the Collection Agent if certain conditions are met (set out in clause 14.2).

32. Furthermore, the Claimant argues that the Senior Noteholders have a clear commercial interest in ensuring that, after service of a Trigger Notice, the person who performs the role of Fiscal Agent is well suited to the role and a person in whom they have confidence.

Analysis

33. In my judgment the judge reached the correct conclusion for the reasons given by the Claimant summarised above. Clause 9 is not expressed to be an exhaustive code. Furthermore, on the Claimant's interpretation, the source of the power to remove and replace the Fiscal Agent absent a Termination Event remains clauses 9.1.1 and 9.4.1. The real question is the interaction between clause 14.1 on the one hand and clauses 9.1.1 and 9.4.1 on the other hand. Service of a Trigger Notice is clearly intended to represent a fundamental shift in the balance of power under the Schemes in favour of the Noteholders, which makes perfect commercial sense. In such circumstances the Noteholders have the power under clause 14.1 to issue directions to the Issuer "in relation to the management and administration of the Receivables". These are broad words, and the exercise of the powers under clauses 9.1.1 and 9.4.1 falls within them if the Fiscal Agent has a role in the management and administration of the Receivables. That it does have such a role after service of a Trigger Notice is demonstrated by the powers conferred on the Fiscal Agent by clause 14.3, and in particular paragraph (c). It is true that, in such circumstances, the powers of the Fiscal Agent will overlap with the powers of the Collection Agent, but that is immaterial because it is inherent in the design of the Schemes. It is also true that the Collection Agent cannot be removed and replaced in the same way, but as the judge held this is understandable once it is appreciated that the obligors in respect of the assets are not notified of the fact that the assets are securitised, and therefore will perceive their obligations as owed to CFE(S), which is also the Collection Agent. Nor is it an objection that the Fiscal Agent could theoretically issue proceedings against the Claimant under clause 14.3(c). This seems unlikely in practice, but in any event the Fiscal Agent would, as the Claimant points out, have its own professional duties to observe. If these required the Fiscal Agent to issue proceedings against the Claimant, then it would not be restrained from doing so by the fact that the Claimant was involved in its appointment.

Conclusion

34. I would therefore dismiss the appeal.

Lord Justice Phillips:

35. I agree.

Lady Justice Asplin:

36. I also agree.