IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST
Claim No: FL-2019-000013
Neutral Citation Number: [2019] EWHC 2917 (Ch)

Court No 5

Rolls Building
7 Rolls Building
Fetter Lane
London EC41 1NL

Tuesday, 22 October 2019

**Before:**

**MR JUSTICE NUGEE**

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BETWEEN:

**BUSINESS MORTGAGE FINANCE 6 PLC**

Claimant

-v-

**ROUNDSTONE TECHNOLOGIES LTD**

Defendant

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**MR T SMITH QC** and **MR A RIDDIFORD** appeared on behalf of the Claimant.

**MR J NKAFU** appeared on behalf of the Defendant.

**APPROVED JUDGMENT**

**JUDGMENT**

**MR JUSTICE NUGEE:**

**1.** This is the trial of a Part 8 claim. It is a follow-on from a previous action in the Financial List, the short title of which is Business Mortgage Finance 6 Plc v Greencoat Investments Limited and Others, which was heard and determined by Zacaroli J and in which he handed down a reserved written judgment on 31 July of this year.

**2.** In that action, the claimant, which I will call "BMF6", and which is the claimant in this action as well, sought declaratory and other relief against a number of defendants in relation to arrangements, the details of which I will have to come to, which had the ostensible effect of enabling the defendants to obtain control of a securitisation structure and Zacaroli J was persuaded to grant those declarations. Indeed, by the time it came to the hearing before him, counsel then appearing for the defendants accepted that the various steps which he deals with in this judgment were, in fact, invalid and did not oppose the relief that he granted in respect of, at any rate, the first nine of ten declarations.

**3.** The tenth declaration, however, was as to the validity of certain transactions. That would include a sale of certain charged assets ostensibly by a receiver appointed over BMF6's assets pursuant to a charge and the purchaser under that sale was Roundstone Technologies Limited, a BVI company, which was not a party to that action. In those circumstances Zacaroli J limited his declaration in

relation to the validity of that aspect of the matter to the parties before him, but accepted that he could not pre-judge any questions which might arise if Roundstone, as I will call it, sought to contend that it was entitled to the benefit of the sale and purchase agreement.

**4.** In those circumstances BMF6, having succeeded against the then defendants, brought this second action by way of Part 8 claim, the only defendant being Roundstone, in order to obtain corresponding relief against Roundstone. BMF6 has appeared by Mr Tom Smith QC, who has taken me through the documents and the arguments in considerable detail.

**5.** Roundstone appeared today by Mr Julius Nkafu. His original application to me first thing this morning was to adjourn the trial for 24 hours to enable other counsel who had been instructed, but who today has been engaged in the Court of Appeal, to appear tomorrow. For reasons that I gave in a very short judgment this morning, I allowed Mr Smith to deploy the evidence and arguments that he wished to rely on, indicating that as there was a full verbatim transcript of the proceedings I would give the defendant an election, if it so wished, when Mr Smith had finished addressing me, to have the remainder of the hearing adjourned to tomorrow so that counsel of the defendant's choice could appear, but only on the terms that the defendant should in any event pay the costs thrown away by the claimant of such an adjournment on an indemnity basis.

**6.** In the event, Mr Nkafu's instructions were not to seek an adjournment on those terms and he relied on a written skeleton argument, unsigned, but I was told prepared by Roundstone in-house but which had the approval of counsel, as encapsulating the points that Roundstone wished to make and, since all those

points had been anticipated by Mr Smith in his opening submissions to me, I did not require Mr Smith to reply.

**7.** The background is quite complex but I will state it as shortly as I can. BMF6 is the Issuer of six classes of Notes under a securitisation structure originating in 2007. The underlying assets which have been securitised are a portfolio of mortgage loans.

**8.** The documents which gave effect to the structure include a Trust Deed which was entered into between BMF6 and BNY Corporate Trustee Services Limited, that Trust Deed being dated 18 May 2007, which I will refer to as "the Trust Deed", as well as a Deed of Charge also dated 18 May 2007, also entered into between BMF6 and BNY Corporate Trustee Services Limited, which I will refer to as "BNY", and indeed a number of other parties, which contained various provisions in favour of the Trustee. In particular it contained in clause 2 a covenant by the Issuer (ie BMF6) to pay monies which would become due to the order of the Trustee and it granted security to the Trustee in the form of fixed security over certain assets, principally the mortgages and the loans secured by the mortgages and a floating security over the whole of its undertaking.

**9.** The Deed of Charge contained at clause 11 power for the Trustee to appoint a receiver in the following terms:

> "11.1 At any time after the Security becomes enforceable or if any person who is entitled to do so presents an application for the appointment of an administrator of the Issuer, gives notice of intention to appoint an administrator of the Issuer, or files such a notice with the court, the Trustee may appoint such person or persons (including an officer or

> officers of the Trustee) as it thinks fit to be receiver or receivers of the Charged Property or any part or parts thereof (a 'Receiver')."

**10.** There were various other provisions in the Deed of Charge which I will in due course have to return to.

**11.** The events with which this action is concerned are set out in detail in Zacaroli J's judgment, the neutral citation number of which is [2019] EWHC 2128 (Ch) and anyone who wishes to look at the detail can have regard to his judgment which, as I say, was a reserved judgment and sets things out in more detail and with more precision than I will be able to. But, as there appears, a company called Greencoat Investments Limited claimed to have acquired a large number of the Notes, at any rate to the extent of having a tender offer for the Notes accepted. The settlement date under its tender offer was originally in February but was extended to at least 10 July 2019.

**12.** As Zacaroli J explains (see [9]):

> "Under the terms of the Tender Offer, until the settlement date, the original holder of the Notes retained all rights to vote in respect of the Notes."

**13.** There was an announcement under which Greencoat Investments Limited, which I will call “GIL”, offered to make an initial payment in order to obtain rights from the Noteholders but there was before Zacaroli J, and there is before me, no evidence that any such payment was made or any rights transferred.

**14.** At [13] of his judgment, Zacaroli J sets out the various steps which were taken by the defendants, who were GIL and various other parties to the transactions, and they started with the purported appointment by GIL of two other companies,

Greencoat Holdings Limited, which I will call “GHL”, and Portfolio Logistics Limited, which I will call “PLL”, as co-trustees of the Notes. That was on 20 June 2019.

**15.** Among the other steps are step iii) of 27 June 2019, when those two companies, GHL and PLL, purported to declare that the Security under the Deed of Charge was immediately enforceable; step iv) when they purported to appoint a Mr Fitzsimons as receiver over BMF6's portfolio of loans and associated security; and step v) when they purported to resolve that BNY be removed as Trustee. I do not think I need refer to the other steps which are there set out.

**16.** It later transpired, however, that in addition to that on 27 June 2019 GHL and PLL purported to appoint a Mr Oyekoya as receiver and that on the next day, 28 June 2019, Mr Oyekoya, acting as receiver for BMF6, executed a Sale and Purchase Agreement dated 28 June 2019 in favour of Roundstone. This contained an agreement for sale and purchase and I should refer to a number of its provisions. By clause 2.1, headed "Agreement for Sale and Purchase", it was provided:

> "Subject to the terms and conditions of this Agreement, the Seller agrees to sell and the Purchaser agrees to purchase on the Purchase Date all right, title, interest and benefit of the Seller in the Receivables listed in clause 2.2.1 to 2.2.3 (inclusive) on the terms set out in clause 2.2 (Sale)."

**17.** Clause 2.2, headed "Sale", reads:

> "The Seller, with full title guarantee, hereby agrees to sell to the Purchaser all beneficial (and in the case of clause 2.2.3 legal) right,

> title, interest and benefit present and future of the Seller to the fullest extent possible under applicable law, of the Seller in
>
> 2.2.1 the Charged Property, including, without limitation, all monies and distributions received in respect of thereof;
>
> 2.2.2 the Charged Obligation Documents and any related security therefore; and
>
> 2.2.3 all monies standing to the credit of the Bank Accounts."

**18.** Clause 2.3, headed "Method of effecting the sale", reads:

> "The sale of the Seller's right, title, interest and benefit in the Receivables specified in clause 2.2.1 and clause 2.2.2 (the 'Trust Receivables') will be effected by the Declaration of Trust granted by the Seller in favour of the Purchaser.
>
> The sale pursuant to clause 2.2.3 shall be by way of absolute assignment and transfer and accordingly the Seller hereby assigns and agrees to assign and transfer to the Purchaser to the fullest extent possible under applicable law, the Seller's right, title, interest and benefit in the Receivables specified in clause 2.2.3 with effect from the Purchase Date."

**19.** Clause 4 provides for the consideration, which consists of a Purchase Price of £237 million divided into £1, called "the Initial Consideration", and the balance, called "the Deferred Consideration".

**20.** The combined effect of clauses 4.2 and 4.3 is that the £1 Initial Consideration is payable on the Purchase Date, which is the date of the agreement, that is 28 June 2019, but the Deferred Consideration is not payable for 32 days and there

is an express acknowledgement and agreement "that the Purchaser's obligation to pay the Deferred Consideration is an unsecured obligation of the Purchaser".

**21.** Clause 5 deals with completion. It says that the sale of the Receivables shall take effect on and with effect from the Purchase Date, and it obliges the Seller to deliver a Declaration of Trust and a Power of Attorney, simultaneously with the Purchaser paying the £1 Initial Consideration.

**22.** Clause 10 contains an unusual limited recourse provision in clause 10.2, headed "Limited Recourse against the Purchaser and the Seller", as follows:

> "The Seller and the Purchaser each hereby agrees that:
>
> (a) notwithstanding any other provision of this Agreement, all obligations to the Purchaser or the Seller (as applicable) to each other are limited in recourse against the Purchaser or the Seller (as applicable) (as set out below);
>
> (b) its claim shall be limited to the value from time to time of the assets of the Purchaser or the Seller (as applicable); and
>
> (c) if following final distribution of the assets of the Purchaser or the Seller (as applicable) the Purchaser or the Seller (as applicable) has insufficient funds to pay in full all of the Purchaser's or the Seller's (as applicable) obligations to the other Party then the Purchaser or the Seller (as applicable) shall have no further claim against the other Party in respect of any such unpaid amounts and such unpaid amounts shall be deemed discharged in full and extinguished.
>
> The provisions of this Clause 10 shall survive termination of this

Agreement."

**23.** Annexed to the agreement at schedule 1 was a form of Declaration of Trust and this provides that the Seller should hold the Trust Receivables in trust absolutely for the Purchaser and its assignees. Schedule 2 attaches the form of the Seller Power of Attorney and, under that, the Seller appoints the Purchaser to be its true and lawful attorney to do various things.

**24.** Those documents were executed or at any rate purportedly executed on 28 June 2019, the Sale and Purchase Agreement itself being executed by Mr Oyekoya as receiver for BMF6 and a signature appears against the execution space for Roundstone, which provides that it was executed and delivered as a deed by Roundstone Technologies Limited acting by a director/its duly authorised attorney. The signature is not legible and no evidence has been put before me as to whose signature it is.

**25.** The Declaration of Trust was also executed or purportedly executed on the same day, 28 June 2019, by, again, Mr Oyekoya on behalf of BMF6 as its receiver and by the unspecified signatory on behalf of Roundstone; and the Power of Attorney executed again on the same day, this being in the form of a deed poll, by Mr Oyekoya on behalf of BMF6.

**26.** There is evidence before me that the Initial Consideration of £1 was paid by Roundstone to one of the purported trustees, that is to PLL.

**27.** The essence of the case put forward by Mr Smith on behalf of BMF6 is a very simple one. It is that GHL and PLL were never in fact appointed trustees of the Trust Deed to act together with or in place of BNY. Therefore, they never in fact had any power to appoint Mr Oyekoya as a receiver and therefore Mr Oyekoya

never had any authority to execute the sale and purchase agreement on behalf of BMF6.

**28.** As to the first step, indeed the first two steps in that argument, he referred me to the judgment of Zacaroli J. As I have already indicated, Roundstone was not a party to those proceedings and Mr Smith accepts that his judgment does not create a *res judicata* and is not binding on Roundstone; but he invites me to adopt the same view of the validity of the appointment of GHL and PLL as Trustees and the appointment of Mr Oyekoya as Receiver as Zacaroli J did or would have done.

**29.** I asked Mr Nkafu if he wished to contend that Zacaroli J was wrong in any of his analysis. Mr Nkafu, who indicated that he was relying on the points set out in the skeleton argument that I have been provided with on behalf of the defendant, which did not address any of these points, told me that he had no submissions to make in relation to them.

**30.** I accept that I am bound to form my own view on the material in order to reach a conclusion and that the defendant has not conceded anything in relation to them before me, but in the circumstances the defendant has not advanced any positive case as to why Zacaroli J's conclusions are wrong.

**31.** I can summarise my views by saying I have been taken very carefully through the relevant parts of his judgment and I see no reason at all to take any different view on these points from the views that he there expressed.

**32.** In more detail, at [35] Zacaroli J set out the initial flaw, as it were, in the steps taken by the defendants before him and he said this:

> "As I have already indicated, the defendants now accept that,

> whatever interest GIL had in the Notes at the time of the steps of which complaint is made, it was not sufficient to constitute it the beneficial owner of the Notes within the meaning of the definition of Instrumentholder. In my judgment, that concession was rightly made, and the declarations are justified on this basis, because the "holder of the beneficial interests" in the Notes, for the purposes of the definition of Instrumentholder, means only those persons in whose name the Notes are held in the records of the clearing systems (ie the account holders at Clearstream and Euroclear)."

**33.** He then sets out the detailed reasons why he came to the conclusion that that concession was rightly made. It is not necessary for me to repeat them. As I have said, I was taken carefully through them. I take exactly the same view as he did and I, too, have come to the view that the concession which was made in that case (but not made before me) was rightly made and that GIL, although in some sense having a beneficial interest in the Notes which it had contracted to buy, was not the holder of a sufficient interest to make it an Instrumentholder as defined. In essence that is because the purpose of that definition was intended only to address the situation where the Notes were held in global form, that where there was any issue over the entitlement of a person claiming an interest it was for the Trustee to determine that question, and that the evidence was that BNY as Trustee would require a current position statement taken from a recognised clearing system record-keeping system. In those circumstances, GIL was not an Instrumentholder.

**34.** That by itself was sufficient for Zacaroli J to conclude that its attempt to appoint

GHL and PLL as additional trustees was invalid and of no effect because GIL's purported ability to do so was dependent on it being a Noteholder and indeed being in a position to pass a written resolution which required it to be a 75 per cent holder of the Notes of the relevant class (see [42] of his judgment).

**35.** He also gave two other reasons why the appointment of GHL and PLL was invalid. One was that although GIL might have claimed to have interests in over 75 per cent of the A1 Notes, that is the sterling A notes, he took the view, and I agree with him, that any Extraordinary Resolution for the purpose of directing the Trustee to appoint an additional trustee would need to be an extraordinary resolution of at the very least the class A Noteholders as a whole and GIL was on no view in a position to procure such a resolution (see [52] of his judgment); and, secondly, the ability of Noteholders, by passing Extraordinary Resolutions, to require the Trustee to take steps could not require the Trustee to appoint further trustees as that would require in the circumstances of the case the Trustee to reach a conclusion that such appointment was in the interests of the Instrumentholders. Zacaroli J took the view that the ability of Noteholders by Extraordinary Resolution to direct the Trustee to take action did not extend to directing it to conclude that the appointment of an additional trustee was in the interests of the Instrumentholders (see [51]).

**36.** That deals with the first plank in Mr Smith's case that the Trustees purportedly appointed, GHL and PLL, were never in fact appointed Trustees.

**37.** The second plank is that having not been appointed Trustees they had no power to appoint Mr Oyekoya as a receiver. There was, in fact, at the time that Zacaroli J gave his judgment on 31 July, no evidence before him that Mr Oyekoya had even

purportedly been appointed as a receiver, the only appointment in evidence before him being a prior appointment of Mr Fitzsimons (see [81] of his judgment).

**38.** There is now before me evidence in the shape of a purported appointment by GHL and PLL dated 27 June 2019, together with an acceptance by Mr Oyekoya dated or purportedly dated in the evening of 27 June, that is the night before the execution by him of the Sale and Purchase Agreement on the morning of 28 June, but Zacaroli J went on to say at [81] in relation to Mr Oyekoya:

> "If he was purportedly appointed by GHL and PLL then, for the same reasons as apply to Mr Fitzsimons, the appointment was of no effect."

**39.** That is a reference back to his consideration of what was the fourth step before him, the appointment of Mr Fitzsimons by GHL and PLL, and he said this at [67]:

> "In view of my conclusions above, GHL and PLL had no standing as note trustees, and the purported appointment of Mr Fitzsimons was for this reason invalid and of no effect."

**40.** By parity of reasoning, exactly the same would, in his view, have applied to Mr Oyekoya and in my view he was right about that. Since GHL and PLL were not in fact Trustees they had no power to appoint Mr Oyekoya as a Receiver.

**41.** I was shown Zacaroli J's Order dated 31 July 2019 in which he made a number of declarations, including at paragraph 1 a declaration that:

> "Notwithstanding the purported written resolution passed by Greencoat Investments Limited ('GIL') on 20 June 2019, neither Greencoat Holdings Limited ('GHL') nor Portfolio Logistics Limited ('Portfolio Logistics') has been validly or effectively

> appointed as an additional and/or separate trustee, whether pursuant to clause 23.2 of the Trust Deed dated 18 May 2007 between, amongst others BNY Corporate Trustee Services Limited ('BNY' or the 'Note Trustee') and Business Mortgage Finance 6 Plc ('the Issuer') ('the Trust Deed') or otherwise, nor has Portfolio Logistics been validly or effectively appointed as an agent of the Note Trustee."

**42.** Then at paragraph 4:

> "Notwithstanding the purported deed of appointment executed by GHL and Portfolio Logistics on 27 June 2019, neither Mr Patrick Anthony Fitzsimons ('Mr Fitzsimons') nor Mr Alfred Olutayo Oyekoya ('Mr Oyekoya'):
>
> a. has been validly or effectively appointed as a receiver of the Issuer or any of the Issuer's property; or
>
> b. has at any material time had any power or authority to act on behalf of the Issuer including (without prejudice to the generality of the foregoing) any power or authority to deal with or dispose of any of the Issuer's assets."

**43.** As I have said, those declarations were not qualified but I accept Mr Smith's submission that that does not make any difference and that those declarations are not binding on Roundstone, Roundstone not being a party to those proceedings, but they were, in my judgment, for the reasons I have given, justified both by the evidence before Zacaroli J and by the evidence before me and I have reached the same view on those two points.

**44.** At paragraph 10 of his Order, Zacaroli J declared as follows:

> "Any and all acts done or purportedly done:
>
> a. by GHL or Portfolio Logistics in their purported capacity as trustees under the Trust Deed ...
>
> c. by Mr Fitzgerald or Mr Oyekoya in their purported capacities as receiver of the Issuer or any of its property ...
>
> are invalid and of no effect as among the parties to the present proceedings and the parties to the securitisation documents (being for these purposes the Trust Deed, the Deed of Charge and the MSA)."

**45.** That is expressly qualified so as to apply only as among the parties to those proceedings and the remaining matter that I have to decide is whether, notwithstanding my conclusions as to the invalidity of the appointment of GHL and PLL as Trustees and of Mr Oyekoya as Receiver, that declaration or a similar one should be made in relation to the Sale and Purchase Agreement.

**46.** Mr Smith put his case primarily on the lack of actual or ostensible authority enjoyed by Mr Oyekoya. In the light of the conclusions I have already come to, I accept, and it has not been suggested to the contrary, that Mr Oyekoya had no actual authority to act on behalf of the Issuer at any stage. The case, therefore, for the Sale and Purchase Agreement being binding on BMF6 must rest on ostensible authority.

**47.** Mr Smith's position is that the suggested defence to this claim put forward on behalf of Roundstone, both in correspondence and in the skeleton argument that has been served on its behalf, that it is a bona fide purchaser for value of the legal

estate without notice of any irregularity -- that is not the only way in which it puts its case but that is put at the forefront of its case – requires it, at the very least, to establish that the document signed by Mr Oyekoya and purporting to be a Sale and Purchase Agreement on behalf of BMF6 is in fact binding on BMF6 as a contract entered into by Mr Oyekoya with actual or ostensible authority, as unless that is the case the defence of bona fide purchaser for value without notice cannot get off the ground because it cannot show that it is a purchaser of the assets of BMF6 at all.

**48.** That seems to me to be a correct analysis, subject to the other arguments put forward on behalf of Roundstone which depend on the protections for purchasers found in the various documents.

**49.** I turn, then, to the question of whether Mr Oyekoya had ostensible authority. Mr Smith very properly showed me a statement in *OBG Ltd v Alla*n [2007] UKHL 21 in the speech of Lord Hoffmann at [92], where he says this:

> "That does not mean that a contract made by a person dealing in good faith with someone purporting to be a receiver, as in this case, can be repudiated by the company. As Lord Simonds went on to point out in *Morris v Kanssen* [1946] AC 460, such a person can rely on the principle of ostensible authority which in company law goes under the name of the rule in *Royal British Bank v Turquand* (1856) 6 E&B 327. In this case, however, it was unnecessary to invoke either that rule or section 232, because NWW refused to rely upon the ostensible authority of the receivers."

**50.** That undoubtedly suggests that a person dealing with someone purporting to be a receiver can rely on the principle of ostensible authority and the doctrine of *Royal British Bank v Turquand*, but Mr Smith said that that brief statement was obiter and irrelevant to the decision in OBG, and it is not an adequate account of how the doctrine of ostensible authority operates in the case of corporate entities; and for that he took me to the recent decision of the Privy Council in *East Asia Company Limited v PT Satria Tirtatama Energindo* [2019] UKPC 30 where Lord Kitchin, giving the judgment of the Board, dealt with the position at [62] to [65].

**51.** At [62] he referred to the indoor management rule, that is the Turquand rule, and cited from the speech of Lord Simonds in *Morris v Kanssen* as follows:

> " … persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and I am not bound to enquire whether acts of internal management have been regular."

**52.** And then I am not going to read the remainder of the passage, but I should draw attention to a citation in [64] from a judgment of Dawson J in Australia which includes the following:

> "The existence of an article under which authority might be conferred, if it is known to the outsider, is a circumstance to be taken into account in determining whether that person is being held out as possessing that authority … In other words, the indoor management rule only has scope for operation if it can be established independently that the person purporting to represent

> the company had actual or ostensible authority to enter into a transaction. The rule is thus dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority."

**53.** Then, at [65], Lord Kitchin said:

> "It follows that the indoor management rule could not, without more, allow PT Satria to assume that the power of delegation had been exercised and, in the circumstances of this case, there was nothing more to be found. It could not be established independently that EACL had made any representation as to the scope of Mr Joenoes' authority to agree a sale of its only asset."

As that indicates, the question in that case was whether an individual (Mr Joenoes) had ostensible authority to sell an asset belonging to a company (EACL) and what was required in order to make good a case of ostensible authority was that EACL, the putative principal, had made a representation as to the scope of Mr Joenoes' authority.

**54.** That I accept as a statement of the law. The doctrine of ostensible authority is based ultimately on estoppel. It requires the third party dealing with a putative agent to establish that the putative principal has held out in some way or other the putative agent as being able to act on its behalf. As Mr Smith put it, there must be something emanating from the company to clothe the agent with authority.

**55.** I have taken the opportunity of looking at the way in which the rule in Turquand's case is put in Bowstead and Reynolds on Agency (21st edition, 2018) at

paragraph 8-034. Under the heading "Common law: the rule in Turquand's case" the editors say this:

> "The public documents of a company may provide that a power can be delegated: but they may require some special procedure, for example a resolution of a general meeting; or special procedures may be laid down by the directors for the exercise of ordinary powers, for example a requirement that a cheque on the company's account needs signatures of persons authorised in particular ways. The third party may have no way of finding out whether or not these procedures may have been followed. This problem was dealt with after the introduction of a system of incorporation by registration, by judicial decision. Under the rule in *Royal British Bank v Turquand* a third party acting in good faith is entitled to assume that the relevant procedures of "indoor management", the details of which are not available to him, have been complied with. He is not, however, entitled to assume from the mere fact that authority was possible that it had actually been conferred. This could only be assumed where under the general principles of agency there would normally be apparent authority. This requires that the company, by a representation traceable back to an authorised officer, has held out the agent as having authority: either by appointing him to a position which would normally carry such authority, or by representing that he has been appointed to it, or by some more specific holding out. If this was so, compliance

> with internal procedures might be assumed. In other words, the rule is not designed to eliminate the need to deal with persons of sufficient standing to make the relevant contract, but only to protect against failure by such persons to comply with procedural rules."

**56.** That seems to me to be entirely in line with what the Privy Council said in the East Asia case and in line with Mr Smith's submissions. Translated to this case, what it means is that the third party, in this case Roundstone, could not rely on the ostensible authority of the Receiver, Mr Oyekoya, unless they could trace back some holding out or representation to the putative principal, in this case the Issuer, BMF6, or, given that a receiver could have been appointed by the Trustee, to some holding out by the Trustee, that is BNY, that Mr Oyekoya had been validly appointed. But there has been nothing (and no evidence has been adduced and no suggestion has been made that there was) emanating from BMF6, or indeed from BNY, holding out Mr Oyekoya as having authority to act as Receiver at all.

**57.** It follows, in my judgment, that Mr Smith is right that this is not a case in which Roundstone is in a position to establish ostensible authority. It is not in doubt (see Bowstead and Reynolds at paragraph 3-007) that the onus of proving authority, whether actual or apparent, lies on the party asserting it against the principal, in this case Roundstone; and in the absence of any representation or holding out by the putative principal or, as I say, in this case, by BNY as Trustee, it seems to me that it must follow that Mr Smith is right that this is not a case where ostensible authority can be established.

**58.** In those circumstances the Sale and Purchase Agreement, subject to the specific points relied on for the protection of purchasers, is, on the face of it, not binding on BMF6 and for the reasons that I alluded to earlier Roundstone is not a purchaser so as to enable it to make good the plea of bona fide purchaser for value without notice of a legal estate, a plea which, as I understand it, is a single plea on which the onus of proving all the elements lies on the defendant.

**59.** Nevertheless, I will go on, briefly, to consider the other points which were urged by Mr Smith against the conclusion that this was a case where Roundstone could rely on ostensible authority.

**60.** The next was that Roundstone was on enquiry as to the circumstances of the transaction and, having failed to make enquiries, it could not rely on the doctrine. For the principle he referred me again to the East Asia case where at [75] Lord Kitchin, on behalf of the Board, said that:

> "Ostensible authority is a relationship between a principal and a third party created by a representation made by the principal, which the third party can and does reasonably rely upon, that the agent of the principal has the necessary authority to enter into a contract on its behalf: The Raffaella [1985] 22 Lloyd's Rep 36, para 41. This may be thought to lead naturally to the conclusion that if the third party has reason to believe that the agent does not have actual authority and fails to make the enquiries that a reasonable person would have made in the circumstances to verify that the agent has authority, then the estoppel cannot arise, for in such a case reliance on the representation would hardly be

> reasonable."

**61.** At [78], Lord Kitchin referred to something else said by Lord Simonds in *Morris v Kanssen* in which he explained that the principle of ostensible authority cannot be invoked by a person who is put on enquiry. He said this:

> "It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his enquiry. He cannot presume in his own favour that things are rightly done if enquiry that he ought to make would tell him that they were wrongly done."

**62.** At [79] Lord Kitchin referred to a statement by Slade LJ in *Rolled Steel Products (Holdings) Limited v British Steel Corporation* [1986] Ch 246 at 284-5, where he said that the nature of a proposed transaction may put a third party on enquiry as to the authority of the directors of a company to effect it.

**63.** At [81], Lord Kitchin referred to something said by Lord Scott in *Criterion Properties Plc v Stratford UK Properties LLC* [2004] UKHL 28 where he said that if a person dealing with an agent knows or has reason to believe that the transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for that person to assert with any credibility that he believed that the agent had apparent authority, and lack of such a belief would be fatal to a claim that he did.

**64.** The conclusion, after discussing some authority which appeared to go the other

way, which Lord Kitchin expressed on behalf of the Board, was at [93]:

> "The Board therefore concludes that PT Satria could not rely upon the apparent authority of Mr Joenoes to enter into the HOA on behalf of EACL if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that he had that authority."

**65.** Mr Smith relied primarily on the very unusual terms of the transaction. As appears from the provisions of the Sale and Purchase Agreement which I referred to earlier, the terms were that, although a consideration of a total of £237 million was to be paid, the only Initial Consideration was £1. That triggered the obligation to complete on, indeed, the Purchase Date and on that date title was handed over to the Purchaser in the form of the assignment of the bank accounts, Mr Smith expressly accepting that the effect of the relevant clause was to effect a legal assignment of the chose in action which constitutes BMF6's bank accounts, together with title to what were called the Trust Receivables in that the Declaration of Trust was also executed on the same date, despite the fact that none of the consideration beyond the initial £1 was to be paid for another 32 days and despite the fact that that obligation was expressly said to be an unsecured obligation, thereby quite probably excluding the unpaid vendor's lien which would otherwise arise, combined with the fact that even the right to sue the Purchaser for the Deferred Consideration was subject to the very unusual limited recourse provision in clause 10.2, as a result of which it would have been entirely possible for Roundstone to sell or charge or otherwise dispose of the assets transferred under the Sale and Purchase Agreement without paying the Deferred

Consideration and for the proceeds to disappear, at which point it would not even have a prima facie obligation to pay the Deferred Consideration.

**66.** That, Mr Smith said, was sufficiently egregious as a form of sale of assets of this type for any Purchaser to be put on enquiry as to whether Mr Oyekoya really did have the authority which he claimed to have. It would have been easy to make enquiries. The Purchaser, Roundstone, knew that GHL and PLL had been purportedly appointed as trustees and had appointed Mr Oyekoya or purported to appoint Mr Oyekoya as Receiver because they had seen the proof of Mr Oyekoya's appointment; and they also knew, as is apparent from Mr Osman's third witness statement, Mr Osman having given evidence on behalf of Roundstone, that they had seen the original transaction documents under which they would have seen that BNY was the original Trustee.

**67.** Having seen that BNY was the original Trustee, having seen that Mr Oyekoya was not appointed by the original Trustee but by two other entities purporting to act as trustees, Mr Smith submitted that they were on notice that there was a gap in the chain of succession because they had seen nothing to indicate how the new trustees were appointed and how they could act in place of BNY.

**68.** He also referred to the fact that Roundstone's own evidence indicates that they were sufficiently concerned about the position at the time for the Roundstone board, in the words of Mr Osman's evidence, to have expressly relied on the third party protections in the documentation, which I will come to, and to have made it a condition that the Sale and Purchase Agreement be expressly affirmed and supported by the two trustees. Mr Smith submitted that all of that indicated that Roundstone had sufficient reasons to be concerned about the effectiveness and

validity of the transaction to seek protection.

**69.** I accept, in particular, that the unusual terms of the transaction were sufficient to put Roundstone on enquiry. Enquiry would not have been difficult. All that Roundstone needed to do was to contact BMF6 and BNY and ask them to confirm whether there was any question over the validity of Mr Oyekoya's appointment. Had they made such enquiries, it is as plain as could be that they would have received a response, similar to that which BMF6 gave to GIL at an earlier stage, that the validity of all the transactions was indeed heavily disputed.

**70.** Those conclusions make it unnecessary to deal with a third point urged by Mr Smith, which was that the onus was on Roundstone to show that it had no connection with two individuals, one being Mr Oyekoya and one being a Mr Hussain, whose role in some of the matters is referred to by Zacaroli J.

**71.** It is a striking fact that in this case Roundstone is relying on the validity of acts of Mr Oyekoya in circumstances where, when BMF6's solicitors first attempted to correspond with Roundstone, the email forwarding the letter which had been served on Roundstone's agent in Tortola was forwarded to a Mr Cathersides, who has given evidence by witness statement before me, he acting on behalf of a corporate services provider called Mann Made Corporate Services (UK) Limited, and that he forwarded the correspondence from the claimant's solicitors, Simmons & Simmons LLP, to four individuals who were Mr Oyekoya himself, Mr Hussain, a Mr Kalia, who was connected with PLL, and Mr Fitzsimons, who was the first receiver appointed, asking for instructions as to what should be done. The natural inference from that is that, as far as he was concerned, Roundstone had some connection with those individuals.

**72.** The evidence filed on behalf of Roundstone by Mr Osman attempts to suggest that there was no connection with those individuals, but the onus is on the defendant to show that it was without notice and, had it any connection with Mr Oyekoya, Mr Hussain or Mr Kalia, it does seem to me that Mr Smith is right that it could not rely on ostensible authority because it would be on notice of the matters which had led to the purported appointment of Mr Oyekoya.

**73.** I do not think I need to reach a final conclusion on this aspect, in the light of my previous conclusion, so I will simply say that I think it very doubtful on the evidence before me -- which Mr Smith accepted had to be taken at face value, this being a Part 8 claim and there being no suggestion that I can resolve issues of disputed fact -- whether it has really been shown by Roundstone that there is no sufficient connection with any of the individuals on, as it were, the other side of the transaction.

**74.** Nonetheless, as I say, it is not necessary for me to reach any final conclusion on that point. The effect of the conclusions I have already come to is that, subject to the specific provisions relied on by Roundstone, I am satisfied not only that GHL and PLL were never validly appointed as Trustees and Mr Oyekoya was never validly appointed as Receiver but also that the Sale and Purchase Agreement was not binding on BMF6 because it has not been established that Mr Oyekoya had either actual or ostensible authority to act on behalf of BMF6 and sell its assets; and in the absence of that it is not possible for Roundstone to establish that it is a bona fide purchaser of anything.

**75.** I will simply add, as Mr Smith said, that in any event the plea of bona fide purchaser for value only applies to those who manage to acquire the legal estate

and although he accepted, as I have said, that if the Sale and Purchase Agreement were valid it would constitute a legal assignment of the rights over the bank accounts of BMF6, it seems to me plain from the form of clause 2 of the Sale and Purchase Agreement that in relation to the Trust Receivables all that was purportedly conferred at completion on Roundstone was the beneficial interest. Not only does one find that in the contrast expressly drawn in clause 2.2 between beneficial interest and legal interest, legal interest applying only to clause 2.2.3, but also in the nature of completion taking the form of the Declaration of Trust. That by itself shows that all the Purchaser would have acquired, had it been valid, was a beneficial interest in the Trust Receivables and not the legal estate, and the plea of bona fide purchaser for value of the legal estate would for that reason in any event not assist Roundstone to establish title to the Trust Receivables.

**76.** I turn to the other way in which Roundstone puts its case, which is to rely on specific protections for purchasers in the Deed of Charge. The first of these is found in clause 12.2. Clause 12 is headed "Protection of third parties" and clause 12.2 reads as follows:

> "No Purchaser from or other person dealing with the Trustee and/or the Receiver shall be concerned to enquire whether any of the powers which they have exercised or purported to exercise has arisen or become exercisable, or whether the Secured Amounts remain outstanding, or whether any event has happened to authorise the Trustee and/or the Receiver to act or as to the propriety or validity of the exercise or purported exercise of any such power; and the title and position of such a Purchaser or other

> persons shall not be impeachable by reference to any of those matters."

**77.** In the skeleton argument served on behalf of Roundstone, the emphasis is given to the words "purported" which appear twice in that clause and the submission is made that that clause is clearly designed to protect and does provide ample protection to Roundstone in the current circumstances. I agree with Mr Smith that that is to read too much into the clause. It does not provide, as it might have done, protection for those dealing with purported trustees or purported receivers, but only protection to those dealing with the Trustee and/or the Receiver. In the light of my previous conclusions, the only person who satisfied the description of the Trustee was BNY and there was no person who satisfied the description of the Receiver because no Receiver had been validly appointed: see clause 11.1, which I read earlier, as to what the definition of Receiver is, namely a receiver appointed by the Trustee to be receiver of the Charged Property. Since BNY is the only Trustee, and BNY did not appoint anybody, there is no and was no Receiver. If a person deals with a Trustee or Receiver, clause 12.2 in certain circumstances does give them protection in relation to the purported exercise of powers even if events have not in fact occurred to make those powers exercisable. That is not however the position in which Roundstone finds itself.

**78.** I accept the submission of Mr Smith that somebody such as Mr Oyekoya, who was not validly appointed as receiver, is not a "Receiver" and that clause 12.2 is not cast in terms of a person purportedly appointed receiver. It proceeds on the premise that there is a proper appointment of a Receiver and is dealing with purported exercises of such a person's powers.

**79.** The second and third provisions which are relied on are both found in clause 15 of the Deed of Charge, which is headed "Further assurances and power of attorney". Clause 15.2 reads:

> "For good and valuable consideration the Issuer irrevocably and as security for the interests of the Trustee and every Receiver hereby appoints the Trustee and every Receiver severally to be its attorney and its agent (with full power to appoint substitutes and to delegate, including power to authorise the person so appointed to make further appointments) on behalf of the Issuer and in its name or otherwise, to execute any document, with power to date the same and to do any act or thing which the Trustee or such Receiver (or such substitute or delegate) may, in its or his absolute discretion, consider appropriate in connection with the exercise of any of the powers of the Trustee or the Receiver or which the Issuer is obliged to execute or do whether under these presents or otherwise; and, without prejudice to the generality of its power to appoint substitutes and to delegate, the Trustee may appoint the Receiver as its substitute or delegate; and any person appointed the substitute or delegate of the Trustee or the Receiver shall, in connection with the exercise of the said power of attorney, be the agent of the Issuer."

Then it contains provision that such power of attorney is irrevocable.

**80.** Clause 15.4 provides:

> "The Issuer hereby ratifies and confirms and agrees to ratify and

> confirm whatever any such attorney or agent shall do or purport to do in the exercise or purported exercise of all or any of the powers, authorities and discretions referred to in this Clause."

**81.** As with clause 12.2, I accept the submission that clause 15.2 only applies to the Trustee, that is the actual and validly appointed trustee, in this case BNY, and any Receiver, that being a validly appointed receiver of which Mr Oyekoya is not one.

**82.** In those circumstances, although the Issuer, that is BMF6, appoints the Trustee and every Receiver to be its attorney with wide powers and agrees to ratify and confirm whatever any such attorney shall do or purport to do, it cannot validate the acts, or require BMF6 to ratify the acts, of someone such as Mr Oyekoya who I have found not to be validly appointed as a Receiver, and I do not think it assists Roundstone.

**83.** The final provision on which reliance is placed in the Deed of Charge is clause 21.2. Clause 21 deals with Trustee provisions. Clause 21.1 confirms that certain provisions of the Trust Deed apply **mutatis mutandis** for the purposes of this deed including clause 22 "Appointment of trustees" (it says clause 22 whereas in fact the appointment of trustees is dealt with in clause 23) and clause 21.2 then provides as follows:

> "Any person appointed as, or assuming the position of, trustee in relation to the Charged Property pursuant to the terms of this Deed shall have all the rights, powers and benefits which are vested in the Trustee pursuant to the terms of this Deed."

**84.** That gives rise to a short question of construction, which is what is meant by “any person … assuming the position of trustee”. Does it mean anybody who becomes

a trustee, that is a valid trustee, or does it mean anybody who assumes to act as trustee? Purely as a matter of language I think both constructions are possible, but the former seems to me to be the more natural reading of the language. Had it been intended to catch those assuming to act as trustees it would more naturally, I think, have read "any person appointed as or purportedly appointed as or claiming to act as a trustee" or the like. Certainly when one has regard to the commercial consequences of either construction, something which we are repeatedly told is to be borne in mind when construing documents, it does seem to me that it would be a very unusual provision for a person who confers very large powers on trustees to confirm that those powers should be available not only to those in fact becoming trustees but to anybody who claimed to act as trustee.

**85.** In those circumstances, I accept Mr Smith's submission that the better construction is that those “assuming the position of trustee” means those who become trustees other than by appointment. It is not easy to think of many examples of those who become trustees other than appointment, but he was able to point me to one example specifically dealt with in the Trust Deed. Clause 23.4, under the heading "Successor Trustee", reads as follows:

> "Any corporation or association into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation or association resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation or association to which all or substantially all of the corporate trust business of the Trustee may be sold or otherwise transferred, shall be the successor trustee hereunder without any

> further act."

**86.** He submitted, and I accept, that a person who became the successor trustee under that provision would be a person "assuming the position of trustee", without there being anything which one could point to as being in the nature of an appointment.

**87.** In case I am wrong on that and clause 21.2 of the Deed of Charge was apt to confer powers on those not only validly appointed as trustees but those who were purportedly appointed as trustees and assumed to act as trustees, there is another point which emerged in the course of argument which is this: that the powers vested in the Trustee, in the singular, are those found in the Trust Deed, among other things; and, where there is more than one trustee, clause 23.1 of the Trust Deed makes express provision for trustees to act by a majority, it being of course the general law that trustees, if there is more than one, have to act unanimously.

**88.** Clause 23.1, however, provides (in part) as follows:

> "One or more persons may hold office as trustee or trustees of these presents but such trustee or trustees shall be or include a Trust Corporation. Whenever there shall be more than two trustees of these presents the majority of such trustees shall be competent to execute and exercise all the duties, powers, trusts, authorities and discretions vested in the Trustee by these presents **provided that** a Trust Corporation shall be included in such majority."

**89.** If, therefore, it is to be assumed, contrary to the view I have expressed, that clause 21.2 has the effect that GHL and PLL were to be treated as trustees for the purposes of the Deed of Charge, they would constitute a majority of the Trustees, there being three trustees, but neither of them is a Trust Corporation; see the

judgment of Zacaroli J at [65] and [71] where he dealt with precisely this point. He said at [65]:

> "Clause 1.1 of the Trust Deed defines a Trust Corporation as,
>
> 'a corporation entitled by rules made under the Public Trustee Act 1906, or entitled pursuant to any comparable legislation applic[able] to a trustee in any jurisdiction, to carry out the functions of a custodian trustee'. There is no evidence that either GHL or PLL is a Trust Corporation."

**90.** And at [71], he said that:

> "As I have noted above, neither GHL nor PLL is a Trust Corporation."

**91.** He was dealing there with the question of whether the purported removal of BNY as Trustee was effective, it being provided that where the removal is of the only trustee which is a Trust Corporation the removal shall not become effective until such time as BMF6 as Issuer had appointed a Trust Corporation as a replacement trustee. But the point equally applies here.

**92.** In those circumstances, even if I were wrong on the question of construction, GHL and PLL would not have had power to act by a majority, neither being a Trust Corporation, and for that reason clause 21.2 would not provide a validity to the appointment of Mr Oyekoya which could assist Roundstone.

**93.** A point was made, in both Mr Osman's third witness statement and the skeleton argument served on behalf of Roundstone, that the documentation, both in the Terms and Conditions of the Notes and in the Trust Deed, envisages a procedure whereby the Issuer may redeem the Notes by the Notes having been put up for auction to the highest bidder, and it was said that the Sale and Purchase Agreement was therefore contemplated by the documentation.

**94.** I agree with Mr Smith that whatever the precise circumstances in which such a sale might or might not take place and such a redemption might or might not happen, it cannot by itself bear on the question of whether Mr Oyekoya had authority to act on behalf of BMF6 or whether the Sale and Purchase Agreement is otherwise binding on BMF6. Those provisions in fact say nothing about the appointment of receivers.

**95.** In those circumstances, I find that the claimant has made out its claim as sought and I will hear from Mr Smith and Mr Nkafu as to the terms of any Order to give effect to this judgment.