Neutral Citation Number: [2021] EWHC 2629 (Ch)

Case No: FL-2021-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date:30th September 2021

IN THE MATTER OF an application for directions by Golden Belt 1 Sukuk Company B.S.C. (c) (in liquidation) (as trustee) and Citicorp Trustee Company Limited (as delegate) (together, the "Claimants")

AND IN THE MATTER OF a Declaration of Trust and Agency dated 15th May 2007

Before :

MR JUSTICE ZACAROLI

- -

Richard Salter QC and Sarah Tulip (instructed by **Norton Rose Fulbright LLP**) for the **claimants**

Hearing date: 28th September 2021

APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be NB 12.00 noon on 30th September 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. The first claimant, Golden Belt Sukuk Company B.S.C. (c) ("Golden Belt"), is the issuer and Trustee in relation to an Islamic financing transaction known as a "sukuk". The second claimant, Citicorp Trustee Company Limited ("Citi"), is the entity to which the Trustee's powers and duties in relation to the sukuk have been delegated.

2. By this part 8 claim, the claimants seek the determination of the Court, pursuant to CPR rule 64.2(a)(ii), of certain questions arising in the execution of the trust.

3. At the conclusion of the hearing I announced that I would make the declarations sought by the claimants. These are my reasons for doing so. The hearing took place in public because, although the evidence in support of the claim contains matters that are confidential (in respect of which I have ordered pursuant to Practice Direction 51O that the witness statements, expert reports and exhibits remain confidential), it was not necessary for the purpose of resolving the questions of construction raised by the claim to stray into those confidential matters. For the same reason, this judgment is to be treated as being delivered in open court.

The structure of the transaction

4. The structure of the sukuk was summarised by Males J in a judgment delivered in unrelated proceedings concerning the sukuk ([2017] EWHC 3182 (Comm), [2018] Bus LR 816):

> "[30] … The form which this Sukuk was to take and which in the event it did take was set out in the offering circular dated 14 May 2007. It was effected by an extensive suite of transaction documents dated 14 or 15 May 2007 ("the Transaction Documents"). In summary, and so far as relevant for present purposes, it was structured as follows:
>
> [31] The first step consisted of an English law head lease agreement whereby Mr Al-Sanea [Maan] leased to Golden Belt certain "land parcels" which he owned in Saudi Arabia in return for an upfront payment by Golden Belt, made to Mr Al-Sanea personally, of US$650m. This was described as an "advanced rental amount." The payment was funded from the proceeds raised from the sale to investors of certificates in the Sukuk. A service agreement was then concluded between Mr Al-Sanea and Saad whereby Saad was to provide services to Mr Al-Sanea in return for payment of US$650m. By this means, the funds raised by the Sukuk were made available to Saad for investment in its business.
>
> [32] In theory, therefore, the US$650m was to flow from investors to Golden Belt to Mr Al-Sanea personally and finally to Saad. In fact, however, the flow of funds raised from investors was directly [sic] from BNPP [the arranger] to Saad…

> [33] The return to investors to whom certificates had been issued was provided by means of an English law sublease agreement whereby Golden Belt subleased the land parcels to Saad. This provided for payment by Saad to Golden Belt, for onward transmission to certificate holders, of rental income in instalments between 2007 and 2012 which was equivalent in western economic terms to a return of principal together with a margin of Libor plus 85 basis points. Failure by Saad constituted a "Dissolution Event" which required Golden Belt as the trustee of the rights of certificate holders to terminate the sub lease if requested to do so by holders of 25% of the face value of certificates. Upon such termination, the "Termination Sum" of US$650m became immediately due and payable…
>
> [34] The Sukuk included a Saudi law governed promissory note issued by Saad in favour of Golden Belt in the sum of US$650m. This was one of the Transaction Documents and was described in the offering circular as being "issued in support of Saad's obligations to make payment of the Termination Sum" ..

5. At para 56 of his judgment, Males J explained that the obligations under the Sukuk transaction were unsecured, with the result that:

> "…in the event of default by Saad and termination of the sub lease agreement, the only remedy available to certificate holders was to require Golden Belt (or Citicorp acting as its delegate) to invoke its rights under the Transaction Documents, those rights being held on trust for certificate holders…"

6. A sukuk has an economic effect equivalent to a bond issue, but is structured so as to conform to the principles of sharia law – in particular the principle that prohibits charging or paying interest.

7. The nature and effects of a sukuk are explained in Geoffrey Fuller, *The Law and Practice of International Capital Markets* (3rd Edn, LexisNexis 2012) at paras 6.02-6.03:

> "[6.02] Conventional capital markets instruments (such as bonds and notes) are incompatible with Shari'a law, as they involve payments of interest. The Shari'a prohibits the charging of interest for the use of money, or, more generally, any return for the use of money that is predetermined or guaranteed. In addition, the Shari'a also prohibits uncertainty in contracts, speculation, and dealing in certain products considered to be unethical ..
>
> [6.03] As a result of the above prohibitions, Islamic finance differs from conventional finance by deriving the investor's return from an investment in assets rather from the time value of money. Sukuk (the plural of sakk) are, in essence, trust

> certificates relating to Shari'a-acceptable assets. The instruments, rather than being debt obligations of the issuer, confer rights on the holders as beneficiaries under a trust of the relevant underlying assets. The holders therefore have indirect ownership interests in the underlying assets (which are transferred when the sukuk are traded), and the returns that the holders receive on their investment are merely a pass-through by the issuer of the returns received by it in relation to the assets, in this respect sukuk are thus similar, in legal structure, to depository receipts…"

8. The sukuk in this case is constituted by a Declaration of Trust and Agency dated 15 May 2007 (the "DTA").

9. By clause 2.1.1(d) of the DTA, Golden Belt declared that it held the "Trust Assets" on trust for the Certificateholders, pro rata to the principal amount of Certificates held by each Certificateholder.

10. The Trust Assets include Golden Belt's interest in (among other things) the sub-lease of land parcels from Golden Belt to Saad (the "Sub-lease"), the promissory note in the sum of US$650 million issued by Saad in favour of Golden Belt (the "Promissory Note") and an indemnity from Maan contained in the Head-lease agreement (the "Indemnity").

11. By clause 2.1.4 of the DTA, Golden Belt declared that it would exercise on behalf of all Certificateholders all of the rights under the "Transaction Documents" (which include the Promissory Note, the Sub-lease and the Indemnity).

12. By clause 2.5.1 of the DTA, Golden Belt (as issuer) covenanted to and for the benefit of itself as Trustee that, for so long as any Certificate was outstanding, it may enforce the rights of the Issuer and Certificateholders. By clause 5.1.1 of the DTA, Golden Belt delegated to Citi the "…rights, authority and power … to exercise all of the duties, powers, trusts, authorities and discretions vested in the Trustee" by the DTA.

13. The Certificates are represented by a form of Global Certificate, pursuant to which "Each of the Certificates represents an undivided beneficial ownership of the Trust Assets … held on trust … for the Certificateholders pursuant to the [DTA]". Interests in the Global Certificate are traded on the financial markets. I will refer to those who have acquired such an interest as "Certificateholders".

Default by Saad

14. In about 2009 Saad defaulted on its obligations under the Sub-lease. Since that date, the claimants have been involved in extensive efforts to enforce the rights under the Transaction Documents against Saad and Maan. The details of those efforts do not matter for the purposes of this judgment but, in summary:

(1) Proceedings were commenced in 2011 in the Kingdom of Saudi Arabia ("KSA") against Maan and Saad for the amounts due under the Promissory Note. These were discontinued, however, upon discovering that Maan's signature on the Promissory Note was not a "wet ink" signature, rendering the Promissory Note invalid.

(2) Proceedings were commenced in 2016 in England against Saad and Maan to enforce payment under the Sub-lease and the Head-lease (which are governed by English law and contains an exclusive jurisdiction agreement in favour of the English courts). Summary judgment was granted in favour of the claimants on 10 November 2017 by Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge, against Saad for in excess of US$668 million and against Maan for in excess of US$588 million (the "English Judgment"). These amounts are not cumulative, since the judgment against Maan arises out of the Indemnity. The English Judgment has, however, not been recognised in KSA.

(3) Various other proceedings have been commenced in the KSA but either dismissed, or stayed on the grounds that insolvency proceedings have been commenced against Saad and Maan (described further below).

15. Expert evidence filed by the claimants demonstrates the potential challenges in enforcing the English Judgment, or other rights under the Transaction Documents against Saad or Maan.

Insolvency Proceedings in KSA

16. In February 2019, the Commercial Court in Dammam, KSA granted an application by Maan and Saad to commence a "financial reorganisation" procedure pursuant to Chapter 4 of KSA Bankruptcy Regulation (the "KSA Reorganisation Proceedings"). The claimants (pursuant to a direction from Certificateholders together holding just over 30% of the Certificates) are participating in the KSA Reorganisation Proceedings.

17. The purpose of the KSA Reorganisation Proceedings is to enable debtors to come to arrangements with their creditors under the supervision of a trustee in bankruptcy and the KSA Commercial Court. The key to the process is a proposal for a scheme that must be approved by a two-thirds by value majority of creditors and then ratified by the court. Upon successful implementation of a scheme, if the proposal is ratified, the debtor can return to managing its affairs without supervision. In the meantime, the debtor's affairs are in practice under the control of the trustee in bankruptcy.

18. Creditors are required to submit their claims (which may, but need not, be based on a judgment) to the trustee in bankruptcy, who may either accept or reject them. His decision is subject to review by the KSA Commercial Court.

19. A proposal may only be submitted once a list of creditors' claims has been finally determined (including, where necessary, by the KSA Commercial Court or on appeal to the KSA Court of Appeal).

20. If a proposal is rejected by creditors, or is not endorsed by the KSA Commercial Court, that Court may order a liquidation procedure.

21. The claimants submitted claims in the KSA Reorganisation Proceedings for Saad and Maan in the spring of 2019. On 9 September 2019 the trustee in bankruptcy rejected those claims. The claimants applied to the KSA Commercial Court, which on 25 December 2019 rejected the claimants' objection to the trustee in bankruptcy's decision. The claimants, along with several other potential creditors, appealed that decision to the KSA Court of Appeal which, on 24 March 2021, rejected the KSA Commercial Court's judgment and directed the KSA Commercial Court to direct the trustee in bankruptcy to reconsider the claims of all creditors.

22. On 8 July 2021, the trustee in bankruptcy contacted the claimants' representatives in KSA ("SaudiLegal"), indicating his preliminary recommendation to reject Citi's claim. On 11 July 2021, the trustee in bankruptcy indicated his preliminary recommendation also to reject Golden Belt's claim.

23. In the meantime, discussions were continuing between "Reemas" – a financial consulting firm acting for Saad and Maan in relation to the financial restructuring process – and a Mr Faisal Baassiri ("Mr Baassiri") – a lawyer acting in the KSA for the three Certificateholders who have instructed the claimants to pursue claims in the KSA Reorganisation Proceedings. These discussions, aimed at a potential settlement among the parties, commenced in May 2019 and culminated in a draft settlement agreement dated 1 July 2021.

24. This claim was issued in light of that draft settlement agreement, predominantly to determine whether the claimants had the power, under the DTA, to enter into a settlement agreement with Saad and Maan which involved foregoing rights under the English Judgments in return for accepting an admission of liability enforceable in KSA for a smaller amount. The claimants also sought a determination as to whether they would be acting properly by entering into such a settlement agreement.

25. On 22 August 2021, however, the trustee in bankruptcy notified SaudiLegal that he had recommended to the KSA Commercial Court to: (1) accept Golden Belt's claim for an amount of approximately US$ 650 million; but (2) reject approximately US$7.3 million of Golden Belt's claim and (3) reject Citi's claim in full.

26. In light of this development, the claimants no longer seek determination of whether they would be acting properly in entering into a settlement agreement along the lines of the 1 July 2021 draft. Given the risk, however, that the KSA Commercial Court may reject the trustee in bankruptcy's recent decisions, whether on the objection of the debtors, of other creditors or of its own motion, the claimants still wish this Court to determine whether they have the power under the DTA to enter into a settlement agreement. They also ask the Court to determine whether they have the power to vote in favour of a proposal in the KSA Reorganisation Proceedings which would result in the claimants receiving less than the full amount due to them under the English Judgment.

Engagement with Certificateholders

27. By my order made on 28 July 2021, a procedure was laid down for notifying Certificateholders of this claim, for the provision of relevant documents to them (subject to receiving confidentiality undertakings) and for joining them to the proceedings if they so wished. Certificateholders who did not wish to be joined, but wished to make their views known to the Court, were invited to do so. Pursuant to CPR 9.8A(8)(a), any Certificateholder who is not joined to the claim will be bound by this judgment as if it were a party to it.

28. Certificateholders holding between them approximately 30% of the Certificates are directing the claimants to pursue this claim.

29. As at 24 September 2021 eight other Certificateholders, holding Certificates representing approximately one third of the Certificateholders by value, had requested and been provided with a copy of the claim form and the Order of 28 July 2021. Three of those Certificateholders, holding Certificates representing approximately 8% of the Certificateholders by value, requested and were given access to the evidence. Only one of these Certificateholders has expressed a view in relation to the claim: it has confirmed by email that it is supportive of coming to a settlement with Saad and Maan when appropriate. No Certificateholder has indicated any objection and none attended the hearing of the claim.

30. In the absence of any party able and willing to advance arguments against the claim, it is the duty of a trustee such as the claimants to assist the Court by bringing to the Court's attention any relevant legal proposition or argument affecting the position of the underlying beneficiaries: see *State Street Bank and Trust Company v Sompo Japan Insurance Inc* [2010] WEHC 1461 (Ch), per Sir Andrew Morritt C, at [30]. Mr Salter QC and Ms Tulip, who appeared for the claimants, have ably complied with that duty.

Power to enter into a settlement agreement

31. The principal issue to be determined is whether the claimants (as Trustee and Delegate respectively) have the power under the DTA to enter into a settlement agreement with Saad and Maan, pursuant to which Saad and Maan would acknowledge a liability, enforceable in the KSA, for less than the amount due under the English Judgment.

32. The principles of construction applicable to an English law governed contract are well-established, and may be summarised as follows: the relevant words of a contract are to be construed in their documentary, factual and commercial context, assessed in light of: (i) the natural and ordinary meaning of the provision being construed; (ii) any other relevant provisions of the contract being construed; (iii) the overall purpose of the provision being construed and the contract in which it is contained; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense: *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [17] to [22], per Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hughes JJSC agreed).

33. I have already referred to the express declaration of trust contained in the DTA over, among other things, Golden Belt's interest in the Transaction Documents. Golden Belt's powers as Trustee are set out in clause 7 of the DTA. Clause 7.1 (after disapplying section 1 of the Trustee Act 2000, relating to trustees' duty of care) provides that the Trustee has all the powers conferred upon trustees by the Trustee Act 1925 and the Trustee Act 2000. In addition (by way of "supplement thereto") clauses 7.1.1 to 7.1.32 contain specific provisions relating to the Trustee's powers. These are subject to Clause 9.2, which provides that neither the Trustee nor the Delegate shall be bound to take any "Proceedings" in relation to the DTA or under the Promissory Note or the Payable Rental Promissory Note unless directly requested to do so by a "Certificateholder Direction".

34. The powers under the Trustee Act 1925 incorporated by reference under clause 7.1 include those conferred by section 15 of that Act which in turn includes, relevantly, the following:

> "A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee whereby the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed by him, may, if and as he thinks fit –
>
> …
>
> (d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or
>
> …
>
> (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to… the trust.
>
> And for any of these purposes may enter into, give, execute, and so such agreements, instruments or composition or arrangement, releases and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him if he has or they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000."

35. These powers, however, apply if and so far only as a contrary intention is not expressed in the DTA and otherwise have effect subject to the terms of the DTA: see section 69(2) of the Trustee Act 1925. If no such contrary intention is expressed, then the Trustee may exercise the broad power of compromise without the need to obtain the sanction of beneficiaries: *Re Earl of Strafford* [1980] 1 Ch 28, per Buckley LJ at pp.47D-48D.

36. Mr Salter QC and Ms Tulip have helpfully identified the following arguments potentially open to Certificateholders in opposition to the claim.

37. The first possibility is that a contrary intention is expressed in the DTA, by Condition 13(c), Schedule 2 to the DTA. Schedule 2 contains the terms and conditions of the Certificates. Condition 13(c) provides that no Certificateholder may proceed directly against Saad unless the Trustee or Delegate – having become bound to proceed in accordance with Condition 13(b) – has failed to do so for more than 60 days. It goes on to provide that:

> "Under no circumstances shall the Trustee or the Delegate or any Certificateholders have any right to cause the sale or other disposition of any of the Trust Assets unless an Extraordinary Resolution of the Certificateholders so resolves."

38. This is undoubtedly an express restriction on the Trustee's powers. I do not consider it, however, to be a restriction which prevents the claimants from entering into a settlement agreement with Saad or Maan on terms that less than the full amount of the English Judgment is acknowledged to be due. The phrase "sale or other disposition" is not apt to describe a compromise of the amount due under the Transaction Documents.

39. The second possibility is that the detailed provisions for meetings of Certificateholders, contained in Schedule 3 to the DTA, prevent the claimants from entering into a settlement with Saad and Maan without a resolution of Certificateholders.

40. This breaks down into two parts. First, that the exercise of the claimants' powers (in particular the power to compromise claims relating to the Trust Assets) are subject to the precondition that they have been authorised by a resolution of Certificateholders and, second, that the entry into a settlement agreement with Saad and Maan would constitute a "Reserved Matter", which can only be done if approved by Certificateholders holding not less than 90% in aggregate face amount of the Certificates for the time being outstanding. It is accepted that this is unachievable in practice. "Reserved Matters" is defined to include, relevantly:

> "any proposal to: (e) reduce or cancel any amounts payable in respect of the Certificates; … (h) change any of Saad's … covenants to make a payment under any Transaction Document to which it is a party."

41. The starting point is that, by clause 7.1.1 of the DTA, while the Trustee must, in exercising all powers, trusts and discretions vested in it by the DTA, have regard to the interests of Certificateholders as a class, it "…shall have absolute and uncontrolled discretion as to the exercise thereof…". While, as Mr Salter QC pointed out, this only relates to such powers that are vested in the Trustee by the DTA, those powers include the power to exercise all rights under the Transaction Documents and power to compromise any claims relating to them. Moreover, clause 7.1.10 of the DTA empowers the Trustee to exercise "any power, authority or discretion", whether or not it is specifically referred to in the DTA, if it is satisfied that the interests of the Certificateholders will not be materially prejudiced thereby.

42. By clause 5.1.1(d) of the DTA, all of the "duties, powers, trusts, authorities and discretions" vested in the Trustee are delegated to Citi as the Delegate and all references in (among other things) clause 7 of the DTA to the Trustee shall be construed as references to the Delegate.

43. The Delegate is not *obliged* to take any action under the DTA without first obtaining a Certificateholders' Direction (clause 5.3.1 of the DTA), but it *may* do so (see clause 5.1.4: "[i]n performing the duties, powers, trusts, authorities and discretions delegated to it, the Delegate is entitled to either seek a Certificateholders' Direction or exercise its own discretion").

44. A Certificateholders' Direction is defined as a direction by the Certificateholders to the Trustee and/or Delegate in the form of an Extraordinary Resolution or a written direction by Certificateholders holding at least 25% in aggregate face amount of the Certificates then outstanding (provided, in either case, that the Delegate is indemnified to its satisfaction against any liability incurred in acting upon the direction).

45. If the Delegate acts upon a Certificateholders' Direction it "shall be protected and shall incur no liability for or in respect of [such] action..": clause 5.3.8. Similar protection is afforded to the Trustee by clause 7.1.22: "the Trustee will not be responsible for having acted in good faith on a resolution purporting to have been passed at a meeting of Certificateholders…"

46. Any resolution to approve a Reserved Matter, however, may only be sanctioned by the consent of two or more Certificateholders holding or representing not less than 90% in aggregate of the principal amount of the Certificates then outstanding: see paragraph 21 of Schedule 3 to the DTA.

47. Mr Salter QC identified the following argument as one which could be made: based on the provisions of Schedule 3 a term is to be implied into the DTA to the effect that the claimants are not permitted to take action in relation to the Trust Assets, if that action would constitute a Reserved Matter, without authorisation from Certificateholders in accordance with paragraph 21 of Schedule 3; why, he asked rhetorically, would the limitations in respect of Reserved Matters be contained in Schedule 3 if the Trustee or Delegate were able to carry out actions that fall within the Reserved Matters without reference to Certificateholders? If the Trustee or Delegate had free reign in this way, it would create an uncommercial disincentive on them to seek approval from Certificateholders.

48. Although I see the force of this argument, I do not think it is correct. I consider the wording of the DTA to be clear in providing the Trustee/Delegate with an absolute and uncontrolled discretion to exercise the powers vested in the Trustee (clause 7.1.1). Those powers include the power to exercise all rights under the Transaction Documents and (by express incorporation of the Trustee Act 1925) the power to compromise any claim in respect of the Trust Assets. Moreover, the drafter has recognised the inter-play between the discretion afforded to the Trustee/Delegate and the approval of Certificateholders, and determined that it is up to the Delegate whether it wishes to proceed by exercising its own discretion, or by seeking approval of Certificateholders (see clause 5.1.4).

Moreover, where the drafter intended that the Trustee/Delegate cannot act without authorisation from the Certificateholder, that has been expressly stated: see Condition 13(c), referred to above, relating to sales or disposals of the Trust Assets. The absence of any such requirement anywhere else in the DTA or its schedules, coupled with the clear words providing the Trustee/Delegate with uncontrolled discretion in exercising their powers, makes it difficult in my judgment to impose such a requirement by way of implication.

49. This conclusion does not render schedule 3 without commercial purpose. If the Delegate chooses to seek approval of Certificateholders, then it has the benefit of the protection afforded by clause 5.3.8 of the DTA. This provides that it shall "incur no liability for or in respect of action taken, omitted or suffered in reliance upon … any Certificateholders' Direction…" There is a similar protection for the Trustee in clause 7.1.22 of the DTA. Moreover, the consequence of a Certificateholders' Direction is that it is binding, as a matter of contract, upon and as between all Certificateholders: see paragraph 19 of schedule 3. It is true that (as noted above) a trustee does not need the consent of beneficiaries to exercise the power of compromise conferred by section 15 of the Trustee Act 1925, but there may be in certain circumstances a benefit to Certificateholders being contractually bound in the way envisaged by that provision.

50. Accordingly, I consider that the limitations imposed by schedule 3 to the DTA on the power of Certificateholders to pass resolutions – in particular the limitation that a particular majority is required in order to pass a resolution in relation to Reserved Matters – do not result in an implied limitation on the Trustee's or Delegate's powers, trusts, authorities and discretions vested in them by the DTA.

51. For completeness, I note that Mr Salter QC argued in the alternative that if schedule 3 does impose a restriction on the powers of the claimants, since it does so only by way of implication, that means there is no contrary intention (to the power to compromise under section 15 of the Trustee Act 1925) "expressed in the instrument" (being the phrase used in section 69(2) of the Trustee Act 1925). Had it been necessary to consider it, I would not have accepted that argument, for which no authority was cited. From first principles, it seems to me that section 69(2) in referring to any contrary intention being "expressed in the instrument" is not intended to draw a distinction between "express" and "implied" terms. Rather, it is intended to refer to any contrary intention found in a trust instrument on its true construction (whether by reason of the term being an express one, or one to be implied from the instrument as a whole).

52. In light of my conclusion on this issue, it is unnecessary to consider whether the entry into a settlement agreement with Saad and Maan would constitute a Reserved Matter. While I accept Mr Salter QC's argument that a settlement under which a lesser sum is accepted than the amount due under the English Judgment would not fall within paragraph (e) of Reserved Matters ("…reduce or cancel any amounts payable in respect of the Certificates"), I consider it more difficult to determine in the abstract that a settlement would not fall within paragraph (h) ("…change any of Saad's … covenants to make a payment under any Transaction Document…"). This is an issue which would be better

determined by reference to the terms of a particular settlement agreement and, since the claimants are entitled to the declarations sought without reaching a determination on the issue, I will not attempt to resolve the issue in the abstract.

Power to vote in favour of a financial restructuring

53. It necessarily follows, from my conclusion on the principal issue, that the claimants also have power under the DTA to vote in favour of a restructuring proposal in the KSA Reorganisation Proceedings, notwithstanding that such a proposal would involve the claimants receiving less than the full amounts due to them under the English Judgment.