



Neutral Citation Number: [2023] EWHC 2605 (Ch)

Case No: FL-2023-000005

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

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 20/10/2023

**Before :**

**MR JUSTICE MILES**

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**Between :**

**MADISON PACIFIC TRUST LIMITED**

**Claimant**

**- and -**

**(1) SQUARETWO CAPITAL LIMITED**  
**(2) BASIL VASILOU**

**Defendants**

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**Andrew de Mestre KC & Donald Lilly** (instructed by **Allen & Overy LLP**) for the **Claimant**  
**Tom Smith KC & Clara Johnson** (instructed by **LK Law LLP**) for the **First Defendant**  
The **Second Defendant** did not appear and was not represented

Hearing date: 9 October 2023  
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**Approved Judgment**

**This judgment was handed down remotely at 10.30am on 20 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.**

**Mr Justice Miles :**

**Introduction**

1. The claimant is the Trustee under three deeds of trust dated 20 December 1985, 7 May 1987 and 14 July 1987, as subsequently amended (**the Trustee** and **the Deeds**). The Trustee replaced the original trustee in late 2021. The Deeds are governed by English law. They concern bonds issued by Bell Group N.V. (**the Issuer**) in the amounts of AUD75 million (payable in USD), AUD175 million and GBP75 million respectively (**the Bonds**). The Bonds are subject to terms and conditions which are also governed by English law (**the Conditions**).
2. The Issuer was incorporated in the Netherlands Antilles. Its obligations in respect of the Bonds were guaranteed by The Bell Group Ltd (**the Guarantor**), a company incorporated in Western Australia.
3. The Bonds are bearer instruments.
4. The Issuer defaulted on payments due under the Bonds in 1991.
5. The Issuer and the Guarantor subsequently entered insolvency processes in the Netherlands Antilles and Western Australia (as regards the Issuer) and in Western Australia alone (as regards the Guarantor). Both companies were later dissolved.
6. The Trustee's claim (on behalf of Bondholders) in the liquidation of the Issuer has been accepted in the amount of USD471,568,733.86.
7. The final distribution from the Issuer's liquidation was made on 9 May 2023, by which point the Trustee had received from the Issuer, in total, USD81,176,526.60. It has already distributed some of this but retains part.
8. The Trustee brought this claim under Parts 8 and 64 of the CPR for directions as to how it should apply the funds received by it from the Issuer's insolvency proceedings, which it holds on trust for the Bondholders.
9. The claim arises from two features: questions of interpretation about how the Deeds operate where there has been an insolvency of the Issuer; and the Trustee being unable to trace a number of the Bondholders who still hold their bonds physically rather than having deposited them in central securities depositories. The second feature arises from the bonds being bearer instruments (so that title depends on physical possession) and the long time since the Issuer's default.
10. Because of these features the Trustee is still holding significant amounts on trust which it has not been able to distribute to Bondholders.
11. The Trustee therefore seeks declarations and directions, principally:
  - (a) A declaration as to the meaning of "Relevant Date" under Conditions 8 and 9, which will determine if and when Bonds become void for non-presentation for payment.

- (b) A direction that the Trustee may lawfully convene meetings of the Bondholders of each bond issue for the purpose of amending Conditions 8 and 9 of the Bonds so that the “Relevant Date” occurs upon the Trustee having received all funds that it expects to receive from the Issuer’s liquidation and has given Bondholders notice of the availability of such funds for distribution in accordance with the Conditions; and reducing the “Prescription Period” in Condition 9 from 10 years to 2 years.
  - (c) A direction that it is lawful for only known Bondholders to vote at that those meetings of Bondholders in favour of the proposed amendments, notwithstanding any prejudice that may be caused by those amendments to unknown Bondholders.
  - (d) A direction that, in the event that the known Bondholders approve those amendments, the Trustee may lawfully administer the trusts in accordance with those amendments.
12. The evidence in support of the application, given by Mr Andrew Denny of the Trustee’s solicitors, refers to those Bondholders who are known and unknown to the Trustee under the descriptions **Known Bondholders** and **Unknown Bondholders**. Though these are convenient labels, they do not denote fixed classes. All Bondholders have the same rights under the terms of the relevant Bonds and Deeds. A given Bondholder may stop being unknown and become known simply by identifying themselves to the Trustee. No other qualification is required. Moreover it is inherent in the agreed structure, with bearer bonds held outside a depository, that a given holder may be unknown at any given time.
13. As the Trustee observes however an Unknown Bondholder who is now and in the future remains unknown may have interests which potentially diverge from those of the Known Bondholders. On one of the rival interpretations of the existing wording of the Bonds advanced by the parties the Bonds would have an indefinite life; on the other they would be liable to be avoided after a prescription period which has already started. And the proposed amendments will serve to introduce (at least on one analysis) and shorten (on any view) the prescription period for the valid presentation of Bonds and Coupons.
14. More specifically it would potentially be in the interests of Unknown Bondholders (through the interpretation of “Relevant Date” in their favour and the refusal of any amendment of the definition of that term) to obtain directions which would preserve them for as long as possible (and postpone for as long as possible any distributions from the trusts of monies which would otherwise be paid to Bondholders). At least arguably, the greater the time available for them to come forward or be identified, the more chance there is that they will be able to be identified and participate in distributions. This cannot go on forever as there would come a point where all of the money remaining would be used up in paying administrative costs and expenses and there would be nothing left for Bondholders, but the Unknown Bondholders would at least potentially have a greater chance of coming forward if the questions before the court are answered in their favour.
15. On the other hand, the descriptions of Known Bondholders and Unknown Bondholders are not fixed and it would be in the interests of currently Unknown Bondholders for the Deeds to be amended if those Bondholders then made themselves known to the Trustee

within the revised prescription period – they would not only be entitled to their existing share of the pot but would also benefit from the prescription period applying to others who did not make themselves known.

16. In order to address these potential conflicts or differences of interest the Trustee has arranged for the separate representation of Known Bondholders, with the Trustee advancing the arguments that would be available to Unknown Bondholders.
17. In November and December 2022, the Trustee provided notice to the Bondholders of its intention to commence the present claim by (a) sending a notice through the clearing systems containing the particulars of the intended claim to all Known Bondholders whose Bonds are held in such clearing systems, and (b) publishing that notice in each of the *Luxemburger Wort* and the *London Financial Times* (**the Bondholder Notice**), in accordance with the terms of the Deeds.
18. In response the First and Second Defendants, both Known Bondholders, contacted the Trustee indicating a willingness to act as the representative of the Known Bondholders on the basis that their reasonable legal costs in doing so be paid from the funds available to the respective trusts.
19. This led to a consent order of Marcus Smith J dated 12 April 2023 appointing the First Defendant (**D1**) as the representative of the Known Bondholders. The Trustee and D1 have exchanged position papers setting out their respective positions and these parties have served skeleton arguments. The Second Defendant (**D2**) did not serve a separate skeleton but has provided a witness statement. He has generally taken the same position as D1 but with the differences referred to below.

### **Efforts to trace Bondholders**

20. The proportion of Bonds held by Known Bondholders is 40.98% of the USD Bonds; 78.88% of the AUD Bonds and 86.81% of the GBP Bonds. The vast majority of these Bondholders hold their Bonds in either the Euroclear or Clearstream clearing systems.
21. The Trustee has taken a number of steps to identify Unknown Bondholders. These include the engagement of bondholder identification firm, IHS Markit (**IHS**) and a corporate advisory agency, Alliance Advisors. IHS have been unable to identify any Unknown Bondholders holding physical Bonds outside the Clearing Systems. The social media campaign carried out by Alliance Advisors resulted in four Unknown Bondholders coming forward, though only one of them has presented their Bonds for authentication.
22. In addition to the Trustee's efforts, repeated attempts have been made by the Issuer, the previous trustees and others to contact Bondholders over the last 30 years. These are described in detail in the first statement of Mr Lipman served on behalf of D1. They include the publication of numerous notices in the *Financial Times*, the *Luxemburger Wort* and through the clearing systems, the convening of several meetings of bondholders, and numerous references to the Bonds in publications and judgments relating to various legal proceedings and settlements involving the Issuer, which have ensured that information in relation to the Bonds is in the public domain. These extensive efforts have resulted in little or no success.

23. I am satisfied by the evidence that all reasonable steps have been taken to trace Bondholders and that the likelihood of more coming forward now is fairly remote.

### **Legal principles**

24. There was little dispute about the principles.
25. The starting point is the well known classification in the passage from the judgment of Robert Walker J in *Law Debenture v Egerton Trust* quoted by Hart J in *Public Trustee v Cooper* [2001] WTLR 901 at 923.
26. It was agreed that (to the extent they need to be decided) the claim for a declaration about the meaning of the existing words falls within category (1) and that the application for directions falls within category (2).
27. I am satisfied that the Trustee has not surrendered its discretion in relation to the latter as the Trustee has already made decisions on how to proceed and is seeking the court's approval.
28. The principles of contractual interpretation have been set out in a series of well-known statements by the House of Lords and Supreme Court over the last 25 years or so and I shall not cite from them here, but shall follow their guidance. The task of the Court is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement, reading the agreement as a whole in the factual and legal context, and having regard to both the commercial sense as well as the ordinary meaning of the words and syntax.
29. As to *Public Trustee* category (2), where a trustee seeks to have its intended exercise of discretion blessed, the role of the court and the scope of its review is more limited than where a trustee surrenders its discretion to the court altogether: see *Edge v Pensions Ombudsman* [1998] Ch 512, 534B-H per Sir Richard Scott V-C, as approved by the Court of Appeal [2000] ICR 748, 771E-774D). The court's task is not to determine whether it would exercise the Trustee's discretion in the same manner as proposed by the Trustee, but whether the Trustee is (i) acting within its powers and (ii) not conducting itself in a manner that no reasonable body of trustees would act. Further, the court is not concerned to ascertain whether the Trustee's course is the best available, but instead need only be satisfied that the course of action for which directions are sought is not so unreasonable that no reasonable body of trustees could have reached that decision in all the circumstances.

### **Relevant terms of the Bonds**

30. Though there are some small differences in the words of the three Deeds the parties agreed that nothing turned on these. The submissions were made (with one exception – see below) using the terms of the USD Bonds.
31. That Deed, dated 20 December 1985, provided for the payment of principal (or redemption) on 10 December 1995 or such earlier date as the principal sum became repayable. Early redemption could be involuntary in the event of default and acceleration, or voluntary at the option of the Issuer. Payments of principal fell to be made against presentation of the Bonds. The Bonds bore interest at 11 per cent per

annum. Payment of interest was to be made against presentation of the relevant Coupons (being physical documents).

32. Condition 9 (headed “Prescription”) provided that,

“Bonds and Coupons will become void unless presented for payment within a period of ten years and five years respectively from the Relevant Date therefor, as defined in Condition 8.”

33. Condition 8 provided materially that,

“... As used herein the “Relevant Date” means:-

(i) the date on which such payment first becomes due; or

(ii) if all moneys then due for payment shall not have been paid to the Principal Paying Agent or the Trustee on or prior to such due date, the date on which all such moneys shall have been so paid and notice to that effect shall have been duly published in accordance with Condition 13.”

34. Condition 13 provided for the manner in which notices were to be given (essentially by being published in a leading daily paper circulating in Luxembourg and London.)

35. Clause 6 of the Deeds provided for subordination of the Bonds. Clause 6(2) provided materially that,

“(2) In the event of the winding-up of the Issuer the claims of the Bondholders and the Couponholders against the Issuer in respect of the Bonds and Coupons shall be postponed to the Relevant Claims and accordingly no amount shall be payable by the Trustee to the Bondholders or the Couponholders until the extent of the Appropriate Amount has been finally established and it has been distributed as hereinafter provided and any amounts paid to the Trustee in the winding-up of the Issuer shall be held by the Trustee upon trust:-”

(i) FIRST for application in payment or satisfaction of the costs, charges, expenses and liabilities incurred by the Trustee in or about the execution of the trusts of these presents (including any unpaid remuneration of the Trustee);

(ii) SECONDLY (to the extent only of the Appropriate Amount) for distribution in satisfaction of Relevant Claims which have not been satisfied in full out of the other resources of the Issuer (if any); and

(iii) THIRDLY in or towards payment pari passu and rateably of the principal moneys and interest due upon the Bonds and the Coupons (to the respective extents that the Trustee’s claims in respect thereof shall be admitted in such winding-up).

The said trust in favour of all creditors who have Relevant Claims may be performed by the Trustee by repaying to the Liquidator the amount to be so distributed and paid, on terms that the Liquidator shall distribute and pay the same accordingly, and in that event the receipt of the Liquidator shall be a good discharge to the Trustee and the Trustee shall not be bound to supervise or be in any way responsible for such distribution or payment.”

36. The “Relevant Claims” were the claims of all other creditors of the Issuer as at the date of the winding up and admitted to proof.
37. Clause 6(4) provided that the Trustee should be entitled (but only entitled – and to the exclusion of the Bondholders and Couponholders) to petition for the winding up of the Issuer and participate in its winding up.
38. Clause 12 of the Bonds, which was expressed to be subject to clause 6, provided for the application of monies received by the Trustee in respect of amounts received in respect of the Bonds. In summary and so far as material, the waterfall under that clause was, first, the Trustee’s costs and expenses, second, arrears of accrued interest and principal and, third, repayment to the Issuer.

**First Issue: the “Relevant Date”**

39. The first issue concerns the time at which the Bonds become void, which in turn depends upon the construction of “Relevant Date” as defined by Conditions 8 and 9.
40. It is common ground that the principal amount of the Bonds first became due in 1991 when the Bonds were accelerated. It is also common ground that the Trustee has not been paid in full by the Issuer or Guarantor, nor will it ever be paid sufficient sums by them to discharge in full the sums due to the Bondholders.
41. It is also common ground that the office holder in the winding up of the Issuer has now made a final distribution and that no further payments will be received by the Trustee. The Trustee indeed sent a notice to Bondholders informing them of this final receipt in August 2023.
42. The question of interpretation is whether, in these events, the Relevant Date as currently drafted can occur at all and, if so, when.
43. The Trustee submitted, first, that the combined effect of the language of these Conditions is that the entirety of the sums contractually due for payment from the Issuer to the Bondholders must be paid before the Trustee can give the requisite notice to start the 10-year period to render unrepresented Bonds void. “Such payment” in Condition 8 is the payment of the entire outstanding principal of the Bonds on acceleration and, therefore, “all moneys then due for payment” are that same amount. It is irrelevant whether or not the Issuer or the Guarantor are able to make such payment. The focus is on what is due, not what can be paid.

44. Second, and following the analysis set out above, the “Relevant Date” does not occur on the Trustee receiving a final distribution from the Issuer where that distribution is not sufficient to discharge all sums due from the Issuer to the Bondholders:
- (a) Although Condition 8(i) provides that the “Relevant Date” occurs upon the date when payment of a particular sum (in this case the principal on the Bonds) becomes due, the opening words to Condition 8(ii), namely “if all money then due for payment shall not have been paid”, provide that Condition 8(i) only applies if the Issuer has not defaulted in paying the Bondholders. If the Issuer has defaulted, as in this case, Condition 8(ii) applies.
  - (b) Condition 8(ii) requires “such moneys” to have been paid prior to the Trustee giving notice of payment to the Bondholders. The words “all such moneys” refers back to the phrase “all moneys then due for payment”. In other words, the totality of the sums due under the Bonds. There is no scope to interpret these words as applying to a partial payment of a greater amount that is due.
  - (c) The effect of these Conditions is, accordingly, that the “Relevant Date” will never occur since the Issuer (and Guarantor) will never be in a position to repay the Bonds in full. As a consequence, the 10-year time period under Condition 9 will never start running. The Trustee seeks category (1) relief in the form of a declaration that its construction of Conditions 8 and 9 is correct.
45. The Trustee accepted that this reading might be viewed as commercially surprising or unreasonable. This was however a lacuna or anomaly and did not allow the court to rewrite the contract.
46. D1’s primary submission was that the court does not need to resolve the question of interpretation. The Trustee is in any case proposing amendments to Conditions 8 and 9 which will put the matter beyond doubt. Those amendments are highly likely to be passed. There is no need for a declaration as to the meaning of the existing clauses.
47. D1’s secondary submission was the phrase “then due for payment” (in Condition 8(ii)) refers to the amount which Bondholders are entitled to receive by way of payment under the Deeds. In other words, the clauses are referring to the amount which is actually payable under the Bonds at the point in time when that sum becomes due for payment.
48. If the Issuer (or Guarantor) is solvent, the position is straightforward. The Relevant Date will be the date on which the Bond or Coupon falls due for payment and is paid pursuant to Condition 8(i). Alternatively, in the event that payment is made late, Clause 3(A)(iv) and (v) provide that the overdue amount together with accrued interest must be paid to the Trustee and the Trustee must give notice that the funds are available for payment. The Relevant Date is that date of that Notice pursuant to Condition 8(ii). In both cases, the Relevant Date is the date when Bondholders are given notice that funds are available for collection upon presentation of their Bonds (or Coupons).
49. On the insolvency of the Issuer, Bondholders can neither present their Bonds for payment, nor take action against the Issuer seeking payment of their debts. In any insolvency the Bondholders’ entitlement to payment under the Deeds becomes subject to the payment waterfall under clause 6(A) of the Deed. As a result, on and from the insolvency of the Issuer, the “moneys then due for payment” to Bondholders comprise



the Bondholders' entitlement under Clause 6(A) of the Bonds. That amount was paid in full upon payment of the Final Payment from the Issuer to the Trustee on 9 May 2023. There is (objectively) no possibility of a further payment to the Trustee.

50. D1's construction of clause 8(ii) is both commercially sensible and ensures that the Trust Deed operates rationally in circumstances where the Issuer and Guarantor are insolvent. Specifically this interpretation avoids the commercial anomaly that the prescription period would apply so the Trust could be wound down in an orderly way if the liquidation of the Issuer resulted in the trustee being paid in full, whereas it would not apply (requiring that that the trust remain open indefinitely) if the liquidation only paid 99c/\$.
51. Moreover the Trustee's interpretation leads to the potential absurdity of the Trust continuing in perpetuity with the remaining sums in the Trustee's hands being gradually eroded in fees until nothing is left.
52. D1 also referred to authorities which showed that where a debtor is dissolved the debt itself disappears. D1 argued that this consideration supports its interpretation of Condition 8. The Trustee accepted the proposition of law but said that it threw no relevant light on the issue of interpretation: Condition 8 refers to the amounts contractually due and these became payable before the dissolution of the Issuer.
53. The first issue is whether the court should (as the Trustee submitted) decide this point of interpretation or (as D1 submitted) decline to answer it.
54. I have decided that the Court should determine the point. This is for two main reasons. First, the Court's conclusion about the meaning of the unamended Deeds may have an impact on the Court's view as to the appropriateness of the proposed amendments. If the Relevant Date has already arisen the amendments would naturally be less invasive than if it has not.
55. Second, the current interpretation has a bearing on another issue between the parties, namely, the effectiveness of a notice already given by the Trustee to Bondholders in August 2023 concerning the receipt of final payment by the office-holder in the Issuer's winding up. As counsel for D1 argued, that issue (which is addressed below) is likely to be affected by the Court's view about the interpretation of the unamended Deeds. Logically one cannot approach that issue without deciding the meaning of the unamended Deeds.
56. On the question of interpretation I prefer the submissions of the Trustee.
57. It seems to me that the words and syntax of the definition in Condition 8(ii) are clear and unambiguous.
58. Grammatically, sub-condition 8(ii) consists of a subordinate clause and a main clause. The reference in the subordinate clause to "all monies then due for payment" can only sensibly be a reference back to the amount payable on "the date on which such payment first becomes due" (the phrase used in sub-condition (i)). The phrase "such payment" is in turn a reference to the payments of principal and interest due to be made contractually by the Issuer or Guarantor as the case may be (see the opening words of Condition 8). The reference in the main clause of sub-condition (ii) to "all such

moneys” can only sensibly then be the phrase “the monies then due for payment” used in the subordinate clause.

59. It follows as a matter of syntax that the Relevant Date arises only on receipt by the Principal Paying Agent or Trustee of the monies contractually due for payment in accordance with the Bonds and Coupons. And it only arises when all such moneys have been received by the Principal Paying Agent or the Trustee.
60. D1’s submission was (in summary) that the phrase “all moneys then due for payment” did not necessarily refer to a static date but could refer to the amounts payable from time to time. In the case of an insolvency, by virtue of clause 6(A)(2) the amount payable to Bondholders was that specified in sub-clause (iii), namely the remnant of the final receipts in the insolvency of the Issuer after payment of the costs charges, expenses and liabilities of the Trustee and the amount of the Relevant Claims (if any) of the prior creditors of the Issuer. D1 submitted that it was possible to read the words “all moneys then due for payment” as a reference to that remaining amount.
61. In my judgment this is not an available reading of the definition in Condition 8, read in conjunction with Clause 6. Sub-clause 6(A)(2) is not concerned with the amounts due from the Issuer to the Bondholders. Rather it creates a new subordination turnover trust in the event of the Issuer’s insolvency. In short Clause 6 creates a trust whereby the Trustee is required (after deductions) to hand its receipts over to the unsubordinated creditors (if any) of the Issuer. Bondholders come last in the Clause 6 waterfall. But sub-clause 6(A)(2) does nothing to cut down the amount of the obligations owed by the Issuer on the bonds.
62. Indeed clause 6(A) assumes that (and only works effectively because) the Trustee will be entitled to prove in full in the winding up of the Issuer for the entire amounts outstanding on the Bonds, and not for some lesser sum.
63. D1 also drew attention to clause 6(A)(4), which contains a non-action clause preventing the Bondholders from taking their own action and restricting the Trustee to taking only winding up proceedings against the Issuer. However that clause does not affect the amounts due and payable under the Bonds, it simply controls the remedies of the Trustee and Bondholders and is part of the subordination structure: it is designed to prevent leakage from the turnover trust created by sub-clause 6(A)(2).
64. As the Trustee pointed out, the trust in sub-clause 6(A)(2) replaces the usual priorities of payment in Clause 12, which applies where the Issuer is solvent. That refers to “the amounts payable” under the Bonds, Coupons and the Deeds.
65. Returning to Condition 8, I am unable to accept the submission that the phrase “all moneys then due for payment” in the subordinate clause, or the phrase “all such moneys” in the main clause, can be read as a reference to the amounts (if any) held on trust for the Bondholders under clause 6(A)(2)(iii). Condition 8 is concerned with the amounts contractually due for payment from the Issuer (or the Guarantor) under the Bonds (and Coupons); it is not concerned with the obligation of the Trustee to make payments to the Bondholders. This is clear, not least from the fact that the triggering event under the definition is the receipt by the Principal Paying Agent of the Trustee of the moneys. Moreover, as just explained, there is nothing in clause 6(A) which cuts down the contractual obligations of the Issuer to pay the moneys due under the Bonds.

The Trustee proves in full and receives whatever dividend is available. Clause 6(A)(2) simply creates a subordination trust to give effect to the agreed (subordinated) priority of payments on insolvency.

66. In short I consider that the wording and syntax of the definition of the Relevant Date in Condition 8 unambiguously compel one reading: the Relevant Date arises only when the Trustee or Principal Paying Agent has received all the amounts of principal and interest contractually due under the Bonds, and the Trustee has given notice to that effect under Condition 13.
67. Since the full amounts due under the Bonds have not been paid, the Relevant Date cannot have arisen.
68. This may lead to the anomaly identified by the parties that in the events which have happened there will be no prescription under Condition 9 because the relevant periods can never start to run. The trusts created by the Deeds will therefore continue indefinitely and the funds in the hands of the Trustee will be eroded by fees and expenses. However it seems to me that this is one of those cases where the words are clear and unambiguous and the drafter has simply not thought about what would happen upon the occurrence of certain events which have in fact come to pass. Where the words are clear and unambiguous, commercial sense is not a solvent. It does not empower the court to rewrite the words to fashion a reasonable outcome, however tempting that may be.
69. I also accept the submission of the Trustee that the dissolution of the Issuer after its insolvency makes no difference to the interpretation of the Conditions, for the reasons given by the Trustee and recorded above.
70. For these reasons I determine the first issue in favour of the reading advanced by the Trustee.

**Proposed amendment of Condition 8(ii)**

71. The Trustee intends to convene meetings of the Bondholders of each Bond issue and to propose the following amendment to Condition 8(ii):

“(ii) if all moneys then due for payment shall not have been paid to the Principal Paying Agent or the Trustee on or prior to such due date, the date on which all such moneys, or all such moneys that the Trustee (in its sole discretion) determines it is ever reasonably likely to receive in respect of the Relevant Bonds or Coupons, shall have been so paid and notice to that effect shall have been duly published in accordance with Condition 13.”

(Amendments underlined.)

72. The Third Schedule to the Bonds includes these terms:
  - (a) Clause 2 provides that the Trustee may convene a meeting of Bondholders.

- (b) Clause 3 provides that the Bondholders must be given at least 21 days' notice of any meeting so convened and that such notice must be given in accordance with Condition 13.
  - (c) Clause 5 sets out the requirements for passing a resolution at a Bondholders' meeting as an extraordinary resolution. For such a resolution to be passed, there must be at least two or more Bondholders present at the meeting who represent a clear majority in principal amount due under the relevant Bond issue.
  - (d) Clause 6 provides that if a Bondholder meeting is not quorate, it will stand adjourned for 14 to 42 days with a further notice sent to Bondholders of the adjourned meeting. The adjourned meeting shall be quorate, even to pass an extraordinary resolution, provided that two or more Bondholders are present.
  - (e) Clause 18(C) provides that, at a quorate meeting of Bondholders properly convened, the Bondholder may assent to any modification of the Deeds or Conditions proposed by the Trustee as an extraordinary resolution.
73. I am satisfied that the Trustee has the power to convene a meeting of Bondholders for the purposes of proposing an amendment to Condition 8(ii), notwithstanding the fact that a number of the Bondholders are unknown.
74. The Trustee considers that it is a proper exercise of the Trustee's powers to convene a meeting of Bondholders in respect of each of the three classes of Bonds for the purpose of proposing in each meeting the above amendment to condition 8 in circumstances where:
- (a) Without that amendment, the Trusts would continue unless and until each and every Bondholder presented to the Trustee their physical Bond certificate so that a distribution of their pro rata share of distributions from the Issuer could be made to them.
  - (b) There is on the evidence no realistic prospect that each and every Bondholder will so present their Bond certificates, and thus there is no realistic prospect of the Trustee being in a position to effect a distribution to each and every Bondholder of their pro rata share of distributions from the Issuer, in circumstances where: the Bonds are bearer bonds so there is no means to identify who the Unknown Bondholders are without the Unknown Bondholders presenting the physical Bond certificates to the Trustee; the Unknown Bondholders have not presented their Bond certificates to the Trustee, notwithstanding the very significant passage of time since payment under the Bonds became due and the advertisement of intended distributions in accordance with Condition 13; and the Trustee has undertaken additional steps beyond that required under Condition 13, including advertising on social media and through other electronic means that are more likely to come to the attention of the Unknown Bondholders than the contractually required newspaper advertisements.
  - (c) Hence, without the proposed amendment to condition 8, the Trusts will continue until such time as the sums representing the amounts due to the Unknown Bondholders are depleted by ongoing costs of administering the Trusts.

- (d) It is not in any Bondholder's interests for such sums to be expended on the costs of administering the Trusts. By effecting the amendment, the Trustee will be able to distribute the sums remaining in the Trust to the Known Bondholders on the expiry of the prescription period after the final distribution from the Issuer's liquidation. The amendment ensures that such sums are applied to Bondholders, rather than to the payment of ongoing costs and expenses of the Trusts.
75. The question for the court on this application is whether it considers that, in reaching that decision, the Trustee has taken into account irrelevant matters, or has failed to take into account relevant matters, and it has reached a decision that no reasonable trustee could reach.
76. I am satisfied that the Trustee has reached a proper decision within these parameters. As the Trustee has explained, without the proposed amendment, the trusts would continue until each and every Bondholder presented its physical bond certificate to the Trustee. Given the passage of time since the default in 1991 and the fact that numerous Bondholders have not been identified despite the very significant efforts to do so, there is no realistic prospect that each and every Bondholder will be able to present their Bonds. The alternative to the Trustee's proposal is that the remaining funds in the hands of the Trustee will gradually be eroded in fees. I am satisfied that that would not be in the interests of the class of Bondholders as a whole.
77. I am also satisfied that the Trustee is justified in seeking category (2) approval of its decision to convene a meeting of Bondholders for the purpose of approving the amendment set out above to Condition 8(ii) as the step may be properly regarded as sufficiently momentous where the effect of the amendment (if approved by Bondholders) would be to make it possible that Unknown Bondholders' Bonds would be voided pursuant to Condition 9, where they would otherwise not be.

### **Proposed amendment of Condition 9**

78. The Trustee has decided to propose an amendment to Condition 9 at the same meeting convened for the purpose of amending Condition 8. The proposed amendment is to reduce the prescription period for the Bonds from 10 years to 2 years as follows:

“Bonds and Coupons will become void unless presented for payment within a period of ~~ten years and five years respectively~~ two years from the Relevant Date therefor, as defined in Condition 8.”

79. The reasons for the Trustee deciding to propose that amendment are in summary:
- (a) As already set out above, the Unknown Bondholders have had decades to make themselves known to the Trustee (or its predecessor), but have not done so.
- (b) The Trustee has already advertised the need for Unknown Bondholders to identify themselves to the Trustee (see above).
- (c) There is accordingly little prospect that any Unknown Bondholders will identify themselves within the additional 8 years provided for under the unamended Condition 9.

- (d) During the additional 8 years which would apply absent the proposed amendment, the Trustee will continue to incur costs and expenses in administering the Trusts in accordance with its terms of engagement, which will ultimately diminish the funds available for distribution to the Known Bondholders, who already have suffered significant losses as a result of the Issuer and Guarantor being unable to satisfy their obligations under the Bonds.
80. I am satisfied that category (2) approval of the Trustee's decision should be given. This is essentially for the same reasons as given in [76] and [77] above.
81. D1 and D2 submitted that the proposed amendment should impose a shorter prescription period of 9 or even 6 months. However the Trustee's position is that the period of two years properly balances the interests of the Known Bondholders (to avoid spending, as costs and expenses, funds that ultimately are likely to be distributed to them) and the interests of Unknown Bondholders (to have an appropriate period in which to present their Bond certificates for payment).
82. The application before me is for category (2) approval. The Trustee has not surrendered its discretion to the court. The question for the court is whether the Trustee has made a proper decision in the sense described in the case law (not taken into account irrelevant matters, failed to take into account relevant matters, or reached a decision that no reasonable trustee could reach). The question of the length of the proposed prescription period is not at large and the court is not being asked to exercise any original discretion of its own. The proposal of a shorter prescription period would only arise if the court had concluded that the Trustee's decision was flawed in the above sense and the question arose whether there was a different decision which would not be flawed in the same way. I have concluded that the Trustee's decision is a rational one in the sense described above, so the suggested alternative periods do not arise for consideration.

### **A further amendment**

83. After the exchange of position papers and in corresponding with potential Bondholders who have responded to the Trustee's social media campaign, the Trustee realised that there is an additional term (Condition 7(D) of the USD Bonds) which provides a ten year prescription period for the payment of coupons in circumstances where deductions are made from a payment due to the failure of a Bondholder in presenting coupons along with the Bonds.
84. Condition 7(D) reads as follows:
- “The Bonds should be presented for redemption together with all unmatured Coupons, failing which the face value of the missing unmatured Coupons will be deducted from the sum due for payment. The amounts so deducted will be paid against the surrender of the relevant Coupons within ten years from the Relevant Date, as defined in Condition 8, in respect of such Coupon.”
85. The Trustee is concerned that this term could have the effect of causing the trusts to continue for a ten year period notwithstanding the proposed amendment to Condition 9. Accordingly, and for the same reasons as it intends to propose an amendment to

Condition 9, the Trustee intends to seek the amendment of Condition 7(D) by the replacement of the ten year period with a two year period.

86. The Trustee thus seeks a category (2) blessing of its decision to propose an amendment to Condition 7(D) to reduce the prescription periods to two years. This matches the proposed change to Condition 9, which I have already addressed.
87. There is in my view a reasonable argument that since the dates of all Coupons (which have on their face a contractual payment date) have now passed, this clause can have no application – in other words there would be no deduction to be made from payments to the relevant Bondholders.
88. However I do not think that there can be any objection to the proposal of amendments to tidy things up. It will be for the Bondholders to decide whether to pass these resolutions. I shall therefore approve the Trustee’s decision to propose this amendment.
89. There is a slight difference in this respect between the wording of the USD Bonds and the other Bonds. The relevant clauses of the other Bonds (Condition 7(C)) do not refer to the term Relevant Date. Instead they state:

“The Bonds should be presented for redemption together with all unmatured Coupons, failing which the face value of the missing unmatured Coupons will be deducted from the sum due for payment. The amounts so deducted will be paid against the surrender of the relevant Coupons within ten years from the date on which such Coupons would otherwise have fallen due”

90. Again I consider that the Trustee’s decision to propose the same amendment in relation to this condition is reasonable and justified, in order that there is consistency between the various issues of Bonds. I shall approve it.

### **Voting by Bondholders**

91. Unknown Bondholders will not be present at any meeting at which the proposed amendments are considered and potentially approved. The Trustee has therefore considered whether it would be unlawful for the Known Bondholders present at that meeting to vote in favour of the amendments. Although voting is a matter for the individual Bondholders concerned, the Trustee has considered this question because it would not be a proper exercise of its discretion to propose amendments in relation to which any approval would be unlawful.
92. The Trustee therefore seeks category (2) relief to the effect that it would be lawful for the Bondholders present at the meeting to approve the proposed amendments to Conditions 7, 8 and 9; or confirmation from the Court that any category (2) relief granted in respect of its decision to convene a meeting of Bondholders and table the proposed amendments is on the basis that such amendments could be lawfully approved by the Known Bondholders.
93. In this regard I shall follow well-known principles exemplified by *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch) and *Re the Co-Operative Bank* [2017] EWHC 2269 (Ch).

94. I am satisfied that the Known Bondholders voting in favour of the amendments would be lawful.
95. First, as already explained the descriptions of Bondholders as Known or Unknown are not fixed. Any holder can become Known by identifying themselves. The Bonds of Unknown Bondholders would only be rendered void if they continue to fail to identify themselves, which is something that is in their power to do. This is not a case where one group of holders is seeking unfairly to do down another.
96. Second, there is an existing agreed prescription period of 10 years. The Bondholders would have anticipated payment at the contractually agreed dates at the latest – those passed some decades ago. It is only because of the lacuna now identified in the drafting of the Bonds that the proposed amendments are now being proposed at all.
97. Third, the proposed amendments would not expropriate or otherwise extinguish any Bondholders' rights. Nor do the proposed amendments seek to intimidate or coerce Bondholders into any form of action contrary to their interests. Even if the amendments are approved, all Bondholders would still have two years to present their Bonds for payment.
98. Fourth, the proposal must be seen in the light of the steps that have been taken by the Trustee and its predecessors and by the Issuer and others to identify Bondholders over many decades. Those efforts have led to a small number of Bondholders coming forward. On the evidence there is a very remote prospect of further Bondholders coming forward. Against this is the need to balance the potential prejudice to all Bondholders (seen as a class) from the erosion of the remaining funds through the ongoing fees and expenses of the Trustee. The Trustee has satisfied itself for the reasons already given that the proposed amendments would be in the interests of Bondholders as a whole and I consider that the Trustee's determination is a proper one in the sense described above.
99. Fifth, as already explained, the Trustee considers that the amendments strike a balance between the interests of both Known and Unknown Bondholders and seek to minimise the prejudice to both classes. If the amendments were not approved, while that might be of very marginal, theoretical, benefit to the Unknown Bondholders, it would (without doubt) very seriously prejudice the Known Bondholders. Again I consider that the Trustee's determination is a proper one.

**Has the Relevant Date already arisen for the purposes of the proposed revised Condition 8?**

100. This issue arises on the assumption that the proposed amendments are made to Condition 8.
101. It comes about in this way. The Trustee sent a notice to the Bondholders on 18 August 2023 recording the amounts received from the insolvency officer of the Issuer and stating that these amounts comprise all final amounts that the Trustee expects to receive in the winding up of the Issuer.
102. D1 submitted that this notice would satisfy the requirement in the proposed revised Condition 8 for a notice under Condition 13 stating that the Trustee had determined that it had received all amounts is ever reasonably likely to receive in respect of the Relevant



Bonds or Coupons. D1 said that this was justified if it was correct in its interpretation of Condition 8, since the amendment would simply be putting beyond doubt what was already there. D1 did not suggest that it would be appropriate for the amendment to operate retrospectively if it was wrong on the interpretation issue.

103. The Trustee submitted that any amendments should only operate prospectively and that if the existing wording of Condition 8 had not yet given rise to a Relevant Date, the proposed prescription period should run only from the time the amended version became effective.
104. In the light of my conclusion about the correct interpretation of the existing Condition 8, I consider that the Trustee's position is to be preferred.

### **Future Administration**

105. The Trustee seeks a category (2) blessing of its decision to administer the trusts in accordance with the proposed amendments to Condition 8 and 9 if they are approved by the Bondholders at a properly convened meeting.
106. In light of my earlier conclusions I shall grant this relief too.

### **Conclusions**

107. I shall make a declaration in the sense set out above and shall approve the steps proposed by the Trustee.