Neutral Citation Number: [2020] EWCA Civ 521

Case No: A3/2019/0928

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Sir Geoffrey Vos CHC
[2019] EWHC 778 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE FLAUX
and
LADY JUSTICE ASPLIN DBE

- -

Between :

BARINGS (UK) LIMITED	**Defendant/ Appellant**
- and -	
DEUTSCHE TRUSTEE COMPANY LIMITED (1)	**Claimant/ Respondent**
- and -	
DUCHESS VI CLO BV (2) **NAPIER PARK EUROPEAN CREDIT OPPORTUNITIES FUND LIMITED (3)**	**Defendants/ Respondents**

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David Railton QC and **Jeremy Goldring QC** (instructed by **Dentons UK and Middle East LLP**) for the **Appellant**
Stephen Robins (instructed by **Allen and Overy LLP**) for the **First Respondent**
David Wolfson QC and **Andrew de Mestre QC** (instructed by **Collyer Bristow LLP**) for the **Third Respondent**
The **Second Respondent** did not appear and was not represented

Hearing dates : 17 & 18 March 2020

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Approved Judgment

COVID-19 PROTOCOL

This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to the British and Irish Legal Information Institute (BAILII) for publication. Copies were also made available to the Judicial Office for dissemination. The date and time of handing down shall be deemed for all purposes to be 4pm on Thursday 9 April 2020.

Sir Terence Etherton MR, Lord Justice Flaux, and Lady Justice Asplin DBE :

1. This is a short form judgment: see *Cheyne Capital (Management) UK (LLP) v Deutsche Trustee Company Limited* [2016] EWCA Civ 743.

2. The relevant facts are set out in an Agreed Statement of Facts and in the judgment of the Chancellor at [2019] EWCA 778 (Ch) from which this is the appeal.

3. We dismiss the appeal for the following reasons.

4. The relevant principles of interpretation were correctly summarised by the Chancellor at [28]-[32] of his judgment, and were based on the principal cases, namely *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1WLR 2900, *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, and *Wood v Capita Insurance Services Limited* [2017] UKSC 244, [2017] AC 1173.

5. The definition of the Incentive Collateral Management Fee ("the ICMF") states expressly that the ICMF is payable in accordance with Condition 3 (of the terms and conditions of the Class F Notes). That is consistent with the definition of Cumulative Subordinated Income ("CSI"), which cross-refers to the ICMF and expressly refers to, and only expressly refers to, Condition 3.

6. The appellant's interpretation of the definition of the ICMF as extending to distributions pursuant to Condition 7 and Condition 11, as well as Condition 3, is also inconsistent with the words in parenthesis in the definition – "(after taking account of the interest to be paid to the Class F Secured Income Noteholders on that Payment Date)", which is mirrored in Condition 3(c)(ii)(II), refers only to interest and not capital and both states and restricts what distribution "on" the Payment Date is to be taken into account.

7. The appellant's case requires the ICMF definition to be read either ignoring references to Condition 3 completely or as implicitly including references to Condition 7 or Condition 11 wherever there is a reference to Condition 3. That would not be interpreting but re-writing the definition. Condition 3 and Condition 11 are quite different in material respects, not only in the order of distribution but in the fact that the Class F Secured Income Threshold ("the SIT"), which forms part of the definition of the ICMF, is expressly mentioned in, and is a material criterion in, the Condition 3 waterfalls but is not mentioned at all in Condition 11. We do not accept that the significance of this point is negated by the happenstance that the SIT is incorporated in the ICMF and the Collateral Manager Termination Amount ("the CMTA") or by the argument that, under Condition 11, unlike Condition 3, the Class F Noteholders are only paid after the ICMF has been paid.

8. We reject the appellant's argument that, by tracing through the definitions of "Interest Proceeds", "Principal Proceeds", "Due Period" and "Payment Date", and by reference also to the prospectus, it can be seen that the Interest Proceeds and the Principal Proceeds mentioned in the definition of CSI are amounts distributable under the Condition 11 waterfall and not just Condition 3 and so CSI should be viewed accordingly. The fact remains that the definition of CSI is expressly stated to be "in respect of the [ICMF]" and only refers to Condition 3. In order to accommodate the appellant's interpretation of CSI, for the purposes of the calculation of the ICMF, it

would be necessary to read the references in the definition of CSI to particular provisions within Condition 3 as references to the liabilities in those provisions and the corresponding liabilities in Condition 11 irrespective of any differences in the order of priorities. This convoluted exercise of interpretation and implication is inconsistent with the express wording of the definition of CSI and assumes, contrary to the indications elsewhere in the documentation (as to which see below), that the drafter was not conscious of, and particular in referring to, the different priority regimes under Condition 3 and Condition 11. It amounts to a comprehensive re-writing of the definition. As CSI is an integral part of the ICMF definition, it is not possible to interpret or apply the ICMF definition in the way for which the appellant contends.

9. We reject the appellant's argument that it is necessary to interpret the ICMF definition in the way for which the appellant contends because clause 14 of the Collateral Management Agreement ("the CMA") provides that the sums specified in that clause (the Base Collateral Management Fee and the ICMF) shall be paid on each "Payment Date", and "Payment Date" is defined as including "any Redemption Date", which is itself defined to include "each date specified for redemption of the Notes of a Class pursuant to Condition 7 (*redemption*)". The CMA and related documents contain a variety of provisions dealing with redemption in different circumstances, in some of which Condition 3 is stated to apply and in some of which Condition 7 is stated to apply. In Condition 7(b)(i)(C) (redemption at the option of the Collateral Manager) and Condition 7(c)(i) (mandatory redemption upon breach of coverage tests), for example, the Condition 3 waterfalls are expressly stated to be applicable. Those provisions show that the drafter had well in mind, and made careful choices between, the Condition 3 waterfalls and the Condition 11 waterfall in relation to redemption. Clause 14 is to be interpreted as requiring payment of the sums specified in the clause on a redemption date when that is appropriate and in accordance with the other provisions. It is not in accordance with the definition of the ICMF for the ICMF to be paid on an optional redemption pursuant to Condition 7(b)(i))(A) and Condition 11; but the ICMF definition, as we have interpreted it, does not preclude, and is not inconsistent with, the payment of "accrued and unpaid" ICMF on such a redemption, that is to say ICMF which was due on a prior Payment Date but was unpaid and so deferred (in accordance with clause 14.1 of the CMA).

10. The same point applies in relation to the appellant's argument that clause 14.1 should be interpreted as requiring payment of the ICMF pursuant to Condition 7 and the Condition 11 waterfall because it requires payment of the sums specified in clause 14.1 "in accordance with the Priorities of Payment", and "Priorities of Payment" is defined to mean, among other things, Condition 11 in the case of optional redemption pursuant to Condition 7(b).

11. For those reasons the words "and pursuant to the [CMA]" in the definition of the ICMF take the matter no further.

12. We reject the appellant's argument that the provisions relating to the CMTA in clause 18.8.2(b) of the CMA support the appellant's argument on the proper interpretation of clause 14.1 of the CMA and the definition of the ICMF. The provisions relating to the CMTA form a distinct part of, and bargain within, the overall transaction, the effect of them being to make it almost practically impossible for the Collateral Manager ever to be removed "without cause" under clause 18.8 because the financial consequences of

doing so would be so onerous. There are no clear or wider implications of them for the matters relevant to this appeal.

13. We reject the appellant's argument that the provisions of Condition 6(a)(ii) concerning Class F Secured Income Additional Interest ("additional interest") show that the practice of the drafter was to include references to Condition 3 in a non-restrictive way, that is to say without intending to exclude the application of Condition 7 and Condition 11, as Condition 6(a)(ii) refers expressly only to Condition 3 but Class F Secured Additional Interest ("additional interest") is included in the Condition 11 waterfall at (W). Condition 6(a)(ii) makes clear that, in addition to payment of such interest in accordance with Condition 3 during the currency of the transaction, such interest continues to be paid notwithstanding redemption in full of the Class F Notes. Further, Condition 6(f) deals expressly with the payment and calculation of additional interest on the final Redemption Date.

14. We do not accept the appellant's argument that its case is supported by the fact that, if the Chancellor is correct, the effect of the acceleration provisions in Condition 10(c)(v) is that, if there is sufficient to pay all the payments required under the Condition 11 waterfall, no ICMF is payable, whereas, if there is not sufficient, Condition 3 continues to apply and so ICMF is payable. That is no more than a reflection of the overall scheme that Condition 11 applies on an optional redemption under Condition 7(b)(i) but Condition 3 applies prior to redemption.

15. We reject the appellant's argument that its case is supported by the possibility that if, in attempting to carry out the steps for redemption specified in clause 5.1 of the CMA and Condition 7(b)(ii), there was a failure to secure a binding agreement or agreements sufficient to pay the entire Redemption Threshold Amount ("the RTA"), the consequence would be that there would be no redemption and the ICMF would be payable in respect of the proceeds of the sale distributed to the Class F Noteholders. The hypothetical possibility of the Issuer entering into any agreement or agreements for sale, with a view to redemption, without ensuring that they were binding only if sufficient to meet the full RTA is unrealistic even if, which is at least doubtful, such a course of action was in accordance with the Issuer's legal obligations under the documentation relating to the Class F Notes.

16. None of the above is undermined by the fact that the definition of the SIT embraces all distributions, and features in that way in the Condition 3 waterfalls. The SIT sets a threshold which must be reached before any ICMF is payable but it does not bear on the issue whether, having regard to the definition of the ICMF, the ICMF is payable under Condition 7 and Condition 11 on redemption, taking into account all the distributions to Class F Noteholders on the redemption date itself. Equally, the fact that Condition 3(c)(ii)(Z) allocates a priority to the payment of principal on the Class F Notes sheds no light on whether ICMF is payable under Condition 7 and Condition 11 on redemption or whether, if it was payable, it should be calculated taking into account the amounts paid in redemption of the Class F Notes.

17. We do not accept the overarching submission of the appellant that, as the ICMF is a performance fee, and is regarded as such by the market and specified to be such in the prospectus, it lacks any business sense for the ICMF to be calculated without taking into account capital distributions to the Class F Noteholders on the Redemption Date itself where the redemption has been triggered by the Class F Noteholders under

Condition 7(b)(i)(A). In this highly complex set of agreements it is plain that there are negotiated trade-offs. An obvious one, referred to above, is the financial entrenchment of the Collateral Manager under clause 18.8 of the Management Agreement after removal. Further, as stated above, the definition of the ICMF specifically refers, but refers only, to interest on the Payment Date itself being taken into account in ascertaining whether the SIT has been reached, and a similar provision is to be found in Condition 3(c)(i)(II) and clause 18.8.3 of the CMA. It is impossible in the circumstances of this case for the court to say that the interpretation for which the Class F Noteholders contend at each and every stage of the analysis, through their representative Napier Park, is so patently inconsistent with business common sense ("wholly uncommercial" in the words of the appellant's skeleton argument) that it undermines that interpretation being the correct one.

18. For those reasons we agree with the Chancellor that the Collateral Manager is not entitled to an ICMF when an option to redeem the Class F Notes under Condition 7(b)(i)(A) is exercised. There is therefore no need to address separately any of the other issues before the Chancellor.