Neutral Citation Number: [2019] EWHC 2128 (Ch)

Case No.: FL-2019-000005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR JUSTICE ZACAROLI

- -

Between :

BUSINESS MORTGAGE FINANCE 6 PLC

Claimant

- and -

(1) GREENCOAT INVESTMENTS LIMITED
(2) GREENCOAT HOLDINGS LIMITED
(3) PORTFOLIO LOGISITICS LIMITED
(4) MR PATRICK FITZSIMONS
(5) MR ALFRED OLUTAYO OYEKOYA
(6) MS MARIA STOICA

Defendants

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William Trower QC and Alex Riddiford (instructed by **Simmons & Simmons LLP**) for the Claimant
Alex Cunliffe (instructed by **Singhania & Co Ltd**) for the Defendants

Hearing date: 25 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

MR JUSTICE ZACAROLI:

Introduction

1. Business Mortgage Finance 6 PLC ("**BMF6**"), the claimant, is the issuer of 6 classes of notes under a true-sale securitisation structure originated in 2007 and due to mature in 2040 (the "**Notes**"). The initial principal amount of the Sterling-denominated Notes (Classes A1, M1 and C) was £161,250,000. The initial principal amount of the Euro-denominated Notes (Classes A2, M2 and B2) was €495,400,000. The principal amount outstanding is now considerably less, by reason of the repayment of a substantial part of the amount due under the Class A Notes.

2. The income stream to fund BMF6's obligations under the Notes is derived from a portfolio of commercial mortgages relating to property in the UK.

3. The documents creating the securitisation structure include: a trust deed dated 18 May 2007 (the "**Trust Deed**"), constituting the notes, under which BNY Mellon Corporate Trustee Services Limited ("**BNY**" or the "**Trustee**") is appointed the note trustee; the terms and conditions of the Notes, appended to the Trust Deed (the "**Conditions**"); a deed of charge and assignment of the same date (the "**Deed of Charge**"), under which BMF6 granted a fixed charge in favour of the Trustee, for the benefit of the Noteholders (as defined in the Trust Deed), over its portfolio of secured loans and related contractual rights and a floating charge over the whole of its assets and undertaking; and a **Master Definitions Schedule** (together, the "**Securitisation Documents**").

4. Since 20 June 2019 the first defendant, Greencoat Investments Limited ("**GIL**"), together with the other defendants, as described more fully below, has sought to take control of the securitisation structure, including by appointing additional note trustees, appointing receivers, removing the Trustee, replacing the directors of BMF6, purporting to sell the entire loan portfolio of BMF6 and announcing an intention to redeem all of the Notes in issue.

5. To the extent that such actions have been taken by GIL, it has purported to do so in its capacity as the holder of Notes. It claimed the right to do so, having issued a tender offer in January 2019, inviting Noteholders to tender Notes held by them for purchase by GIL (the "**Tender Offer**").

6. Pursuant to the Tender Offer, holders of the Notes were invited to offer their Notes for sale to GIL at a price which (in the case of the A Notes) was 101% of the principal amount of the Notes, with a decreasing percentage for the remainder of the Notes (down to 5% for the C Notes). The settlement date was 28 February, at which point the purchase price was payable.

7. GIL claims to have accepted, in March 2019, certain Notes, which it says were tendered pursuant to the Tender Offer. The settlement date under the Tender Offer was originally 28 February 2019, but was apparently extended on at least two occasions, first to 30 April 2019 and then to 10 July 2019. For the purposes only of this Part 8 claim, BMF6 accepts that the matters referred to in this paragraph are true. It is common ground that the Notes had not settled before 10 July 2019. It remains unclear whether settlement occurred on 10 July 2019, or indeed has occurred since.

8. The holders of notes were defined in the Tender Offer as including both the persons shown in the records of the clearing systems through which the Notes are held and traded (Euroclear and Clearstream) as the holders of the notes (i.e. those who held accounts with the clearing systems) ("**Direct Participants**") and each beneficial holder of a note held by a Direct Participant on that beneficial holder's behalf. Only Direct Participants, however, were permitted to submit tender instructions.

9. Under the terms of the Tender Offer, until the settlement date, the original holders of the Notes retained all rights to vote in respect of the Notes. On 18 March 2019 GIL issued an announcement stating: "In accordance with the terms of the offer as described in the Tender Offer Memorandum, the Offeror will make an initial cash payment to each Holder in respect of the BMF6 Tendered Notes equal to 1% of the relevant Purchase Consideration for the immediate transfer to the Offeror of all the rights and authorities held by each Holder in respect of the BMF Tendered Notes that it has accepted for purchase."

10. There is no evidence that any such payment was made, or that any holder of Notes in fact transferred to GIL any rights in respect of the Notes prior to the Settlement Date. Accordingly, I find that until the settlement date, as between, on the one hand, the original holder of any of the Notes accepted by GIL pursuant to the Tender Offer and, on the other hand, GIL, all rights to vote in respect of the Notes remained vested in the original holder.

11. The evidence of GIL's ownership of any of the Notes is that contained in the third witness statement of Rajnish Kalia, a director of GIL. Mr Kalia exhibits emails dated 18 July 2019 from, respectively, Euroclear and Clearstream confirming that the following Notes are blocked and held to the order of GIL:

    i) Class A1 Notes: £10 million, representing at most 86.12% of the amount outstanding in respect of all Class A1 Notes as at 15 May 2019 (£11,612,226);

    ii) Class A2 Notes: €6.45 million, representing at most 14.69% of the amount outstanding in respect of all Class A2 Notes as at 15 May 2019 (€43,896,408);

    iii) Class M1 Notes: £14 million, representing 36.84% of the amount outstanding in respect of all Class M1 Notes as at 15 May 2019 (£38,000,000);

    iv) Class B2 Notes: €8 million, representing 20.46% of the amount outstanding in respect of all Class B2 Notes as at 15 May 2019 (€39,100,000).

    GIL's holding of the Class A Notes is described as "at most" the relevant percentage, because the amount outstanding in respect of the Class A Notes held by it is stated as at a date when the total amount outstanding in respect of the Class A Notes was higher. As a result of repayments made since that date, the total amount outstanding has reduced with the likely (but unconfirmed) consequence that the amount outstanding in respect of the Class A Notes blocked and held to the use of GIL has correspondingly reduced.

12. BMF6 contends that, certainly as at the date that GIL purported to take various steps as Noteholder, there is no evidence that GIL had satisfied the requirements of the Trust Deed so as to entitle it to act as Noteholder. On this basis, and on the basis of a

number of further arguments arising from the terms of the Securitisation Documents, BMF6 contends that each of the steps taken by GIL is void and of no legal effect.

13. The steps taken by the defendants, which are the subject matter of the declarations sought by BMF6 as being void and of no effect are as follows:

    i) On 20 June 2019, GIL (in its purported capacity as a Noteholder) purported to appoint the second and third defendants, Greencoat Holdings Limited ("**GHL**") and Portfolio Logistics Limited ("**PLL**"), as separate and/or co-trustees of the Notes, and purported to appoint PLL as the agent of BNY;

    ii) On 24 June 2019, GIL purported to direct BNY as Trustee to certify that an Event of Default had occurred and to issue an Enforcement Notice declaring the Notes were accelerated and the security under the Deed of Charge was enforceable, and to appoint joint administrators of BMF6 under paragraph 14 Schedule B1 to the Insolvency Act 1986;

    iii) On 27 June 2019 GHL and PLL, as purported note trustees, purported to declare that an Event of Default had occurred, to accelerate the Notes and declare that the security under the Deed of Charge was immediately enforceable;

    iv) On 27 June 2019 GHL and PLL, as purported note trustees, purported to appoint the fourth defendant, Mr Fitzsimons, as receiver over BMF6's portfolio of loans and associated security;

    v) On 27 June 2019 GIL (again acting in its purported capacity as a Noteholder) purported to direct or resolve that BNY be removed as Trustee;

    vi) On 27 June 2019, Mr Fitzsimons, as receiver, purported to exercise a power to terminate BMF6's corporate administration agreement with Sanne Group plc and Sanne Group Corporate Secretaries (UK) Limited;

    vii) On 27 June 2019, Mr Fitzsimons, as receiver, purported to exercise a power to remove BMF6's directors;

    viii) By letter dated 1 July 2019 (and on other occasions), the fifth defendant, Mr Oyekoya and the sixth defendant, Ms Stoica, held themselves out as directors of BMF6;

    ix) On 1 July 2019 GIL purported to give notice to the Special Servicer, Target Servicing Limited ("**Target**") that BMF6 intended to redeem all of the Class A, M, B2 and C Notes at their Principal Amount Outstanding on 15 August 2019 and requiring Target to give at least 14 days' notice to Noteholders in advance of that intended redemption. This was followed, on 3 July 2019, by GHL and PLL purportedly (as note trustees) terminating the appointment of Target as Special Servicer and Cash/Bond Administrator, with GHL being appointed in its place.

14. In addition to a declaration relating to each of the nine steps above, BMF6 seeks a declaration ("**Declaration 10**") in the following terms:

> "Any and all acts done or purportedly done (a) by GHL or Portfolio Logistics in their purported capacity as trustees under the Trust Deed, (b) by GHL in its purported capacity as Cash/Bond Administrator or Special Servicer, (c) by Mr Fitzsimons or Mr Oyekoya in their purported capacities as receiver of the Issuer or any of its property and/or (d) by Mr Oyekoya and/or Ms Stoica in their purported capacity as directors of the Issuer, are void and of no effect."

15. BMF6 issued its Part 8 claim form on 4 July 2019, seeking declarations relating to, and injunctions to restrain the defendants from acting pursuant to, the above steps. On the same date, it issued an application for an interlocutory injunction in similar terms, pending judgment in the action.

16. On 11 July 2019, I granted BMF6 an interlocutory injunction and, with the support of all parties, ordered expedition of the trial of the Part 8 claim, so that it be heard with a time estimate of one and a half days commencing on 25 July 2019.

17. Since that date, in addition to providing evidence in respect of the Notes acquired by GIL, GIL has served evidence (in response to paragraph 5 of the Order dated 11 July 2019) of the purported sale of the loan portfolio, by way of a witness statement of Mr Oyekoya exhibiting a copy of a sale and purchase agreement dated 28 June 2019 (the "**SPA**") between BMF6 "in receivership" and a company incorporated in the British Virgin Islands called Roundstone Technologies Limited ("**Roundstone**"). The SPA is signed, on behalf of BMF6 by Mr Oyekoya, described as "its receiver". It is signed on behalf of Roundstone by an unnamed "director/its authorized attorney" (the signature is undecipherable).

18. By clause 2 of the SPA, BMF6 purported to sell (1) the Charged Property, (2) the Charged Obligation Documents, and (3) all monies standing to the credit of the Bank Accounts (each as defined in the Master Definitions Schedule forming part of the Securitisation Documents). The sale of the first two items was effected by a declaration of trust granted by BMF6 in favour of Roundstone.

19. By clause 4.1 Roundstone agreed to pay £237,000,000 for the purchase of the assets sold by clause 2. As to £1, this was payable on the date of the Sale Agreement. As to the remainder (the "**Deferred Consideration**") this is payable within 32 days of the date of the SPA or such other date as the parties otherwise agree. The Deferred Consideration constitutes an unsecured debt due from Roundstone, bearing interest at the rate of 10% per annum.

20. By clause 10.2, however, the claims of each of BMF6 and Roundstone against each other under the SPA are limited recourse, such that (for example) BMF6's claim against Roundstone (including in respect of the Deferred Consideration) is limited to the value of the assets of Roundstone from time to time.

21. Mr Oyekoya, in his second witness statement dated 10 July 2019, said that he understood that the (then unnamed) purchaser under the SPA was not a "connected party". When BMF6 discovered the identity of the purchaser, their solicitors (Simmons & Simmons) sent a copy of the order of 11 July 2019 to Roundstone under

cover of a letter dated 17 July 2019. On 23 July 2019 Simmons & Simmons were copied in to an email exchange which demonstrated that:

i) Trident Trust Company, which appears to act as administrator for Roundstone in the BVI, forwarded Simmons & Simmons' letter to someone in the Mann Made Group;

ii) The recipient of that email forwarded it to other people in the Mann Made Group, including a Mr David Cathersides;

iii) Mr Cathersides forwarded the email to a number of people including Mr Kalia, Mr Oyekoya, Mr Fitzsimons and a Mr Rizwan Hussain ("Mr Hussain"), saying: "Please refer to the attached document, the covering email below and give KGreenaway@tridenttrust.com your instructions regarding the original document."

22. No explanation was offered at the hearing by the defendants as to why a director of GIL and the purported receivers were being asked for instructions by the corporate administrator of Roundstone.

23. Mr Hussain earlier served a witness statement in these proceedings, in which (despite having been the sole representative of GIL in court during hearings relating to the administration application made by GIL against BMF6) he denied having any ownership interest directly or indirectly in any of the first to third defendants. Mr Hussain had been involved in earlier court proceedings relating to attempts to obtain control of securitisation structures similar to those relating to BMF6. On two occasions, he has been the subject of strong criticism from the court. In particular, in a judgment given on 10 May 2019 by David Halpern QC sitting as a Deputy High Court Judge in *Kilimanjaro AM Limited v Mann Made Corporate Services* [2019] EWHC 1189 (Ch), Mr Hussain (having given oral evidence) was described as "a deeply unsatisfactory witness, whose evidence, both in his witness statements and under cross-examination was profoundly dishonest".

24. BMF6, in light of this recent disclosure, has serious concerns as to the propriety of the transaction between the purported receivers and Roundstone.

The issues

25. The declarations sought as to the validity of the steps taken by the defendants give rise to a number of detailed issues as to the meaning and effect of the Trust Deed, the Deed of Charge and the Conditions.

26. At the commencement of the hearing, Mr Cunliffe, who appeared on behalf of all six defendants, indicated that the defendants no longer opposed the making of the declarations save for sub-paragraph (c) of Declaration 10. In particular, the defendants accepted that GIL was not a Noteholder at the time of any of the steps taken in reliance on its supposed status as such. He indicated, however, that the defendants did not necessarily accept all of the arguments advanced by BMF6 in support of the declarations and that the defendants still challenged the terms of the injunctions sought.

27. It remains necessary, therefore, to consider in detail the arguments advanced by BMF6 in support of the declarations, partly because the Court needs to be satisfied that it is appropriate to grant relief by way of declaration and partly because the precise scope of any injunction may depend on the extent to which one or other of the arguments advanced by BMF6 in support of the declarations is correct.

28. The validity of most of the steps depends in the first instance on the ability of GIL to pass a written resolution in accordance with the provisions of the Securitisation Documents (a "**Written Resolution**") of a relevant class of Noteholders. In particular, most of the steps flow from, and thus depend for their validity on, the appointment of GHL and PLL as additional trustees, which GIL purported to effect by way of Written Resolution of the Class A1 Noteholders.

29. I will address, first, therefore, the question whether GIL, at the relevant time, was capable of passing a valid Written Resolution in the circumstances in which it purported to do so. I will then address any separate questions that arise in connection with each of the steps that are the subject matter of the declarations sought.

GIL's ability to pass a Written Resolution

30. A "Written Resolution" means "a resolution in writing … signed by or on behalf of Instrumentholders of not less than 75 per cent of the aggregate notional principal amount outstanding of the Notes (or the Notes of the relevant class) … who for the time being are entitled to receive notice of a meeting in accordance with the provisions herein contained": see the Master Definition Schedule and Schedule 5, paragraph 23 to the Trust Deed.

31. Instruments and Instrumentholders are defined, for the purposes of Schedule 5 to the Trust Deed, by paragraph 1.1.5 thereof, as meaning "in connection with a meeting of A Noteholders (or either class thereof), A Notes and A Noteholders respectively (or of such class of A Notes and A Noteholders as the case may be". Paragraph 1.1.5 states that this definition also covers Notes and Noteholders.

32. However, "the holder of any voting certificate or the proxies named in any block voting instruction shall for all purposes in connection with the relevant meeting … be deemed to be the holder of the Instruments to which such voting certificate or block voting instruction relates." A "voting certificate" and a "block voting instruction" are documents issued by a Principal Paying Agent (i.e. BNY). BMF6 accepts that this deeming provision cannot apply in the case of a Written Resolution, given that a voting certificate is only issued in connection with a meeting, once the meeting has been notified to Instrumentholders.

33. Accordingly, BMF6 accepts that "Instrumentholder" is to be construed by reference to the definition in the Master Definition Schedule. It is there defined (through a chain of definitions), so far as the A1 Noteholders are concerned, as the "several persons who are for the time being holders of the A1 Notes". Importantly, the Master Definition Schedule also provides, except where the context otherwise requires, that "References to Instrumentholders shall be deemed to include references to the holders of the beneficial interests in such Instruments as relevant."

34. The Notes are currently held in global form, no definitive notes having been issued. The only holder of the Notes themselves, therefore, is BNY as common depository in respect of the relevant global note. The issue, therefore, is whether GIL was, at the relevant time, a holder of the beneficial interest in any Notes which it had accepted under the Tender Offer.

35. As I have already indicated, the defendants now accept that, whatever interest GIL had in the Notes at the time of the steps of which complaint is made, it was not sufficient to constitute it the beneficial owner of the Notes within the meaning of the definition of Instrumentholder. In my judgment, that concession was rightly made, and the declarations are justified on this basis, because the "holder of the beneficial interests" in the Notes, for the purposes of the definition of Instrumentholder, means only those persons in whose name the Notes are held in the records of the clearing systems (i.e. the account holders at Clearstream and Euroclear). That is for the following reasons, which largely reflect those advanced by Mr Trower QC, appearing with Mr Riddiford, for BMF6:

    i) The extended definition of Instrumentholders, so as to deem it to include the holders of a beneficial interest, is intended to address the situation where the Note is held in global form, such that there is in fact only one Noteholder, but where interests in that note are held through the clearing system;

    ii) By clause 21.3 of the Trust Deed, so long as the Notes are held in global form (and no definitive Notes have been issued), then "the Issuer, the Trustee and Paying Agents may deem and treat the bearer thereof as the absolute owner of such Instrument and the Issuer, the Trustee and the Paying Agents shall not be affected by any notice to the contrary";

    iii) However, by clause 21.4 of the Trust Deed, the Issuer and Trustee may call for, and rely fully on as sufficient evidence of the facts contained therein, a certificate or letter of confirmation from Euroclear or Clearstream, to the effect that at any particular time any particular person is, was or will be shown in its records as entitled to a particular interest in a global note;

    iv) Where there is any issue over the entitlement of a person claiming an interest in the Notes, then it is for the Trustee to determine any question arising in that respect, and its determination is binding on the Issuer, the Instrumentholders and all other secured creditors: clause 15.26 of the Trust Deed;

    v) Where the Notes are held in global form and a temporary global note is deposited with a Common Depository for the clearing systems then, by clause 11 of the global Note, notice to Noteholders may be given by delivery of the relevant notice to the clearing systems and such notice is deemed to constitute notice to the Noteholders;

    vi) Moreover, in those same circumstances, the Trustee, in considering the interests of Noteholders, is entitled by clause 12 of the global note to have regard to such information as may have been made available by or on behalf of the clearing system as to the identity of its accountholders with entitlements in respect of the global note, and to consider such interests on the basis that such accountholders were the holder of the permanent global note;

vii) Accordingly, wherever the Trust Deed, or other Securitisation Documents, envisages going behind the bearer of a global or definitive note, it goes no further than someone recorded as the holder of an account in the books of Euroclear or Clearstream;

viii) There are strong, practical reasons why that is so, given that the ultimate beneficial interest in Notes held through the clearing system could subsist via a chain of intermediaries, such that neither the clearing systems themselves, nor their account holders, would have knowledge of the ultimate beneficiary;

ix) BNY, as Trustee, has indicated that in order to satisfy itself as to the entitlement of someone claiming to hold an interest in the Notes, it would require (per its letter of 24 June 2019) "a current position statement taken from a recognised clearing system record keeping system" or (per the letter from its solicitors, Allen & Overy, of 19 July 2019) in relation to a Written Resolution, that it was signed by "one or more direct participants [i.e. account-holders at the clearing systems] and accompanied by one or more statement(s) showing Notes credited to the account(s) of such direct participant(s)".

36. In his first witness statement, Mr Kalia cited *Assenagon Asset Management SA v Irish Bank Resolution Corporation Ltd* [2012] EWHC 2000 (Ch) in support of GIL's (then) contention that the beneficial interest in the Notes had vested in it at the relevant time. That case concerned (relevantly) a prohibition against the issuer of notes and its subsidiary voting at a meeting in respect of notes beneficially held by it or for its account. Briggs J held that notes which had already been offered and accepted for exchange with the issuer were beneficially owned by the issuer, and thus fell within the prohibition. He said, at [64] to [65]:

> "All those notes were by that time held under contracts for sale between the relevant majority noteholders and the bank. Provided only that they were contracts liable to be specifically enforced, then on well settled principles they thereby conferred a beneficial interest in the notes on the bank from the moment of the bank's acceptance of the offered exchange on the day before the meeting. I consider it clear that the contracts for sale by exchange of the 2017 notes which came into existence on the day before the noteholders' meeting were specifically enforceable. Contracts for the sale of shares or securities are specifically enforceable unless damages for breach by the seller would be an adequate remedy. Damages are an adequate remedy if, but only if, there exists a ready market for the securities in question such that the buyer can use his damages to obtain the substance of what he bargained for, namely equivalent securities: see generally Jones & Goodhart, Specific Performance, (1996) 2nd ed, pp 161–162."

37. In that case, however, the terms of the contract for exchange of the notes expressly required the sellers to vote the notes, prior to settlement, in a manner calculated to serve the issuer's interests. In the absence of such a provision, the mere fact that – as between buyer and seller – the buyer had a beneficial interest in the notes would not commit the seller to vote the notes in any particular way. As Briggs J said, at [68], of

the nature of the beneficial interest acquired by a purchaser under a specifically performable contract:

> "It is not an outright beneficial interest which reduces the title of the seller to that of a mere nominee. Generally, it does not even require the seller to vote the shares, pending completion, at the direction of the buyer: see *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964 and *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, 119."

38. Accordingly, whatever beneficial interest GIL may have acquired by reason of acceptance of Notes under the Tender Offer, it did not constitute it a Noteholder within the meaning of the Trust Deed or other Securitisation Documents.

39. Even if GIL's rights in respect of the Notes identified as being blocked and held to its order in the emails of 18 July 2019 from the clearing system constitute it an Instrumentholder for the purposes of Schedule 5 to the Trust Deed, a Written Resolution requires the support of 75% of the Notes of the relevant class. GIL holds more than 75% of the Class A1 Notes, but significantly less than 75% of the Class A Notes as a whole.

40. That raises the question whether the relevant Written Resolution has to be one of the Class A1 Noteholders, or of the Class A Noteholders as a whole. I will consider this question, where relevant, in connection with the specific step complained of.

First step: appointment of additional note trustees and agent of the note trustee

41. On 20 June 2019, GIL purported to pass a written resolution as a Noteholder of Class A1 Notes, resolving and/or directing that GHL and PLL be appointed as additional trustees pursuant to clause 23.2 of the Trust Deed, and that PLL be appointed as agent of the Trustee pursuant to clause 18 of the Trust Deed.

42. For the reasons set out above, a declaration that this step was invalid and of no effect is justified on the basis that GIL was not a Noteholder at the relevant time.

43. In addition, that declaration is justified for the following reasons.

44. The power to appoint a new trustee is vested in BMF6 as the Issuer, by clause 23.1 of the Trust Deed. Although any such appointment must be ratified by an Extraordinary Resolution of the A Noteholders (while they remain outstanding), the Noteholders do not have the power to appoint a trustee.

45. Clause 23.2 provides that:

> "Notwithstanding the provisions of Clause 23.1, the Trustee may, upon giving prior written notice to the Issuer (but without the consent of the Issuer or the Instrumentholders), appoint any person established or resident in any jurisdiction (whether a Trust Corporation or not) to act either as a separate trustee or as a co-trustee jointly with the Trustee (a) if the Trustee considers

> such appointment to be in the interest of the Instrumentholders or (b) for the purposes of conforming to any legal requirements, restrictions or conditions in any jurisdictions in which any particular act or acts is or are to be performed or (c) for the purposes of obtaining a judgement in any jurisdiction or the enforcement in any jurisdiction of either a judgement already obtained or any of the provisions of these presents against the Issuer."

46. It is clear from the face of clause 23.2 that the power to appoint an additional trustee vests solely in the Trustee.

47. Similarly, the power to appoint any "agent, custodian, delegate or nominee" of the Trustee vests, pursuant to clause 18 of the Trust Deed, solely in the Trustee.

48. Accordingly, to the extent that GIL purported to appoint GHL or PLL as trustee or agent, it was simply incapable of doing so under the terms of the Trust Deed.

49. The defendants previously contended, however, that GIL could, in its capacity as Class A1 Noteholder, pass a resolution directing the Trustee to appoint an additional trustee.

50. The defendants relied on clause 8.1 of the Trust Deed, which provides that:

> "the Trustee shall not be bound to direct or take any such steps or proceedings as are mentioned in Clause 7.1 or any other action or proceedings pursuant to or in connection with these presents, the Notes or the Documents unless … directed to do so by an Extraordinary Resolution of the Noteholders (or, as the case may be, the Noteholders of any class)…"

51. On the assumption that clause 8.1 is capable of extending to the power of the Trustee to appoint an additional trustee under clause 23.2, it is of no help to the defendants in connection with the declaration sought in respect of step 1. That is because clause 23.2 permits the Trustee to appoint an additional trustee in only the following three circumstances: (1) if the Trustee "considers such appointment to be in the interests of the Instrumentholders"; (2) for the purposes of conforming to any legal requirements, restrictions or conditions in a jurisdiction in which particular acts are to be taken; or (3) for the purposes of obtaining or enforcing a judgment in another jurisdiction. Neither the second nor third of these is relevant here. So far as the first is concerned, as Mr Cunliffe accepted, the right of Noteholders by Extraordinary Resolution to direct the Trustee to take "action" does not extend to directing it to conclude that the appointment of an additional trustee is in the interests of the Instrumentholders.

52. In addition, in my judgment any Extraordinary Resolution under clause 8.1 for the purposes of directing the Trustee to appoint an additional trustee would need to be an Extraordinary Resolution of, at the very least, Class A Noteholders as a whole. In the first place, where the Trust Deed provides for Noteholders to have any say in the appointment or removal of a note trustee, it confers the right (so long as there are A Notes outstanding) expressly on the Class A Notes as a whole: see clause 23.1, concerned with the right of Noteholders to approve (or, by implication, disapprove) of

a Trustee nominated for appointment by the Issuer; and see clause 24, concerned with the removal of a trustee. Secondly, by clause 8.1, the relevant class of Noteholders required to pass an Extraordinary Resolution is that which, in the opinion of the Trustee (determined in its absolute discretion), is affected by the resolution. It is inconceivable that the Trustee could conclude that the decision to appoint an additional note trustee would affect the interests of the Class A1 Noteholders to the exclusion of the interests of the Class A2 Noteholders, given that the only difference between them is the currency in which the Notes are denominated.

53. Moreover, the Trustee is not bound to act in accordance with any Extraordinary Resolution of Noteholders under clause 8.1 unless it was indemnified and/or secured to its satisfaction against all actions, proceedings, claims and demands to which it may be rendered liable by so doing. The Trustee was not so indemnified to its satisfaction in relation to the Written Resolution underpinning step 1.

54. In those circumstances, it is unnecessary for me to determine whether clause 8.1 might, in other circumstances, permit the Noteholders, or an appropriate class thereof, to direct the Trustee to appoint an additional trustee under clause 23.2. The defendants indicated that they would welcome this point being determined nevertheless, as it might be relevant to actions the defendants take in the future. In circumstances, however, where the parties have required this judgment to be provided in a very short timescale, and a proper consideration of that question would require a greater in-depth examination of the provisions of the Trust Deed as a whole than has been undertaken at the trial, in particular to consider all the circumstances in which it might be said clause 8.1 could apply, I do not think it appropriate to attempt to answer this, at the moment, hypothetical question.

55. To the extent that the defendants have sought to contend that they could rely upon either clause 8.3 or clause 15.8 of the Trust Deed to give Noteholders a right to direct the Trustee to appoint an additional trustee under clause 23.2, I reject that contention. Clause 8.3 is expressed to relate to enforcement of security or actions against the Issuer and both clauses apply only where the Trustee has otherwise become bound to take action. They do not define, or add to, the circumstances in which the Trustee can be required to act.

Second step: direction to the Trustee to certify that an Event of Default had occurred and to accelerate the notes

56. On 24 June 2019, GIL purported to pass a written resolution as holder of Class A1 Notes, directing the Trustee to certify that an Event of Default had occurred which was materially prejudicial to the interests of the Noteholders of any class, and to declare that the notes were immediately due and payable. The resolution further directed the Trustee to appoint joint administrators. By paragraph 7 of the resolution, GIL stated that – for the purposes of the indemnification of the Trustee specified in conditions 9(1) and 10 of the Notes, the deed poll indemnity dated 20 June 2019, previously provided by GIL in favour of the Trustee, could be "fully and properly utilised in relation to these Directions".

57. Clause 8.1.2 permits the holders of not less than 25 per cent of the aggregate principal amount outstanding of the Class A Notes to request the Trustee in writing to declare

that the notes were immediately due and payable (pursuant to clause 9(a) of the Conditions), provided that (by clause 8.1.3) the Trustee shall have been indemnified and/or secured to its satisfaction against all actions, proceedings, claims and demands to which it may thereby render itself liable and all liabilities, costs, charges, damages and expenses which it may incur by so doing."

58. Assuming (contrary to my conclusion above) that GIL was a Noteholder at the relevant time, and that although it purported to act as Class A1 Noteholder, it is sufficient that it in fact held Class A2 Notes as well, then its total holding of Class A Notes was more than 25% of the total of such Notes. BMF6 contends, however, that there was no Event of Default, so the pre-condition for making such a request did not exist.

59. The resolution did not specify what Event of Default was said to have occurred.

60. The defendants, in their skeleton argument for this hearing, contend that BMF6 is insolvent with depreciating assets, given that the balance sheet liabilities have far outstripped the balance sheet assets in a range of £50 million to £60 million for at least the last four years, there is no external financial support available to BMF6, and the Notes have not received all the interest due for at least the last four years, with the Class C Notes having received no interest due. While this may all be true, it does not amount to an Event of Default, as defined by clause 9 of the Conditions. There is no Event of Default by reference to the "insolvency" (whether balance sheet or cash flow insolvency) of BMF6 and non-payment in respect of the Notes while the Class A Notes are outstanding (other than a failure to pay principal or interest when due on the Class A Notes themselves) does not constitute an Event of Default.

61. The only possible event that GIL might have relied on is the commencement of the administration application by GIL. That would, however, have constituted an Event of Default only if the Trustee certified that the event was "in its opinion materially prejudicial to the interests of the Noteholders of any class". That did not happen and, in the context of an application which was doomed to fail (due to lack of standing on the part of GIL) and was struck out for a failure to provide security for costs, it is difficult to see how the Trustee could have concluded that it was materially prejudicial to the interests of any Noteholder. Moreover, the Trustee was not indemnified to its satisfaction under clause 8.1.3 of the Trust Deed.

62. For the above reasons, in addition to the fact that GIL was not a Noteholder at all, this step was invalid and of no effect.

Third step: acceleration of Notes

63. On 27 June 2019, GHL and PLL purported as note trustees to serve an "Enforcement Notice" on BMF6, declaring that an Event of Default that was materially prejudicial to the interests of the Noteholders of any class had occurred, to accelerate the Note and to declare that the security under the Deed of Charge was immediately enforceable.

64. In view of my conclusion that GIL was not a Noteholder and that the purported appointment of GHL and PLL as trustees was of no effect, they had no standing as note trustees and the purported Enforcement Notice was itself therefore of no effect.

In addition, in view of my conclusion that there had been no Event of Default, there was no power in the note trustee (even one who was properly appointed) to accelerate the Notes.

65. Further, at the time that this notice was given, it appears that BNY remained Trustee, because GHL and PLL purported to act as "Majority Trustees". By clause 23.1 of the Trust Deed, although not all trustees have to be "Trust Corporations", one of them must at all times be a Trust Corporation and where a decision is taken by the majority of trustees, one of that majority must be a Trust Corporation. Clause 1.1 of the Trust Deed defines a Trust Corporation as "a corporation entitled by rules made under the Public Trustee Act 1906, or entitled pursuant to any comparable legislation application to a trustee in any jurisdiction, to carry out the functions of a custodian trustee." There is no evidence that either GHL or PLL is a Trust Corporation. The purported notice was therefore invalid and of no effect for this additional reason.

Fourth step: appointment of a receiver

66. On 27 June 2019, Mr Fitzsimons wrote to the directors and company secretary of BMF6, on headed notepaper of "Business Mortgage Finance 6 PLC (in receivership)", stating that he had been appointed a receiver of BMF6. He enclosed a purported "Deed of Appointment of Receiver", signed by GHL and PLL in their capacities as note trustees, purporting to appoint Mr Fitzsimons as receiver of the "Security Assets", defined as being the assets charged pursuant to clause 3 of the Deed of Charge. Clause 3 of the Deed of Charge is a series of fixed charges over the loans, mortgages, other collateral, insurance contracts, other contractual rights and bank accounts of BMF6.

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

Fifth step: removal of BNY as Trustee

68. On 27 June 2019 GIL purported as holder of Class A1 Notes by Written Resolution, pursuant to clause 11 of the Conditions and schedule 5 of the Trust Deed, to remove BNY as Trustee, so that GHL and PLL were the sole trustees.

69. In addition to the fact that GIL was not a Noteholder, this step was invalid and of no effect for two further reasons.

70. First, any Written Resolution to remove a Trustee must (by clause 24 of the Trust Deed, while there are A Notes outstanding) be passed by 75% of the Class A Noteholders as a whole, and GIL held (and even now holds) insufficient Class A Notes for that purpose.

71. Second, clause 24 requires that where the removal is of the only trustee which is a Trust Corporation, the removal shall not become effective until such time as BMF6 as Issuer has appointed a Trust Corporation as replacement trustee. As I have noted above, neither GHL nor PLL is a Trust Corporation. The removal of BNY would – if otherwise effective – not have taken effect until a replacement Trust Corporation was appointed by BMF6.

Sixth step: termination of corporate administration agreement

72. By a further letter dated 27 June 2019 Mr Fitzsimons, purporting to act as receiver, wrote to Sanne Group Secretaries (UK) Limited and Sanne Group plc, terminating the corporate administration agreement ("CSA") with BMF6 on the ground of unspecified breaches of its terms.

73. In view of my finding that Mr Fitzsimons was not validly appointed as receiver, this purported termination of the CSA was of no effect.

Seventh step: removal of directors

74. In the same letter of 27 June 2019 as that referred to under the fourth step above, Mr Fitzsimons purported to remove the directors and company secretary of BMF6.

75. In view of my finding that Mr Fitzsimons was not validly appointed as receiver, this purported removal of officers of the company was of no effect.

76. In any event, a receiver appointed under the Deed of Charge, even if properly appointed, would have no power to appoint and remove directors of BMF6. The power to remove directors vests in the company in general meeting under Article 80 of BMF6's articles of association. While the appointment of receivers will supersede the powers of the company (and thus the board of directors) to act in relation to the charged assets, it does not vest the receivers with any power to interfere in the shareholders' control over the appointment and removal of directors. The defendants have not pointed to any provision in the Deed of Charge, or any other of the Securitisation Documents, that would give the receiver such a right.

Eighth step: the holding out by the fifth and sixth defendants as directors of BMF6

77. On 1 July 2019, Mr Oyekoya and Ms Stoica each signed as "Director", a letter on paper headed "Business Mortgage Finance 6 PLC (in receivership)" to GHL and PLL (as purported note trustees) certifying that BMF6 would be in a position to discharge all its liabilities in accordance with clause 5(b) of the Conditions.

78. BMF6 is unaware how, if at all, they were appointed directors of BMF6, but assumes that they were purportedly appointed by Mr Fitzsimons as receiver. The defendants have not provided any evidence of their appointment.

79. If, as BMF6 anticipates, they were appointed by Mr Fitzsimons, then that appointment is of no effect in light of the fact that Mr Fitzsimons was not validly appointed as receiver. In any event, the power to appoint directors is principally vested in the shareholders of BMF6 (by Article 70) although, by Article 71, the board itself may appoint a director until the next annual general meeting, either to fill a vacancy or as an addition to the board. For reasons similar to those set out in relation to the seventh step above, in my judgment a receiver, even if validly appointed pursuant to the Deed of Charge, would have no power to appoint directors to the board of BMF6.

Ninth step: notice of intended redemption of the Notes and termination of Target as Special Servicer and Cash/Bond Administrator

80. By a letter dated 1 July 2019 Mr Oyekoya, purporting to act as receiver of BMF6, gave notice to Target that BMF6 intended to redeem all of the Notes on 15 August 2019, and required Target to give notice at least 14 days prior to 15 August 2019 to the Noteholders in accordance with clause 15 of the Conditions.

81. The first point to note about this letter is that there is no evidence of Mr Oyekoya having been appointed as a receiver (the only notice of appointment in evidence relating solely to Mr Fitzsimons). In the absence of such evidence, I conclude that there was no such appointment. The letter to Target was accordingly of no effect for this reason alone. Further, if he was purportedly appointed by GHL and PLL then, for the same reasons as apply to Mr Fitzsimons, the appointment was of no effect.

82. By a letter to Target of 3 July 2019, headed "Business Mortgage Finance 6 plc (in receivership)" but signed by GHL and PLL purportedly in their capacity as note trustees, Target was given notice of termination of the Special Servicer Agreement. By a further letter to Target of the same date, GHL and PLL gave notice terminating the Cash/Bond Administration Agreement.

83. Since the appointment of GHL and PLL was invalid and of no effect, the same is true of these purported notices. In addition, in each case, the purported termination was effected under a clause in the relevant agreement which only applies if an Enforcement Notice is given. For the reasons set out above under the second and third steps, no valid Enforcement Notice was given and the purported termination of the agreements was of no effect for this further reason.

Declaration 10

84. BMF6 contends that Declaration 10 is the logical consequence of the prior nine declarations. I agree. Mr Cunliffe raises, however, an issue in respect of Declaration 10. He contends that as drafted (in particular by use of the word "void") it would have the consequence of shutting out any third party purchaser from contending that, notwithstanding that for the numerous reasons identified above there was no valid appointment of GHL and PLL as trustees and thus no valid appointment of receivers, it was entitled, as a bona fide purchaser for value without notice, to retain such interest as it had acquired under an agreement entered into with the receivers.

85. The only person who might conceivably be interested in making such an argument is Roundstone. For the reasons set out at the beginning of this judgment, BMF6 is highly dubious that Roundstone could ever claim to be a bona fide purchaser without notice, particularly where to date it has paid only £1 and purported to acquire under the SPA only an interest under a trust in the relevant assets.

86. Nevertheless, Mr Trower QC accepted that, as at present Roundstone is not a party to these proceedings and no injunctive relief is sought against it, the declarations that I propose to make cannot prejudge the questions that may arise if Roundstone sought to contend that it was entitled to retain such benefit as it had acquired under the SPA

notwithstanding the invalidity of all steps taken by GIL, GHL, PLL and the purported receivers in procuring the entry by BMF6 into the SPA. In these circumstances, subject to any further submissions of Counsel on handing-down of this judgment, I propose formulating Declaration 10 in terms that each of the purported acts referred to in it are invalid and of no effect as between the parties to the Securitisation Documents and the parties to this action.

Injunctive relief

87. The defendants accept that some form of injunctive relief is appropriate, but seek to narrow the scope of that relief in a number of ways.

88. In particular, Mr Cunliffe did not object to injunctions being granted to restrain GHL and PLL from purporting to act as note trustees or (in the case of PLL) as agent of the Trustee, or to restrain Mr Fitzsimons and Mr Oyekoya from purporting to act as receivers, subject only to some limitation to cater for the possibility that at some point in the future there may be a proper and valid appointment of any of them. I can see the force of this point, which is capable of being addressed by the injunction remaining in force until such time as BMF6 confirms in writing that it accepts there has been a valid appointment, or further order of the Court. No objection at all was made to the proposed injunction to restrain Mr Oyekoya and Ms Stoica from acting as directors of BMF6, in light of the absence of any basis to think they might ever be properly appointed to that position.

89. Objection was made, however, to the width of the injunction sought against GIL. The injunction sought is as follows:

> "GIL (whether acting by their directors, servants, employees or agents, including for the avoidance of doubt Clifden IOM No.1 Limited ("Clifden"), Mr Rizwan Hussain ("Mr Hussain"), Mr Rajnish Kalia ("Mr Kalia") and Mr Oyekoya, or otherwise):
>
> a) shall not hold itself out or act as if it were a holder of the Notes, or as having any beneficial or other interest in or any other right in respect of any of the Notes, including (without limitation) by making any announcement, statement or representation or issuing any communication to any person, unless and until the Note Trustee has first confirmed in writing to GIL that it is satisfied that GIL is or is deemed to be a holder of any Notes; and
>
> b) shall take no further step in relation to the Issuer or any of its property without first obtaining the permission of the Court to do so, unless and until the Note Trustee has confirmed in writing to GIL that it is satisfied that GIL is or is deemed to be a holder of any Notes."

90. Mr Trower QC accepted that insofar as this would prevent GIL from holding itself out as having a "beneficial or other interest" in the Notes, then it was too wide. He said that the essential purpose of the injunction sought is to prevent GIL from taking action

as a Noteholder as defined in the Securitisation Documents, or to hold itself out as a Noteholder in that sense.

91. Mr Cunliffe's primary submission is that I should conclude that GIL has now provided sufficient evidence to establish that it is a Noteholder, on the basis of the emails dated 18 July 2019 from the clearing systems. I reject that submission. The emails themselves contain unexplained redactions. The context in which the clearing systems were asked to confirm that the Notes were blocked and held to the order of GIL is unclear. It is unclear, for example, whether the confirmation was sought in the context that the Notes remained in the accounts of the custodians of the selling Noteholders pursuant to the Tender Offer. Save for the assertion made in Mr Kalia's witness statement, there is no evidence that the settlement date under the Tender Offer has in fact occurred.

92. The relevant Notes are held in seven separate accounts. BMF6 suggests that this indicates that they remain in the accounts of the sellers' custodians. Mr Cunliffe submitted that this is explained by the fact that GIL's custodian (i.e. the account holder at the clearing systems holding notes on behalf of GIL) holds multiple numbered accounts. There is, however, no evidence of this. In circumstances where BMF6 has previously, but unsuccessfully, sought information from GIL as to the manner in which any Notes said to be held by it with the clearing systems are in fact held, I am not prepared to reach a conclusion in GIL's favour on the basis of submissions unsupported by evidence.

93. Typically, the person beneficially entitled to notes held for it by an account holder at the clearing systems will provide evidence of that interest by instructing its account holder to provide such evidence via the clearing system directly to BNY. This has not been done. Mr Cunliffe accepted that it could be done, but suggested that it had already proved difficult to get the information contained in the emails of 18 July 2019 from the clearing systems. There is no evidence for that suggestion. It appears to be contradicted by the fact that, from the timing of those emails, the responses from the clearing systems to requests for confirmation were provided without any material delay.

94. In these circumstances, I am not satisfied on the evidence available that GIL has demonstrated that it is a Noteholder in respect of any of the Notes. The Trust Deed confers on the Trustee the task of determining whether anyone other than the bearer of a global or definitive Note is a beneficial holder entitled to take action such as participating in a Written Resolution under the terms of the Securitisation Documents. The injunction sought prevents GIL from acting, or holding itself out as, a Noteholder only until such time as BNY confirms that it is satisfied on this point.

95. Mr Cunliffe nevertheless submits that the injunction sought is in any event too wide, because it seeks to prevent GIL from taking action, or holding itself out as a Noteholder, in ways that go beyond the actions it has so far taken (and which – by its acceptance of the declarations – it acknowledges it was not permitted to do).

96. The starting point, in my judgment, is that there remains a strong probability that, unless restrained by an order of the Court, GIL would continue to interfere with the securitisation structure irrespective of whether it has the requisite standing as a Noteholder to do so. Its past conduct in purporting to wrest control of the entire loan

portfolio from BMF6 and the Trustee, pursuant to steps which it accepts were wholly ineffective indicates a disregard for compliance with the rules. Its maintenance of its position that it was entitled to do so, for some weeks, only for them to be abandoned on the morning of the trial, demonstrates a willingness to act on the basis of any argument, however weak.

97. BMF6 acknowledged that the Court should not grant a final injunction if damages would be an adequate remedy: see e.g. *Ottercroft Limited v Scandia Care Limited* [2016] EWCA Civ 867. It submitted that in considering whether to grant a final injunction, the Court should apply the four-fold test set out in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, but as modified by Lord Neuberger in *Lawrence v Fen Tigers Ltd* [2014] AC 822, at [123].

98. The four-fold test is:

i) Whether the injury to the plaintiff's legal rights is small;

ii) Whether that injury is one which is capable of being estimated in money;

iii) Whether that injury is one which can be adequately compensated by a small money payment; and

iv) Whether the case is one in which it would be oppressive to the defendant to grant an injunction.

99. Lord Neuberger's modification of the *Shelfer* test is as follows:

> "First, the application of the four tests must not be such as 'to be a fetter on the exercise of the court's discretion'. Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."

100. At [121], Lord Neuberger cautiously approved the following statement from Lord Macnaghten in *Colls v Home & Colonial Stores Ltd* [1904] AC 179, 193:

> "In some cases, of course, an injunction is necessary - if, for instance the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others."

101. In *Ottercroft Limited*, at [14], the Court of Appeal noted, as regards the relevance of the Defendants' conduct to the exercise of the Court's discretion in this regard, as follows:

> "But in any event the judge was entitled to consider the defendant's conduct in the round, and that included everything that had preceded the commencement of the action…"

102. In my judgment, the first, third and fourth of the *Shelfer* tests are clearly not satisfied in this case. While it cannot be known what steps GIL would take, if not prevented by the injunction, its intention to wrest control of BMF6's assets is clear. As is its willingness to publicise to Noteholders and the market the steps it is taking, without first establishing the right to do so. This has the potential to cause substantial damage to BMF6 and its Noteholders more generally. While this is capable of being estimated in money, the injury could not be compensated by a small payment. Moreover, there is a serious question mark over the ability of the defendants to satisfy any monetary award. Since it is open to GIL to take action as a Noteholder if and when it provides evidence of its holding of Notes to the satisfaction of BNY, I do not regard the injunction as oppressive to GIL. Looking at GIL's conduct in the round, which can fairly be described as an attempt to steal a march on BMF6, an injunction is clearly justified.

103. Accordingly, I propose to make an order broadly in the terms set out at paragraph 89 above, but modified to reflect the essential purpose of the injunction as set out in paragraph 90 above. In that respect, it may be sensible for the injunction to reflect my conclusions as to the requisite majority of Noteholders required in order to effect an Extraordinary Resolution (including a Written Resolution) to remove the Trustee or take other specific action pursuant to clause 8.1, subject to the relevant terms of the Trust Deed.

104. I will leave it to the parties to seek to agree the precise terms, with any remaining disagreement being resolved at the hearing upon hand-down of this judgment.