Neutral Citation Number: [2023] EWHC 2073 (Ch)

Case No: BL-2023-000359

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

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

Date: 9 August 2023

Before :

Mr Simon Gleeson
Sitting as a Deputy High Court Judge

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Between :

Banca Generali S.p.A	**Claimant**
- and -	
(1) Sovereign Credit Opportunities SA	
(2) CFE Advisory Services	**Defendants**

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Andrew de Mestre KC and Andrew Rose (instructed by **Mayer Brown International LLP**) for the **Claimant**
Conall Patton KC and Adam Rushworth (instructed by **Macfarlanes LLP**) for the **Defendants**

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APPROVED JUDGMENT

Mr. Simon Gleeson:

1. On 11 July I gave judgment for the Claimant in this matter. The parties addressed consequential matters in written submissions. This Judgment sets out my decisions on those matters, along with my reasons for those decisions. Except where indicated otherwise the capitalised terms used in this judgment have the meanings given in that earlier judgment.

2. The parties have agreed the terms of the declarations to be granted, and the position as regards costs. Consequently, the issues which remain to be decided are the Defendants' applications for (i) permission to appeal, and (ii) a stay pending appeal. Both the Claimant and the Defendants argue (for differing reasons) for the Claimant to have liberty to apply.

Application for Leave to Appeal

3. I do not propose to give leave to appeal in this matter, for the reasons set out below.

4. In considering an application for leave to appeal, I am prohibited from giving any such permission unless I am satisfied that the appeal would have a real prospect of success; or that there is some other compelling reason for the appeal to be heard (CPR 52.6(1)). In this case I do not think that there is any "other compelling reason", so the question is simply one as to whether the Defendants would have a real prospect of success – real, in this case, meaning more than merely fanciful (*Swain v Hillman* [2001] 1 All E.R. 91 CA).

5. The Defendants put forward a single ground of appeal, which is to the effect that I wrongly construed Condition 12.1 of the Notes and/or Clause 14.1 of the

Intercreditor Agreements ("Condition 12") as entitling the Organisation of Noteholders to direct the Issuer to (i) remove the Fiscal Agent and (ii) appoint a specified replacement Fiscal Agent. They put forward three arguments in respect of this position.

6. First, they say that I have misconstrued Clause 9 of the Fiscal and Calculation Agreement ("Clause 9"). This clause contains provisions relating to the removal and replacement of the Fiscal Agent and the Calculation Agent. The Defendants say that I should have construed Clause 9 as providing a complete code regarding the circumstances in which the parties could terminate and replace the Fiscal Agent, such that any attempt to remove the Fiscal Agent outside the specific circumstances described in that clause must be invalid. The basis of this argument is that there were some parts of the documentation which expressly contemplated what would happen in the event of the service of a Trigger Notice (they identify Clause 14.1 of the Fiscal and Calculation Agreement as an instance of this), but no reference to the consequences of a Trigger Notice appears in Clause 9. They seek to infer from this that Clause 9 should be interpreted as if it contained a provision to the effect that the service of a Trigger Notice was not intended to have any impact, direct or indirect, on its operation.

7. I think that this argument is hopeless. The Defendants accept that under Clause 9 the Issuer has a power to remove the agents, and they accept that under Condition 12, once a Trigger Notice has been delivered, the Issuer is required to comply with all directions of the Most Senior Class of Noteholders ("Noteholders"). The ordinary consequence of these two provisions is that the Noteholders may use their power under Condition 12 to instruct the Issuer to

exercise its powers under Clause 9 to remove the Fiscal Agent. The fact that Clause 9 contains a number of other provisions specifying a number of other mechanisms by which the Issuer and the Noteholders, acting together, may remove the Agents, is nothing to the purpose – I do not think that there is any reasonable prospect of implying into the agreement a provision to the effect either that the power of the Noteholders to give directions to the Issuer under Condition 12 is implicitly limited, where it is expressed to be unlimited, or that the Issuer's power to remove the Agents under Clause 9 is somehow voided if it is exercised on the instructions of the Noteholders, where in the clause itself that power is expressed to be absolute.

8. Second, the Defendants argue that a direction requiring the replacement of the Fiscal Agent is not one "in relation to the administration and management of the Receivables" within the meaning of Condition 12. It is therefore not a direction which Condition 12 gives the Noteholders the power to give. Their basis for this argument is that the fundamental responsibility for managing the Receivables has at all times rested with the Collection Agent, and they say that whilst the Fiscal Agent may have been able to take action against the Collection Agent in respect of the administration and management of the Receivables, the Fiscal Agent itself did not and could not administer and manage the Receivables directly. In this regard they say that the effect of Clause 11 of the Master Transfer Agreement ("Clause 11"), which provided for all such activities to be performed by the Collection Agent (not the Fiscal Agent), implicitly excludes all other persons from performing these functions, such that for as long as the Calculation Agent is in place, no other person can perform these functions. Finally, they say that the fact that one of the functions of a new Fiscal Agent

might be to take action against the Collection Agent cannot justify regarding the role of that Fiscal Agent as a whole as being "in relation to the administration and management of the Receivables", such that the wholesale removal and replacement of the Fiscal Agent would fall within Condition 12.

9. I do not regard these points, individually or collectively, as meeting the real prospect of success test. As regards the first issue, although it is clear that the Collection Agent had both the power and the ability to manage the Receivables, it was appointed to that role by the Issuer. Once a Trigger Notice has been served, the Fiscal Agent is obliged to take any action which it deems necessary on behalf of the Issuer to protect the interests of the Noteholders in respect of the Receivables. There is no indication that its power to act in respect of the Receivables is limited so as to prohibit it from interfering with the actions of the Collection Agent – indeed the natural construction would be rather the reverse. In order to succeed on this point, the Defendants would have to show that the effect of Clause 11 was not only to vest the power to manage the Receivables in the Collection Agent, but also to divest the Issuer of those powers so completely that it could not exercise them, or appoint the Fiscal Agent to exercise them on its behalf. I cannot find any support for this proposition in any of the documentation, and I do not think that it is arguable. Consequently I do not think that this ground has any prospect of success.

10. Furthermore, it is clearly correct that the fact that one of the functions of a new Fiscal Agent might be to take action against the Collection Agent cannot justify regarding the role of the Fiscal Agent as a whole as being "in relation to the administration and management of the Receivables". However, this is not what

is relied upon. Clause 14.3(c) of the Fiscal and Calculation Agreement provides that after a Trigger Notice the Fiscal Agent is entitled to take such action in the name of the Issuer as it may deem necessary in respect of the Receivables. This seems to me to make clear that the role of a Fiscal Agent in this circumstance is potentially to act in relation to the administration and management of the Receivables. I therefore do not regard the second argument in support of this position as arguable.

11. The Defendants' third argument is based on the proposition that one of the potential roles of the Fiscal Agent after a Termination Notice is to pursue any remedies which are available to the Issuer against any creditor. "Creditor" in this context could include the Noteholders. They therefore argue that this could potentially place the Noteholders in a position of conflict of interest, since they would be using their power to appoint a person to decide (inter alia) whether to sue them. It was (I think) accepted that this issue was entirely theoretical, since there is no suggestion that any such claim existed, or was in any way likely to exist. However, the point which the Defendants made was that the fact that the Noteholders' having a power to replace the Fiscal Agent after a Termination Notice could give rise to a conflict of this kind must be an indicator that such a power could not have been intended by the parties to have been created.

12. Here again, I think that this argument is hopeless. The mere fact that the exercise of a contractual power could place a person in a position of conflict is not per se an argument that that power does not exist or is invalid. It is perfectly open to contracting parties to agree to place each other, or to place a third party, in a position where conflicts of interests might arise. It might be argued that the more

inevitable the conflict, the greater the possibility that that outcome might not have been intended, but even if that were true it would not avail the Defendants in this case, where the possibility seems to be entirely notional. Consequently, I do not regard this argument as having any realistic prospect of success.

Stay Pending Appeal

13. The general principles were set out in *Re Maud* [2016] EWHC 1319 (Ch) by Snowden J (as he then was) at [22]-[23]:

> "22. The principles applicable on an application for a stay pending appeal were helpfully summarised by Mr Justice Eder in *Otkritie International Investment Management Limited & Ors v Urumov (aka George Urumov) & Ors* [2014] EWHC 755 (Comm) at paragraph 22. Mr Justice Eder stated:
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> "As summarised by the claimants, the applicable principles are as follows:
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> 1. First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR 52.7.
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> 2. Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: *Winchester Cigarette Machinery Ltd v Payne And Another* unreported 10 December 1993 per Ralph Gibson LJ.
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> 3. Third, as stated in *DEFRA v Georgina Downs* [2009] EWCA Civ 257 at paragraphs 8 to 9, per Sullivan LJ (emphasis supplied):
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> > 'A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay and, if such grounds are established, then the court will undertake a balancing exercise, weighing the risks of injustice to each side if a stay is or is not granted.
> >
> > It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture or because a threatened strike will occur or because some

> other form of damage which will be done which is irremediable …'
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> 4. Fourth, the sorts of questions to be asked when undertaking the "balancing exercise" are set out in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd.* [2001] EWCA Civ 2065 at paragraph 22 per Clarke LJ (emphasis supplied):
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> > 'By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent? '
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> 5. Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: *Leicester Circuits Ltd v Coates Brothers* [2002] EWCA Civ 474 at paragraph 13, per Potter LJ."
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> 23. That last reference to the decision in *Leicester Circuits* is to a paragraph in the judgment of Lord Justice Potter which summarised the position concisely as follows:
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> > "The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."'

14. The Defendants argue that the interests of justice require a stay, and the Claimant opposes this request.

15. The Claimant's first argument is (in effect) that it is impossible to stay a declaration since a declaration is not a mandatory order. As Toulson LJ said in *West Tankers Inc v Allianz SpA and another* [2012] Bus. L.R. 1701 at [22]

> "A declaratory judgment or award decides some question as to the respective rights and obligations of the parties. It is not "executory" in form in that it does not formally order either party to do or to refrain from doing anything."

16. This is true in theory - non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution. However, like a number of propositions which are true in theory, practice is somewhat different. Leaving aside the fact that disobedience to a declaration can be punished by sequestration (see *Webster v Southwark London Borough Council* [1983] QB 698), the more important point is that the effect of a declaration may be to enable a person to act so as permanently to alter the legal position between the parties and third parties. An example of this was *Rousselon Freres et Cie v Horwood Homewares Limited* [2008] EWHC 1660 (Ch), [4]. In that case a declaration had been made to the effect that the Respondent was not entitled to certain trade marks. The Court pointed out that, if the effect of this declaration were not suspended, the consequence would be that the marks would be removed from the register, and the Appellant would suffer irreversible prejudice. The effect of the declaration was therefore to effect an irreversible change in the position of one of the parties as against third parties, and as a result the declaration was suspended pending appeal.

17. In that case the court considered the argument that a declaration, since it could not be enforced, could not be suspended. In this regard, Warren J said

> "Next, Mr Vanhegan submits that a declaration is complete in itself and requires no enforcement; I suppose that it should then follow that, since there is no need for enforcement, there is no scope for stay. In the case of a declaration having effect only between the parties, that may ordinarily be so. But even in such a case, the court must surely have, at least pending an appeal, a jurisdiction to prevent possibly irrevocable action being taken in reliance upon the declaration."

18. I think that this is a correct statement of the position. The position as regards a stay of a declaration is therefore, in my view, to be considered on the same grounds as any other application for a stay. This position was summarised by Clarke LJ in the passage from *Hammond Suddard* cited by Snowden J in *Re Maud* cited in para 13 above.

19. The question here is therefore as to what the position would be if these declarations, if not suspended, would have on the position of the parties. The Defendants say that the risk here is so great as to potentially render a successful appeal nugatory. Their argument is that if the declarations are not suspended, then by the time the appeal comes to be heard the Fiscal Agent will have been replaced by a new agent appointed by the Noteholders, and that agent will have given a number of instructions to the Collection Agent and to third parties upon which they will have acted. They therefore say that even if the existing Fiscal Agent were to be restored to its position pending a successful appeal, the consequences of third parties having acted on the instructions of the (*ex hypothesi* illegitimate) Fiscal Agent in the interim would be difficult, if not impossible, to unscramble.

20. The Defendants further point out that the Claimant's position is not that there is any immediate risk if the Defendants remain in control of the Issuer and its actions. They point out that this is not a case where the Claimant has applied for

an expedited hearing because of any suggested imminent harm if the existing agents are not replaced, and that they have not applied for interim relief. They further submit that the point to be appealed is a short one which should be capable of being dealt with expeditiously, so the length of the stay which they seek should not be material.

21. In this regard I agree with the Defendants. The truth of the matter is that the Defendants are seeking to maintain their existing control over the actions of the Issuer in order to continue to operate it in the way in which they have historically done so. The Claimant seeks to take control in order to effect what might be considered a plan of remediation. I think it is necessarily correct that the commencement of the implementation of that plan by the Claimant could have very significant consequences for the affairs of the Issuer, and potentially make the restoration of the status quo ante impossible.

22. I therefore think that the declarations should be stayed pending the resolution of the appeal process. My fundamental task here, as set out by Buckley LJ in *Minnesota Mining and Manufacturing Co v Johnson & Johnson Ltd* [1976] RPC 671 at 676, is "so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be.", and I think a stay of the declarations is the best way in which to achieve that end.

23. The Claimant poses two objections to the imposition of a stay. One is that such a stay would deprive them of the benefit of the plea of *res judicata* in any further proceedings between these two parties brought before the completion of the

appeal process. The other is that the stay means that they will be unable to apply for any sort of injunctive relief as against the Defendants until that point.

24. I do not think that there is anything in either of these points. The Defendants agree that the Claimant should have liberty to apply in these proceedings. In the event of further litigation between these parties prior to the completion of the appeal process, it seems to me that it would be open to the Claimant to apply for adjustment of the effect of the stay in either of these sets of circumstances. The purpose of a stay of a declaration is to avoid the taking of actions which would affect the position of third parties on a permanent basis. As between the parties the stay could be (and should be) dispensed with upon request in an appropriate case.

25. Consequently, I refuse the application for leave to appeal, and grant the application for the declarations to be stayed pending the completion of the appeal process.