Neutral Citation Number: [2023] EWHC 1732 (Ch)

Case No: BL-2023-000359

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 11/07/2023

Before :

Deputy High Court Judge Gleeson

- -

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**

Hearing dates: 3 July 2023

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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.

Deputy High Court Judge Gleeson

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Deputy High Court Judge Gleeson :

1. This claim concerns the interpretation of certain contractual provisions in three securitisation transactions, and the consequences of that interpretation for the validity of steps taken under the transactions.

2. The First Defendant is a compartmentalised securitisation vehicle. It is the Issuer of notes (the "Issuer") for four separate securitisations, referred to as TFI, TFII, TFIII and TFIV (each a "Scheme"). Some of the documentation relating to these Schemes, and in particular the Terms and Conditions of the Notes ("the Conditions"), is governed by English law and provides for the exclusive jurisdiction of the English courts. The Claimant is a party to some but not all of the documentation for each Scheme.

3. Three of the Schemes (TFI, TFII and TFIII) have now passed their redemption date without the relevant liabilities being fully discharged. It is these three Schemes which are the subject of this CPR Part 8 claim.

The Schemes

4. The assets securitised are trade finance receivables. They comprise claims and other monetary rights arising under payment instruments and other forms of financing, or under insurance policies granted by export credit agencies, issued in connection with the provision of export finance.

5. As a broad overview of the Schemes:
   5.1. CFE (Suisse) S.A. ("CFE(S)"), originates receivables and sells them to the Issuer (the "Receivables");
   5.2. CFE(S) is appointed Collection Agent by the Issuer, and undertakes the administration, management and collection of the Receivables;
   5.3. The Issuer issues senior and junior notes to the noteholders. Senior notes were purchased by the Claimant and then on-sold to its clients; junior notes were retained by CFE(S); and
   5.4. The Issuer agrees to apply all collections received or recovered from the Receivables to pay the obligations due to the noteholders.

6. The Second Defendant occupies various roles in relation to TFI, TFII and TFIII, having been appointed by the Issuer as Fiscal Agent and Calculation Agent.

7. There are some differences between the different Schemes in terms of their documentation. However, it was common ground before me that these differences do not affect the issues to be decided.

8. The failure of the TFI, TFII and TFIII Transactions to redeem in full on their final maturity dates constituted "Trigger Events" under Condition 11 of their respective Conditions. The Scheme documentation provides that if this occurs, Trigger Notices may be served on the First Defendant as Issuer for each set of notes, and provides for certain consequences to flow from the service of these notices.

9. One of the consequences of the service of the Trigger Notices is that:

    9.1. under condition 12.1 of the Notes, the First Defendant must "comply with all directions of the Most Senior Class of Noteholders set out in a dully [sic] passed Ordinary Resolution in relation to the management and administration of the Receivables pursuant to the Fiscal and Calculation Agreement".

    9.2. under clause 14.1 of the Intercreditor Agreement (as defined in the claim form, the "Intercreditor Agreements" are the Fiscal and Calculation Agreements for TFI and TFII and the Intercreditor Agreement for TFIII), the Issuer shall "comply with all directions of the Organisation of the Noteholders in relation to the management and administration of the Receivables…".

    These are the relevant provisions for TFII – the provisions for TFI and TFIII are in identical terms but with different documentary references.

10. The Claimant has, in purported exercise of this power to give directions, directed the First Defendant to remove and replace the Second Defendant as Fiscal Agent and as Calculation Agent in respect of TFII and TFIII. As regards TFI, it is necessary to convene a meeting of Noteholders (in respect of TFI) to take action. It is common ground that a notice to convene such a meeting has been given, and the question in this case is whether that notice was valid. The First Defendant takes the position that the directions given fall outside the scope of the power which these provisions vest in the Claimant. The First Defendant has therefore refused (a) to comply with directions (in respect of TFII and TFIII) to terminate the Second Defendant as Fiscal Agent and Calculation Agent and replace it with Mount Street Mortgage Servicing Limited and (b) to convene a meeting of Noteholders (in respect of TFI) to consider a resolution directing the same.

11. The issue before me is therefore as to whether the directions (or, in the case of TFI, the notice to convene a meeting) given were validly given.

The Agents

12. There are four agents appointed by the Issuer:
    12.1. The Paying Agent;
    12.2. The Collection Agent;
    12.3. The Calculation Agent; and
    12.4. The Fiscal Agent.

The Paying Agent

13. The Paying Agent is appointed under the Payment Agency Agreement for the purpose of, inter alia, providing directions as to the payment of interest and the repayment of principal in respect of the Notes. The position of the Paying Agent is not in issue before me.

The Collection Agent

14. The Collection Agent is appointed under clause 11 of the Master Transfer Agreement. It is, in essence, the Issuer's agent in charge of all the activities related to the

administration, management and collection of the Receivables. Of particular relevance:

14.1. The Collection Agent shall act on behalf of the Issuer, but also in the interests of the Noteholders;

14.2. The Collection Agent undertakes to carry out, directly or through its delegates, all the activities related to the administration, management and collection of the Receivables (defined as the "Collection Services"). There is a long list of non-exclusive obligations owed by the Collection Agent including, inter alia, managing the Receivables, initiating judicial proceedings on behalf the Issuer to recover them and negotiating settlement agreements.

14.3. The Issuer may terminate the appointment of the Collection Agent only where (i) there has been a Collection Agent Termination Event; and (ii) there is the prior consent of the Organisation of the Noteholders or the Issuer has been directed to terminate the appointment by the Organisation of Noteholders.

The Calculation Agent

15. The Calculation Agent is appointed under the Fiscal and Calculation Agreement (or, in TFIII, the Intercreditor Agreement). It is, in essence, the Issuer's agent for calculating its payment obligations (which are then paid by the Paying Agent). Its core duties are set out in clause 6 of that agreement. In summary, on or prior to each Calculation Date, the Calculation Agent shall determine:

15.1. The amount of Issuer Available Funds;

15.2. The principal payment (if any) due on the Notes on the immediately following Payment Date;

15.3. The Principal Amount Outstanding of each Note on the immediately following Payment Date; and

15.4. The amount of any Premium (if any) payable on the Junior Notes.

16. The Calculation Agent is obliged to notify these determinations by means of a payments report (the "Payments Report") which it should deliver to various parties including the Issuer and the Paying Agent, and procure that the report is notified to the Noteholders.

The Fiscal Agent

17. The Fiscal Agent is also appointed under the Fiscal and Calculation Agreement (or, in TFIII, the Intercreditor Agreement). It is, in essence, the Issuer's agent in respect of its organisational dealings with the Noteholders. Its core duties prior to the service of a Trigger Notice are set out in clause 5. In summary:

17.1. The Fiscal Agent is the agent of the Issuer and not the Noteholders;

17.2. Where either the Issuer and/or the Fiscal Agent is required to act upon a Resolution of the Organisation of the Noteholders or Class of Noteholders, the Fiscal Agent shall comply with such Resolutions and with the directions contained therein;

17.3. The Fiscal Agent shall perform the activities it is required to perform under the Rules of the Organisation of the Noteholders including issuing certificates and instructions in relation to Meetings;

17.4. Upon the receipt of a demand or notice from any Noteholder, the Fiscal Agent shall forward a copy of the demand or notice to the Issuer;

17.5. The Fiscal Agent shall cause to be published all notices required to be given by the Issuer under the Conditions; and

17.6. The Fiscal Agent shall hold a copy of the Transaction documents to be available for inspection at its office.

The Documentation

18. Condition 12.1 of the Notes provides:

> "*Proceedings: At any time following the delivery of a Trigger Notice, the Issuer shall comply with all directions of the Most Senior Class of Noteholders set out in a dully* [sic] *passed Ordinary Resolution in relation to the management and administration of the Receivables pursuant to the Fiscal and Calculation Agreement, including, without limitation, any direction to sell or otherwise dispose of the Receivables according to the provisions of the Fiscal and Calculation Agreement.*"

19. Clause 14.1 of the Fiscal and Calculation Agreement provides:

> "***Withdrawals***
>
> *Following the delivery of a Trigger Notice, the Issuer shall, subject to mandatory provisions of Luxembourg insolvency laws, comply with all directions of the Organisation of the Noteholders in relation to the management and administration of the Receivables, including, without limitation, any direction to dispose of the Receivables pursuant to clause 14.2 below, and no monies may be withdrawn or liquidated, as the case may be, from the Accounts, except to the extent that any such monies are applied in accordance with the applicable Priority of Payments or as otherwise provided for by Clause 15 below.*"

20. Article 20 of the Rules of the Organisation of the Noteholders provides (among other things) that:

> "*…Any Ordinary Resolution or Extraordinary Resolution involving any matter other than a Basic Terms Modification that is passed by the Most Senior Class of Noteholders shall be binding upon all the holders of the other Classes of Notes irrespective of the effect thereof on their interest.*"

21. Following a Trigger Notice the Fiscal Agent assumes a significantly expanded role. Clause 14.3 of the Fiscal and Calculation Agreement provides:

> "***14.3 Other actions following the delivery of a Trigger Notice***
>
> *Without limitation to the generality of the foregoing, subject to mandatory provisions of Luxembourg insolvency laws, following the delivery of a Trigger Notice, the Fiscal Agent shall also be entitled, until the Notes have been redeemed in full or cancelled in accordance with the Terms and Conditions:*

> *(a) upon request of the Organisation of the Noteholders, to request the Account Bank to transfer all monies standing to the credit of the Account held with the same into one or more accounts opened for such purpose by the Fiscal Agent in the interest of the Noteholders and the Other Issuer Creditors, provided that the Fiscal Agent shall keep at all times the monies transferred separate from the monies and separate from all other sums which may, at any time and for whatsoever reason, be in its possession;*
>
> *(b) upon request of the Organisation of the Noteholders, to request any party to the Transaction Documents to transfer any monies to be paid or delivered to the Issuer into an account opened pursuant to paragraph (a) above;*
>
> *(c) to require performance by each Other Issuer Creditor of its obligations under the Transaction Documents to which such Other Issuer Creditor is a party, to bring any legal actions and, in case of failure by the relevant Other Issuer Creditor to perform its obligations, to pursue any remedies which are available to the Issuer under any relevant Transaction Document against such Other Issuer Creditor, in the name and on behalf of the Issuer, and generally to take such action in the name and on behalf of the Issuer as the Fiscal Agent may deem necessary to protect the interests of the Issuer, the Noteholders and the Other Issuer Creditors in respect of the Receivables and the rights and powers of the Issuer under the Transaction Documents; and*
>
> *(d) to pay or cause to be paid, on behalf of the Issuer, all sums due and payable by the Issuer to the Noteholders, the Other Issuer Creditors and any other creditors of the Issuer in respect of fees, costs and expenses incurred in relation to the Securitisation in accordance with the applicable Priority of Payments.*"

22. Clause 9 of the Fiscal and Calculation Agreement contains provisions relating to the removal and replacement of the Fiscal Agent and the Calculation Agent as follows:

22.1. Clause 9.1.1 provides:

> "*The Issuer may at any time, with the prior consent of the Organisation of Noteholders, revoke the appointment of any of the Calculation Agent or Fiscal Agent by giving not less than 30 (thirty) days prior written notice to the relevant Agent, with a copy to the Fiscal Agent, where appropriate (the* ***Revocation Notice****), regardless of whether a Termination Event has occurred, without being requested to give any reason for such revocation and without being responsible for any liabilities, damages, costs, expenses or losses incurred by any*

> *Party as a result of such revocation save in case of gross negligence or wilful misconduct of the Issuer.*"

22.2. Clause 9.2.1 sets out several Termination Events and clause 9.2.2 provides:

> "*If a Termination Event occurs the Issuer may (or shall if so requested by the Organisation of Noteholders or in any case if the events under numbers (iv) and (vi) above occur) forthwith terminate the appointment of the Agent by giving a written notice to the relevant Agent, with a copy to the other parties and to the Noteholders (the* ***Termination Notice****).*"

22.3. Having removed an Agent, the Issuer is to appoint a replacement under clause 9.4.1:

> "*Save as provided by Clause 9.4.2 below, following any termination or resignation pursuant to this Clause 9, the Issuer shall appoint, with the prior consent of the Organisation of Noteholders and the prior notice to the other Parties, a successor Agent.*"

23. The regime for the Issuer to remove and replace the Fiscal Agent and/or Calculation Agent, as summarised above, is expressed to apply "*at any time*" and so regardless of whether there has been a Trigger Event.

24. As regards construction, counsel helpfully took me to the primary authorities on the interpretation of contracts, and reminded me that the task of the Court is to "ascertain the objective meaning of the language which the parties have chosen to express their agreement": *Wood v Capita* [2017] AC 1173, per Lord Hodge at [10]; or, to put it more straightforwardly, "to determine what the parties meant by the language used": *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900 at [14]. This involves "ascertaining what a reasonable person would have understood the parties to the contract to have meant": *Rainy Sky* at [14].

The Issues

25. The question is as to whether the power of the Most Senior Class of Noteholders to give directions following a Trigger Event entitles it to direct the Issuer to exercise the power which it has under Clause 9 to remove the Agents and appoint successors. This will be the case if – but only if – the direction to replace the Agent is a direction which is within the scope of Condition 12.

26. The Claimant says that these conditions are satisfied. The Defendants dispute this on two broad grounds. One is that, as a matter of construction, the terms of Clause 9 prevent the power from being exercised to instruct the Issuer to remove the agent. The other is that the powers of the Noteholders do not extend to instructing the removal of the Fiscal and Calculation agents, since such an instruction is not an instruction "in relation to the management and administration of the Receivables", and is therefore not within the scope of Condition 12.

The Construction of Clause 9

27. Clause 9 provides that the Issuer may at any time, with the prior written consent of the Organisation of the Noteholders, revoke the appointment of the Calculation Agent or Fiscal Agent. The clause also identifies a number of events ("Agent Termination Events") which, if they occur, trigger specific termination provisions. In the event of an Agent Termination Event occurring with regard to an Agent, the Issuer must terminate the appointment unilaterally if that Agent Termination Event constitutes an event of insolvency or the imposition of withholding tax by reason of the Agent's appointment. In the case of other Agent Termination Events, the Issuer may unilaterally terminate the appointment of the Agent, but must do so if instructed to do so by the Organisation of the Noteholders.

28. The Defendants say that Clause 9 operates as a complete code regarding the circumstances in which noteholders may be involved in the removal of the Fiscal Agent or the Calculation Agent (and the extent of their involvement in the appointment of a replacement Agent). They say that, since this code is set out in the agreement it cannot be circumvented by seeking to invoke the power to issue directions regarding the management and administration of the Receivables in Condition 12. They say that the Claimant is seeking to use the power given under Condition 12 to "reach through" to Clause 9, requiring the Defendants to take an action under that clause which the clause itself does not provide for. Their position is that if it had been the intention of the parties that the service of a Trigger Notice should result in the senior noteholders having a power to dismiss the Agents under Clause 9, then Clause 9 would have expressed that in clear terms, and that I should infer from the fact that it does not do so that that was not the intention of the parties.

29. The Claimant says that the fact that Clause 9 specifically sets out the circumstances in which the Organisation of the Noteholders should have any involvement in the removal of an Agent is only relevant as regards the position before the Noteholders assume the power to direct the Issuer following a Trigger Notice. Once the Trigger Notice is served, the powers of the Noteholders are expanded by their power to direct. It therefore says that the terms of Clause 9 cannot be read as implicitly limiting the powers of the Noteholders after the service of a Trigger Notice.

30. On this point I agree with the Claimant. There is nothing in the agreement which purports to limit the use of the Condition 12 power to direct the Issuer to exercise the Clause 9 power. The Defendants argument that such a limit should be inferred from the drafting of the Clause 9 provisions is based on the idea that having provided for some noteholder involvement in some decisions in some circumstances, the clause should be read as excluding all other noteholder involvement in all other circumstances. I do not think that this is correct. The argument from absence is always a difficult one in the context of contractual construction – the idea that the fact that a particular outcome is not addressed in a particular contract is positive evidence that the parties intended not to permit it is inherently unpersuasive. More importantly, it is necessary to remember that documentation of this kind is prepared to govern the position when things go right. It does the best it can to provide for the position when things go wrong, but the fact that it does not specifically contemplate and provide for

a particular unintended outcome is not, of itself, determinative as to how that outcome should be addressed.

31. The Defendants also point out that it would not be possible to use this route to remove the person primarily charged with the management and administration of the Receivables – that is, the Collection Agent. The Issuer has no general power to remove the Collection Agent in the absence of a Termination Event. Pursuant to clause 11.5 of the Master Transfer Agreement, the Collection Agent may only be removed if a (specifically defined) Collection Agent Termination Event has occurred or it has become illegal for the Collection Agent to carry out one or more of its duties and no arrangement is put in place by the parties in a reasonable timeframe. They therefore say that the Claimant's construction of Condition 12 would have the effect of empowering the Noteholders, in the absence of a Termination Event, to compel the removal and replacement of the Fiscal Agent and the Calculation Agent, even though the Noteholders would have no equivalent power to compel the removal and replacement of the Collection Agent. In circumstances where the Condition 12 power is delimited by reference to the "management and administration of the Receivables" – which they say is the exclusive prerogative of the Collection Agent – this would be paradoxical.

32. I do not think that there is anything paradoxical about this outcome. Prior to the service of a Trigger Notice, the responsibilities of the Fiscal Agent do not extend to the management and administration of the Receivables, and the only person charged with this responsibility is the Collection Agent. It is therefore true that the position of the Collection Agent is to some extent entrenched in the documentation.

33. It is helpful in this regard to consider why this might be – in other words, why is the Collection Agent treated differently in this regard. This is a relatively easily answered question. The securitisations in question are securitisations of trade receivables. As is common with securitisations of this type, the assets owned by the vehicle are receivables originated by a trade finance bank (in this case, CFE(S)). The obligors in respect of the assets are not notified of the fact that the assets are securitised. In consequence, they perceive their obligations as owed only to CFE(S). This means that CFE(S) must in practice manage the property owned by the securitisation vehicle, and it would be extremely difficult for any other person to do so without the active co-operation of CFE(S). I think that the point here is that what is "entrenched" in this agreement is not the status of Collecting Agent *qua* manager and administrator of the Receivables, but CFE(S) *qua* originator of the Receivables.

34. It is quite clear that the aim of Clause 14.3 is to expand the role of the Fiscal Agent very significantly upon such a notice being served. For the reasons set out below (paragraphs 41-2), I consider that the post-notice responsibilities of the Fiscal Agent do extend to the management and administration of the Receivables, and overlap to some extent with those of the Collecting Agent. I do not think that this has any bearing on the question of whether the Fiscal Agent can be removed or not.

35. It therefore seems to me that if the Most Senior Class of Noteholders does indeed have the power to give a direction to the First Defendant to exercise its powers under Clause 9, there is nothing in the Clause, or elsewhere in the Scheme documentation,

which prevents or inhibits them from exercising that power. The only question is as to whether this power can in fact be used for that purpose.

Can the Condition 12/Clause 14 Power be Used to Replace the Fiscal Agent?

36. It is clear that the Condition 12 power can only be used to do a thing for a purpose "in relation to the management and administration of the Receivables" owned by the Scheme. The question is whether the appointment of a new Fiscal Agent can be said to be for that purpose.

37. It is agreed that ordinarily responsibility for managing and administering the Receivables is the role of the Collection Agent. The first question is whether that responsibility is exclusive, such that for as long as the Collecting Agent is in post, no other agent can perform these functions. If that is the case, then the Fiscal Agent, even with its expanded powers, cannot be said to be engaged in those activities.

38. There was some debate before me as to whether the appointment of CFE(S) as Collection Agent had in fact terminated under the scheme documentation. This arose out of a provision in the Master Transfer Agreement (by which the various agents were appointed by the Issuer) to the effect that "the appointment of the Collection Agent is made in respect of all the Receivables transferred from time to time … and shall remain in full force and effect until the Final Maturity Date.". The Claimant argued that this meant that the function of Collection Agent was not being performed by anyone, that it was therefore incumbent on the Fiscal Agent to step into the breach, and that the Fiscal Agent must therefore be charged with the duty of performing the Collection Agent's function of managing and administering the Receivables. They therefore concluded that if the Fiscal Agent was in fact now charged with the Collecting Agent's responsibilities of managing and administering the Receivables, then a direction in respect of the appointment of the Fiscal Agent must necessarily be a direction in relation to the management and administration of those Receivables.

39. I do not think that this is correct. The wording of the clause cited above does not seem to me to be effective to automatically terminate the appointment at the Final Maturity Date – rather its function seems to be to lock in the Collection Agent until that date. I also note that in fact the Collection Agent has continued to perform its function as such until today, with – as I was shown in correspondence – the active consent of the Claimant. Given that on the facts of this particular situation the active co-operation of the Collection Agent is more or less essential to the extraction of value from the Receivables, that is unsurprising. I think that even if the clause was intended to have the effect that the Claimant suggests that it has, its terms seem to have been varied by conduct.

40. More importantly, if the clause had the meaning argued for by the Claimant, the result would be that on a termination arising (as it has here) whilst the vehicle still owned assets, the vehicle and its investors would be in a distinctly sub-optimal situation. It seems very unlikely that this would have been the intention of either party. In short, although the Claimant sayA that the effect of the drafting was to terminate the appointment because the draftsman did not envisage a termination whilst the vehicle still owned assets, I think that the true position is that the drafting does not have that effect because the draftsman did envisage precisely that circumstance.

41. However, that is not the end of the matter. The agents are appointed by the Issuer to discharge functions which would otherwise fall to be discharged by the Issuer. Each agent has some degree of discretion as to the discharge of their function, and, to the extent that they have such discretion, it is exercised on behalf of the Issuer. The actions of each agent are therefore – ultimately - the actions of the Board of the Issuer.

42. It therefore follows that in respect of any action which an Agent is appointed to take, the Board is not excluded from also taking that action. I think it is also the case that if a different Agent of the Issuer is also empowered to take such an action, the powers continue to exist in parallel. Put simply, if the effect of the documentation is to grant to the Fiscal Agent powers to manage and administer the Receivables, the fact that the Collection Agent is also in post and charged with performing that function does not mean that the Fiscal Agent would be somehow debarred from exercising those powers.

43. I therefore think that the question as to whether the Fiscal Agent has power to manage and administer the Receivables is unaffected by the question of whether the Collection Agent is or is not currently in post.

44. The Fiscal Agent today may "take such action in the name and on behalf of the Issuer as [it] may deem necessary to protect the interests of the Issuer, the Noteholders and the Other Issuer Creditors in respect of the Receivables and the rights and powers of the Issuer under the Transaction Documents". The question is therefore one as to whether the exercise of a power to appoint a person to perform such a role can be said to be the exercise of a power relating to "the management and administration of Receivables".

45. I think that this must be the case. An agent who has the power to take action in the name of the owner of receivables to protect the interests of that owner in those receivables seems to me to be necessarily potentially involved in the management and administration of those receivables. I therefore also think that the appointment of such an agent is a matter which falls within the scope of action relating to the management and administration of those receivables.

46. The Defendants point out that since the Claimant is one of the "Other Issuer Creditors", there might be issues with the Claimant having an unrestricted right to appoint a replacement Fiscal Agent. It might be that, if the Claimant were facing the prospect of legal action, and if it were to seek to replace the Fiscal Agent with a substitute in order to avoid such an action, there might be all sorts of issues regarding the extent of the power. However, I do not think that that is relevant to the issue which is before me today.

The Calculation Agent

47. The position as regards the Calculation Agent, however, is very different. The Calculation Agent's role is principally to produce the Payments Report, which following a Trigger Notice is to be done on or prior to such date *"as may be reasonably indicated by the Fiscal Agent*" under clause 6.3.2 of the Fiscal and Calculation Agreement.

48. The Claimant says that the production of the Payments Report is administrative in nature and relates to the Receivables. I broadly agree with this, but there is a clear distinction between actions which relate to recoveries from the Receivables and actions which constitute the management or administration of the Receivables. In my view, the Calculation Agent cannot be said to be involved with the management or administration of receivables. I therefore do not think that the Condition 12 power can be used to require the Issuer to replace the Calculation Agent.

Commercial Considerations

49. I was addressed by both parties as to the commercial considerations which they said supported their positions. However, I find that this issue can be addressed as a simple matter of construction, and there is no reason on either side to go beyond the four corners of the documents.

50. I therefore find that :-

    50.1. Issue 1: Condition 12.1 of the Notes and/or clause 14.1 of the Intercreditor Agreements (or in the case of TFI, clause 13.1) entitles the Organisation of Noteholders to direct the Issuer to (i) remove the Fiscal Agent and (ii) appoint a specified replacement Fiscal Agent.

    50.2. Issue 2: The direction in writing of the Senior Noteholders given in respect of TFII and TFIII on 16 December 2022 was validly given for the purposes of condition 12.1 and/or clause 14.1 as regards the Fiscal Agent.

    50.3. Issue 3: The notice to convene a meeting of Noteholders for TFI dated 23 November 2022 (or alternatively 28 November 2022) was validly given as regards the Fiscal Agent.