



**NEUTRAL CITATION NUMBER: [2019] EWHC 3900 (Ch)**

**Case No: FL-2019-000005**

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

**7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL**

**Thursday, 11 July 2019**

**Before :  
THE HONOURABLE MR JUSTICE ZACAROLI**

**Between :**

**BUSINESS MORTGAGE FINANCE 6 PLC**

**Claimant**

**- and -**

**GREENCOAT INVESTMENT LIMITED & OTHERS**

**MR W TROWER QC & MR A RIDDIFORD** (instructed by **Simmons & Simmons**)  
appeared on behalf of the Claimant

**MR T QURESHI** (instructed by **Singhania & Co**) appeared on behalf of the Defendants

**APPROVED JUDGMENT**

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(Official Shorthand Writers to the Court)

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**MR JUSTICE ZACAROLI:**

1. This is an application by Business Mortgage Finance 6 plc ("BMF6") for urgent interim relief and an order for expedition in the context of a Part 8 claim against Greencoat Investments Limited ("GIL") and five other defendants. I heard today from Mr Trower QC for the claimant and from Mr Qureshi for all the defendants. BMF6 is the issuer of six classes of notes under a securitisation structure originated in 2007 and due to mature in 2040 ("the Notes"). The income stream to fund the issuer's obligations under the Notes is derived from a portfolio of commercial mortgages relating to property in the UK. The Notes are constituted by a trust deed of 18 May 2007, under which BNY Mellon Corporate Trustee Services Limited ("BNY") is appointed the trustee.
2. For some time, GIL has been holding itself out and purporting to take various steps as a noteholder with a substantial holding of these Notes. The claimant contends that GIL is not, however, an actual or deemed noteholder. It says that while GIL has made a tender offer for the Notes, there is no evidence that it has paid for any Notes or that it has satisfied the requirements of recognition of a person entitled to exercise any of the rights of a noteholder under the securitisation documents.
3. Since 20 June 2019, GIL and the other defendants have purported to take a number of steps which BMF6 contends are wholly invalid and ineffective but which, until the court rules on the point, are having or are likely to have a seriously prejudicial effect on the interest of the issuer and its assets as well as on the interests of the true noteholders and the various obligors under the underlying mortgage loans which constitute the issuer's principal asset. Those steps are as follows.

(1) On 20 June 2019, GIL, purporting to act as 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 also to appoint PLL as an agent of BNY.

(2) On 24 June 2019, GIL purported to direct BNY as note trustee to accelerate the Notes and to appoint administrators of the issuer under paragraph 14 of Schedule B1 to the Insolvency Act 1986.

(3) On 27 June 2019, GHL and PLL, as purported note trustees, purported to accelerate the Notes and then to appoint Mr Fitzsimmons (the fourth defendant) as receiver over the issuer's loans outstanding, including all the other charged property.

(4) Also on that date, Mr Fitzsimmons, as receiver, purported to exercise a power to remove the issuer's directors and to terminate the issuer's corporate administration agreement with Sanne Group. The fifth defendant (Mr Oyekoya) and the six defendant (Ms Stoica) now hold themselves out as directors of the issuer.

(5) Again on 27 June, GIL, in its purported capacity as noteholder, sought to direct the removal of BNY as note trustee.

(6) On 28 June, the purported receiver purported to sell the "loans outstanding, including all the other charged property", for a cash consideration of £237 million to an unidentified purchaser. The claimant received notice of this in a letter from Mr Oyekoya of 1 July, who at that stage was holding himself out as the receiver. Despite requests, no evidence has been provided as to the identity of the purchaser, the terms of the proposed sale or the receipt or destination of the purchase price.

(7) On 3 July, GHL and PLL purported to act as note trustees in terminating the appointment of Target Servicing Limited as special servicer and cash bond administrator, with GHL being appointed in its place.

4. The claimant seeks interim injunctive relief pending determination of its Part 8 claim in five parts: first of all, an injunction restraining GHJ and PLL from purporting to act as note trustees or, in PLL's case, as agent of BNY; secondly, an injunction restraining GHJ from purporting to act as cash bond administrator or special servicer; thirdly, an injunction restraining the fourth and fifth defendants from purporting to act as receivers of the issuer or its assets; fourthly, an injunction restraining the fifth and sixth defendants from acting as directors of the issuer; and fifthly, an order requiring the fourth and fifth defendants to disclose the person or persons to whom they contend the charge property has been sold and full particulars of the terms of that sale.
5. It is common ground the principles to be applied are those set out in *American Cyanamid v Ethicon* [1975] AC 396. Those are as follows. First, is there a serious issue to be tried? Second, would damages be an adequate remedy either way (that is, for either side, depending on whether the court granted or refused the injunction)? Third, if not, where does the balance of convenience lie?
6. Dealing with the first question (is there a serious issue to be tried) Mr Qureshi accepted in his submissions this morning that there is such a serious issue to be tried. He was plainly right to do so, in my judgment. In order to explain my conclusions on the later part of the *Cyanamid* test, it is, I think, necessary in any event to set out briefly my reasoning on this point. In its Part 8 claim, the claimant seeks declarations as to the invalidity of each of the above steps that I have mentioned. It provides a number of grounds for contending that each of them is invalid and of no effect. However, the third, fourth, sixth and seventh steps depend for their legitimacy on the effectiveness of the first step. The second step (the instruction to the note trustee that there has been an event of default to accelerate the Notes and appoint administrators) is not directly relevant since it does not underly any of the actions that have since been taken or which are sought to be restrained by the injunction. The legitimacy of the fifth step depends upon arguments that mirror those relating to the first step. Accordingly, I will focus, as Mr Trower has, on the first step, being the purported appointment of the separate or co-trustees of the Notes and of PLL as agent of BNY.

7. In broad terms, the claimant contends that the first step is invalid because, first of all, GIL is not a noteholder and, secondly, even if it was a noteholder at the time, the terms of the securitisation documents precluded it from taking the steps it purported to take. So far as the question of GIL as a noteholder is concerned, Mr Kalia, a director of GIL, recently provided evidence in support of a failed application to put BMF6 into administration, positively asserting that GIL is not a noteholder. Moreover, he accepted that the note trustee only has duties towards parties who have the express book entries in the clearing systems stating that they have beneficial title in the Notes. That was said in support of an administration application, and to explain why any attempt to appoint administrators via the note trustee would be fruitless.
8. BNY has consistently sought evidence of GIL's standing as a noteholder (see most recently a letter dated 10 July 2019) but none has been provided. I note that yesterday was the intended further delayed settlement date under the tender offer, but no evidence has been presented as to what happened, if anything, in relation to that tender offer.
9. Second, even if GIL is a noteholder in the sense of having acquired a beneficial interest in the notes, the claimant contends it has no power to remove the note trustee and, in any event, it has no power to appoint a separate or co-trustee. As to removal, GIL relies on clause 24 of the trust deed. This empowers the holders of the A Notes, while they subsist, by extraordinary resolution to remove the notes trustee. The defendants rely on having executed a written resolution to this effect. This is the subject matter of schedule 5 to the trust deed, paragraph 23 of which treats a written resolution in essentially the same way as a resolution of instrument holders, in which case two hurdles need to be overcome by the defendants. First, they must establish they are instrument holders and, secondly, that they are entitled to receive notice. Paragraph 1.1.5 of schedule 5 states that those who are in possession of a voting certificate are deemed for all purposes to be the holder of the Notes in connection with any meeting, including, therefore, for the purposes of notice being given. A voting certificate is a certificate issued by the principal paying agent. There is no evidence that GIL has been issued with such a certificate.

10. Mr Trower pointed out a potential contrary argument based on page 488 of the bundle, being the master definition of a noteholder. The sentence includes:

"Instrument holders shall, except where the context otherwise requires, be deemed to include holders of beneficial interests in the instruments."

But, he submits (and I see the force of this) the context in schedule 5 clearly requires otherwise since it provides a complete and self-contained mechanism for determining who can vote at meetings or by written resolutions.

11. As to the appointment of a trustee or agent, the claimant appears to be on even stronger ground. Paragraph 23.1 of the trust deed states that the power to appoint a trustee vests in the issuer alone. True it is that the appointee must be approved by an extraordinary resolution of the A noteholders but there is nothing in the trust deed which empowers the A noteholders to appoint a trustee. The only other power to appoint a trustee is the power to appoint a separate or co-trustee by paragraph 23.2 of the trust deed, but that vests solely in the existing note trustee. There is a question mark over whether that is a power that the trustee could be directed to exercise. Assuming it is, however, the power in 23.2 is only exercisable in three circumstances, two of which (relating to the need or desirability of having a trustee to take proceedings or enforce judgments) do not arise in this case, and the third of which is if the existing trustee considers the appointment to be in the interests of noteholders. That is not something which it can be *required* to do on an instruction of noteholders. The only power to appoint an agent of the note trustee similar vests in the notes trustee (see clause 18 of the trust deed).
12. The defendants rely on clause 8.1 of the trust deed for the contention that the trustee is bound to act on the instructions of an extraordinary resolution of noteholders. Clause 8.1 relates in the first instance to the trustee's powers of enforcement under clause 7, although it does include reference to "any other action of the trustee under the trust deed". Mr Trower accepts that for today's purpose there is at least an argument as to whether that wording is sufficiently broad to include the appointment of a co-trustee, but it also seems to me to be at least arguable that this is a power itself limited to actions relating to enforcement.

13. The defendants also rely on clause 15.8, but this merely adds a protection for the trustee in circumstances where it is otherwise bound to act on the instructions of noteholders, namely it need not do so unless first indemnified and/or secured to its satisfaction against all actions et cetera. It does not specify what those circumstances are.
14. Finally, the defendants rely on clause 8.3, but this again relates to the enforcement of the security or other terms of the trust deed. It precludes the noteholders proceeding directly against the issuer unless the trustee, having become bound to do so, has refused to do so within a reasonable period. In other words, it only applies where the trustee is otherwise under an obligation to comply with a direction but does not add to the circumstances in which it must do so.
15. Accordingly, I am satisfied that there is at the very least a serious issue to be tried as to the validity of the appointment of GHL and PLL as trustees and of PLL as agent. Since the second to fourth and the sixth and seventh steps are all dependent on the validity of that appointment, there is, even without a consideration of the separate arguments relating to them, a serious issue to be tried in respect of the validity of each of them.
16. I should say something, however, about the purported removal of the existing directors of the claimant and the appointment of the fifth and sixth defendants as directors in their place, particularly (as I will mention in a moment) the defendant seeks an order adding what they call the former directors as parties to these proceedings, on the basis, they say, that there is an issue over whether the former directors are indeed still directors.
17. The appointment of Mr Fitzsimmons as a receiver was made by a deed of appointment dated 27 June 2019. This appointed Mr Fitzsimmons over 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 contains a series of fixed charges over the loans, mortgages, other collateral, insurance contracts and other contractual rights and bank accounts of the issuer. By letter dated 27 June 2019, Mr Fitzsimmons purported to remove the directors of the claimant:

"... pursuant to powers granted and vested in the receiver by the deed of charge and assignment dated 18 May 2007."

It does not identify which power or powers entitle the receivers to remove or appoint directors of the issuer. In his witness statement Mr Fitzsimmons relies on clause 11.7 of the deed of charge, but that merely enables the trustee to vest the receiver with such powers the trustee may have under the deed.

18. In addition to the point that there is no evidence the trustee ever did vest any specific powers in the receiver, the problem here is the trustee itself has no power to remove or appoint directors of the issuer under the deed of charge. The power to appoint and remove directors vests in the company in general meeting under the issuer's articles of association. The trustee's powers under the deed of charge are contained in clause 10. These include, at their widest, permission for the trustee to carry on the business of the issuer and to appoint and dismiss agents, but none of these powers extend, in my judgment, to enabling the trustee to exercise any power to appoint or remove directors vested in the general meeting. 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 powers *other than* to deal with the charged assets. It certainly does not equip them with a power to interfere in the shareholders' control over the appointment and removal of directors. The trustee's specific power to appoint and dismiss agents must be seen in that light. It is a power to appoint his agents, not a power to dismiss other agents of the company such as its directors. Accordingly, I fail to see any basis on which the appointment of the fifth and sixth defendants as directors could be effective.
19. Turning, then, to the second question under the *Cyanamid* test (are damages an adequate remedy) first, what would be the position if I refused to grant the injunction? The claimants contend that there are serious doubts as to whether there has been a sale at all and, if so, whether it was for £237 million and whether that money is secured or controlled by the defendants. Their concerns in this respect are compounded by the complete absence of any evidence on these points as opposed to bare assertion in the defendants' witness statements. Even now, the defendants have failed to produce any evidence on any of these points. I accept the proposition that if there has been no sale or if the sale proceeds are not secured then the risk of damage arising from the



claimant's inability to control its assets and from the potentially misleading messaging to the market and noteholders, if the claimant is right, is a material risk. Similarly, there is continuing uncertainty as to what has been done and what further might be done. I am satisfied on the evidence that there is a serious question mark over the ability of the defendants to satisfy any award of damages. Fortified by the uncertainty surrounding what steps have been or might be taken, I find that damages would not be an adequate remedy for the claimant if I were to refuse the injunction and it turned out one should have been granted at a later date.

20. What, then, if I grant the injunction and it turns out to be wrong to have done so? Mr Qureshi says on the evidence that there would be damages in the amount of £63 million as set out in Mr Kalia's statement of 10 July. Paragraph 8 of that statement, although identifying four different heads of damage (which it is true total in aggregate £63 million), is merely a series of bare assertions as to what damage is said to occur. For example, at subparagraph (c) it is said that if the Notes were not to be redeemed as envisaged on 15 August 2019 then this would result in an estimated loss of no less than £31 million. When I pressed Mr Qureshi as to how and on what basis these sums had been arrived at, he fairly and frankly accepted he could not elaborate on them.
21. Standing back and asking what damage would the injunction cause, on the defendants' case they have sold the entire mortgage portfolio. The injunction would not put that sale at risk. All it means is that in the period between now and the trial, which it is accepted and which I find (as I will explain in a moment) should be expedited, it cannot be used to pay down the Notes, but the defendants do not propose doing that until 15 August anyway. For these reasons I conclude damages would not be an adequate remedy in this case.
22. I need to address a separate question, however, as to the question of a cross-undertaking in damages. The issuer makes no bones about the fact that it cannot fortify the cross-undertaking in damages out of its own assets. That is because all the sums that the issuer receives are secured in favour of the noteholders and need to be used to pay down under the waterfall in favour of the noteholders. Such sums as may be siphoned off for expenses would be **de minimis** in all the circumstances. It does, however, point to the fact that it is owed substantial sums by GIL as a result of costs

orders arising from the failed administration proceedings, and there is at least something in the way of assets, therefore, which it would be able to use to satisfy an undertaking to a limited extent.

23. As against this, however, there is no evidence that the defendants wish to do anything before 1 August, which is the point at which they would wish to give notice of redemption. Accordingly, it seems to me there is no realistic possibility of damage being suffered by an injunction being granted for the short period between now and 1 August.
24. Turning to the third question (the balance of convenience), according to the defendants there is nothing more to do in relation to the administration of BMF6 other than to pay down the proceeds of sale for the benefit of the noteholders on 15 August. It is therefore very difficult to see what prejudice would be caused by injuncting them from taking any further steps in their purported capacity as trustee, agent, directors, et cetera, until then. On the other hand, I have already referred to the potential for continuing damage if the claimant's fears turn out to be justified. Particular reliance is placed on the risk of confusion for present and prospective noteholders and the risk of interfering with the underlying assets. Plus, there is a strong incentive to preserve the status quo in the short time pending the final resolution of this matter. The status quo in this case is, in my judgment, properly to be regarded as that immediately existing before the defendants took the first steps of which complaint is made.
25. For all those reasons, in all the circumstances I exercise my discretion in favour of the grant of the injunction. Although I will require a cross-undertaking in damages from the issuer, I do not require it to be fortified.
26. There is a separate injunction sought in relation to the provision of information. The order sought is that the purported receivers provide information which relates to the issuer's property, specifically the person or persons to whom this property has been purportedly sold, and the terms of that purported sale. CPR 25.1(g) permits the court to order a party to provide information about relevant property or assets which may be the subject of an application for a freezing order. "Relevant property" means property

which is the subject of the claim or as to which any question may arise in the claim (see CPR 25.1(2)).

27. The claimant contends this is relevant property on the basis it is property as to which a question may well arise in the Part 8 claim, for example, if it transpires that the terms of the purported sale are not in the best interests of the issuer or the secured creditors. Alternatively, the claimant contends it may well be necessary to apply for a freezing order given the suspicions they have made clear - as to the reality of a sale, its terms and/or the security of the proceeds - and given the refusal by the defendants to provide information.
28. The test to be applied is set out in the White Book commentary at 25.1.26. There must be some credible material or a reasonable possibility based on credible evidence that a freezing order may be sought. In this case the very fact that the defendants claim to have taken control of and sold the entire assets of the issuer in circumstances where there is a serious issue to be tried as to whether they ever had the power to do so, combined with their refusal to give any information about that sale or the proceeds is itself sufficient, in my judgment, to justify the order being sought on either or both of the required bases, and I therefore make that order as well.
29. Turning to the question of expedition, although it is agreed by the defendants that this is a matter suitable for expedition, it is nevertheless a matter on which the court needs to be satisfied. The test to be applied is well known. In *WL Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 622 [25] to [38], Neuberger J set out the four factors that are to be considered on an application for a trial to be expedited. First, there must be good reason, of which Henderson J in *JW Spear & Sons Ltd v Zynga Inc* [2013] FSR 270 [28] explained, "It is only in a case of real, objectively viewed urgency that such an application may properly be granted." Secondly, the court needs to consider the level of interference with the administration of justice. The third factor is the prejudice to the other side and the fourth is any other special factors.

30. So far as good reason is concerned, Mr Trower relies on a letter of 1 July from the purported receiver in which is stated an intention to complete a redemption of all outstanding Notes. The claimant remains sceptical and is concerned that no notice of redemption shall be given on 1 August. There seems to me to be considerable urgency here whichever of the parties is right at the end of the day. If the defendants are right then, in light of the injunction I have granted, they will need the issue to be resolved before 1 August 2019, or at least very soon afterwards, in order to know whether a notice is to be given to the note trustee so that the Notes can be redeemed on 15 August.
31. Balancing the risk of uncertainty for the parties and others against the fact that there is an unsatisfactory position as to the adequacy of damages on both sides, this is not a case where the court can reasonably take the view that, once the injunction is in place, the case can be left to go on at a more leisurely pace. For the reasons I have already set out, it seems to me highly unlikely that the injunction would cause any further damage to be caused in the meantime between now and the date of expedition. Even if it does, the issuer needs to know where it stands. Mr Qureshi says that there was no response to the notice of intention to appoint a receiver for a whole 24 hours after it was made. It seems to me that 24 hours is an extremely limited period to respond in any event, and a response was in fact given 24 hours later. But, in any event, that is irrelevant, in my judgment, to the need for urgency going forward between now and the date of the trial.
32. The second matter is interference with the administration of justice. The parties made enquiries of the listing office and learnt that it would be possible to have a trial of this matter before the end of this term for a one-day hearing. I add that it is possible that that could be extended to one-and-a-half days but no more. It seems to me the urgency of this case justifies that step, notwithstanding that it may mean that other parties do not get their cases listed before the end of this term.
33. So far as prejudice to the defendants is concerned, this has largely fallen away in the light of the defendants' acceptance of an order for expedition. In reality, this case involves, predominantly, if not solely, questions of construction. There is no evidence required for that beyond the documents. Most of the evidence already filed will, I

suspect, be wholly irrelevant to the trial itself, although it may be relevant to the question of an injunction.

34. The only question where there may be an issue of fact is the first one, that is, whether GIL is in fact a noteholder. It is likely that this is capable of being determined on limited evidence pretty quickly. It seems to me unlikely that there will need to be disclosure, and witness evidence (if any) should be very limited.
35. Turning to the question of special factors, there are none, in my judgment, which count against expedition in this case.
36. For those reasons, I propose to order that the trial be expedited to be heard with a time estimate of one to one-and-a-half days. I will discuss with counsel the precise timing of that and the precise directions in a moment.
37. Finally, I need to deal with the application by the defendants to join the former directors. Mr Qureshi says that the former directors (as he calls them) should be joined as parties. He says they are the driving force behind this litigation. He says they did not really have any function, being paid only £8,000 a year, but it is being suggested on the evidence they did have some greater role which the defendants wish to challenge. In my judgment, that has no relevance at all to the issues that need to be determined in this trial.
38. For the reasons I have given earlier, it seems to me very (if not wholly) difficult to argue that the directors were properly removed and that the fifth and sixth defendants were properly appointed as directors by the receivers. I put to Mr Qureshi that I could not see any basis upon which the appointment was valid, and he was either unable or did not wish to make any reasoned response to that point. On that basis, I dismiss the application to join the so-called former directors.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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