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



No. FL-2018-000014

[2019] EWHC 964 (Ch)

Rolls Building  
Fetter Lane  
London EC4A 1NL

Thursday, 28 March 2019

Before:

SIR GEOFFREY VOS

(Chancellor of the High Court)

B E T W E E N :

DEUTSCHE TRUSTEE COMPANY LIMITED

Claimant

- and -

(1) DUCHESS VI CLO B.V  
(2) BARINGS (UK) LIMITED  
(3) NAPIER PARK EUROPEAN CREDIT OPPORTUNITIES FUND LIMITED

Defendants

MR S. ROBINS (instructed by Allen & Overy) appeared on behalf of the Claimant.

THE FIRST DEFENDANT did not attend and was not represented.

MR J. GOLDRING QC (instructed by Dentons UK and Middle East LLP) appeared on behalf of the Second Defendant.

MR D. WOLFSON QC and MR A. DE MESTRE (instructed by Collyer Bristow LLP) appeared on behalf of the Third Defendant.

**J U D G M E N T**

## THE CHANCELLOR:

- 1 I now have to decide an issue as to the costs of the proceedings that I have determined. The question is who should pay the costs of the neutral parties to these proceedings: first, the first defendant Issuer, represented by Baker McKenzie LLP, who did not appear before the court at the trial but sent a letter saying they would be bound by the outcome, and secondly, the Trustee (the claimant), which did appear by Mr Robins at the trial and made brief submissions but did not take a position ultimately as between Napier and the Collateral Manager.
- 2 The competing arguments are that Mr Wolfson, on behalf of Napier, submits that if the Collateral Manager is not ordered to pay the costs of the neutral parties, the Class F Noteholders will be deprived, pound for pound, of those monies, so they will not achieve the complete victory that this hostile litigation has resulted in for them. Conversely, Mr Goldring, for the Collateral Manager, submits that that outcome is the contractual consequence of the notes that Mr Wolfson's clients have purchased. The Class F Noteholders are at the end of the line and the neutral costs are to be financed by those Class F Noteholders who only get out what is left after all items of expense in the Waterfall have been discharged.
- 3 I suggested in the course of argument that a line might be drawn as regards the Trustee's costs at some intermediate stage after the dispute had raised its head but before it had become proper hostile litigation. Ultimately in submissions it appeared that the only possible line to draw as regards the Trustee's costs would be at the issue of proceedings. Mr Robins, for the Trustee, submits that there were significant costs incurred by the Trustee before the issue of proceedings but argued that those costs were very much hostile litigation costs in that the battle lines were drawn early on. Indeed, Mr Wolfson confirmed that, saying (in his usual vivid style) that this dispute was totally apparent from the get-go.
- 4 Mr Robins suggested another possible interim solution, which is that I might order that the Collateral Manager pay only the costs of and occasioned by the proceedings which might exclude some of the costs of the Trustee that could properly be described as administrative costs relating to the issue rather than the dispute.
- 5 In my judgment, there is a real analogy here with a trust dispute, as I put to the parties in the course of argument. It is quite imaginable that in a trust dispute, where there is a dispute between beneficiaries, that the costs as between the beneficiaries will be treated as if it were hostile litigation, whilst the costs of the Trustee will normally come from the fund, on the basis that the Trustee is neutral as between the disputing parties.
- 6 This, however, is a rather different position because the warring parties are not both beneficiaries of the fund. Whilst it is true that if the Collateral Manager had won, it would have received the fund, there is no other beneficiary, apart from the Class F Noteholders, who would benefit from the neutral position taken by the Trustee. So I think that I have to look at this on the basis of the transaction documentation without in any way assuming that the normal rules applicable to trust litigation will be relevant here.
- 7 The first starting point is how to deal with the costs of the Issuer. It seems to me that that is relatively clear. The Issuer has not come to court to participate in these proceedings and has agreed to be bound by the outcome. It has asked in a letter to the court dated 28 March 2019 that the court should deal with its costs having regard:

"To the submissions put forward by counsel for the Trustee (in so far as applicable to the Issuer) as the other neutral party in the case".

8 It seems to me, however, that the factors that apply to the Trustee, which has set the scene for this dispute and appeared at the hearing, do not apply to the Issuer. The Issuer is entitled to its costs as a matter of contract under the documentation. By not participating in the proceedings, and not even attending today, it is not really entitled to ask for its costs from the other parties - it must rely on the contractual documentation for its recoverable costs - so I decline to make any order in favour of the Issuer.

9 As regards the Trustee, in my judgment, for the reasons I have partially given already, its costs of and occasioned by these proceedings were in the nature of adversarial costs. Mr Robins made the good point that the Trustee's job is to protect the Noteholders' interests and had the Noteholders not appeared themselves, it would have been likely that it would have been required to argue their case against that of the Collateral Manager if no resolution could have been achieved. It seems to me, therefore, that whilst it is unfortunate that there are two parties to an adversarial dispute on the one side, rather than only one, inevitably the consequence of the Collateral Manager having lost the battle with Napier is that it also has to pay the adversarial costs of the Trustee, which was a necessary and proper party to the proceedings. Moreover, the same result would have applied if the Collateral Manager had won, namely Napier would have had to pay the costs of the Trustee in the adversarial litigation.

10 So the order I shall make is that there be no order as to the costs of the Issuer but that the Collateral Manager will pay the Trustee's costs of and occasioned by the proceedings, on the standard basis, to be assessed if not agreed.

[LATER]

11 I now have to deal with the question of what payment should be made on account of Napier's costs. The competing positions are that Mr Wolfson asks for 60 per cent of those costs, which comes out at £265,000 (not including VAT), and Mr Goldring submits that it should only be 40 per cent of those costs because there is a hefty amount of £167,000 in the bill for the professional fees of Sidley Austin LLP, who were the solicitors acting until quite a late stage in the proceedings. Mr Wolfson has informed me that the reason that they ceased to act was as a result of a conflict, whether commercial or legal, and the Collateral Manager declined to allow Sidley Austin to continue to act for Napier in the litigation.

12 It does seem to me that that argument is one that I am wholly unable to resolve today, but that an assessment may make it much clearer, and therefore I would not wish to pre-judge it in awarding an interim payment which is so large that if those costs were to be disallowed, or if it were to be found that there was a large element of duplication between what Sidley Austin charged and Collyer Bristow charged, my interim payment had been reached. In those circumstances, I propose to order an interim payment of £180,000, as suggested by the Collateral Manager, to be made within 28 days.

[LATER]

13 Interim payment of £84,000 to be made within 28 days.

[LATER]

- 14 I now have to decide whether to grant permission to appeal to the Collateral Manager. Whilst I reached a clear view as to the proper interpretation of the transactional documentation, I do not think either side really suggested that the competing position was not arguable. I have to decide whether there is a real prospect of an appeal succeeding. The reality is in these much-vexed interpretational disputes, as Mr Goldring submits, that other judges can take a different view and purely pragmatically I expect that the matter would be delayed by going to an application for permission to appeal. I take the view that there is a real prospect of success, whilst endorsing my own opinion, but that is in the nature of judging. I am perfectly content that I have reached the right conclusion but, equally, open to the idea that others may disagree and may be able to produce very sound grounds for doing so, and I think it is appropriate in this case, which has potential repercussions beyond the £50 million odd in issue, to grant permission to appeal if the Collateral Manager wishes to take the matter to appeal and risk the costs of doing so if it loses.
- 15 I will grant permission to appeal, but I am not extending time.
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This transcript has been approved by the Judge