

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Right Honourable Mr. Justice Arnold

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 17/05/2016

Before :

THE CHANCELLOR OF THE HIGH COURT

LADY JUSTICE MACUR

and

LORD JUSTICE BEAN

Between :

CHEYNE CAPITAL (MANAGEMENT) UK (LLP)

**Appellant/
First Defendant**

- and -

(1) DEUTSCHE TRUSTEE COMPANY LIMITED

**Respondent/
Claimant**

(2) DECO 15-PAN EUROPE 6 LIMITED

**Respondent/
Second Defendant**

MR. GABRIEL MOSS QC (instructed by **Sidley Austin LLP**) for the **Appellant/First Defendant**

MR. ROBIN DICKER QC (instructed by **Clifford Chance LLP**) for the **First Respondent/Claimant**

MR. JEREMY GOLDRING QC (instructed by **Reed Smith LLP**) for the **Second Respondent/Second Defendant**

JUDGMENT

THE CHANCELLOR (Sir Terence Etherton):

1. This appeal concerns the meaning of clause 26.4(b) of the Issuer Servicing Agreement dated 28 July 2007 which is part of the documentation relating to the commercial mortgage-backed securitisation transaction out of which this dispute arises. It is an appeal from the order and judgment of Arnold J dated 31 July 2015: [2015] EWHC 2282 (Ch).
2. This judgment is a short form judgment which, with the encouragement of Lord Dyson MR, judges of the Court of Appeal may in the future use for appellate decisions in appropriate cases. It is used here because this appeal raises no issue of law, precedent or other matters of general significance, and the relevant facts and documentary material are set out in the judgment under appeal and are not in dispute on the appeal.
3. The relevant facts, which were agreed by the parties in two Statements of Agreed Facts, are set out in Arnold J's judgment, as are the provisions in the relevant Transaction documents. The abbreviations used in Arnold J's judgment are adopted here.
4. I would dismiss the appeal.
5. The natural and ordinary meaning of the words in clause 26.4(b) - "and the Rating Agencies have confirmed to the Issuer Security Trustee and the Note Trustee that the appointment of the successor Issuer Servicer or Issuer Special Servicer will not result in an Adverse Rating Event" - are clear and unambiguous. Their natural and ordinary meaning does not permit the failure of one or more rating Agencies to provide such confirmation to be ignored merely because the Rating Agency or Agencies in question do not provide such confirmations as a matter of principle.
6. There is a fundamental commercial difference between, on the one hand, a condition that requires a specific confirmation from the Rating Agencies that there will be no resulting Adverse Rating Event and, on the other hand, a condition that there must be either such a confirmation or an unwillingness in principle to provide a confirmation one way or the other.
7. Neither the agreed facts, nor the other provisions of the Transaction documents, including in particular clause 29.13 and the proviso to clause 26.3, are inconsistent with or otherwise undermine that natural and ordinary meaning in relation to Fitch and S&P. Nor do they support any inference that the parties, if they had thought about the possibility of Fitch or S&P or both refusing to provide confirmation as a matter of principle, would have agreed that the need for those Rating Agencies to provide the confirmation required by clause 26.4(b) should simply be dispensed with.

8. That natural and ordinary meaning does not produce a commercially absurd result and is not inherently inconsistent with commercial common sense. The exception (or what Arnold J called the second limb) in clause 26.4(b) – “unless each class of Noteholders have approved the successor Issuer or successor Issuer Special Servicer, as applicable, by Extraordinary Resolution” – covers the situation where a Rating Agency has indicated that as a matter of principle it will not give confirmations at all just as much as where it refuses to give a confirmation.
9. The exception cannot be dismissed as irrelevant because of being practically inoperable. The evidence does not support the conclusion that there is no practical possibility of the exception being put into operation in the case of the termination of an appointment under each of clauses 26.1, 26.2 or 26.3. The fact that it might be difficult to secure the approval of the more senior classes of Noteholders to the requisite extraordinary resolution, or that one class of Noteholder might be able to block a change required by the Controlling Class, does not mean that giving the relevant wording of clause 26.4 its natural and ordinary meaning produces a commercially absurd result or is contrary to commercial common sense. It is inherent in the exception, as it is throughout the Transaction, that priority is given to the interests of the higher classes of Noteholders over the more junior classes, and in that respect the exception operates in precisely the same way whether one or more Rating Agencies refuses to provide the confirmation or indicates that in principle it does not provide confirmations.
10. The views expressed by the deputy judge in *US Bank Trustees Limited v Titan Europe 2007-1 (NHP) Ltd* [2014] EWHC 1189 (Ch) at [99] and [106] do not assist on the point in issue. There are material differences between the relevant documents in the two cases: in particular, the absence in the *Titan* case of the exception in clause 26.4(b) and the different wording of the equivalent provision to clause 29.13 (clause 26(7)(e) in the servicing agreement in the *Titan* case).

LADY JUSTICE MACUR: I agree.

LORD JUSTICE BEAN: I also agree.
