



Neutral Citation Number: 2008 EWHC 463 (ch)

Case No: 01753 of 2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th March 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

MR JUSTICE EHERTON

IN THE MATTER OF WHISTLEJACKET CAPITAL LIMITED (IN RECEIVERSHIP)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Mr Simon Mortimore QC and Mr Barry Isaacs (instructed by **Clifford Chance**) for the
Receivers
Ms Susan Prevezer QC and Mr Paul Stanley (instructed by **Bingham McCutchen (London)**
LLP) for Interested Party A
Mr Stephen Atherton QC (instructed by **Morgan Lewis**) for Interested Party B

Hearing dates: 3rd March and 4th March

APPROVED JUDGMENT

Mr Justice Etherton :

Introduction

1. This is an Originating Application (“the Application”) by the receivers of Whistlejacket Capital Limited (“the Company”) for directions as to the management of the Company’s business. The receivers are Neville Barry Kahn, Nicholas Guy Edwards and Nicholas James Dargan (“the Receivers”).
2. There are no named respondents to the Application. Two interested parties have appeared and made submissions on the hearing of the Application. They wish to preserve anonymity. Following a procedure used by Briggs J in *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch) (“*Cheyne Finance (No 1)*”) and *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch) (“*Cheyne Finance (No 2)*”), I shall refer to them as Party A and Party B.
3. Party A holds US\$220,797,902 US Medium Term Notes issued by the Company with a stated maturity date of 15 February 2008 (“Party A’s US Notes”). Party B holds various US Medium Term Notes issued by the Company, with various maturity dates, of which US\$110,393,502 US Medium Term Notes with a stated maturity date of 25 February 2008 (“Party B’s US Notes”) are relevant to the Application. The Receivers seek directions as to the manner in which they should manage and apply the Company’s assets having regard to Party A’s US Notes and Party B’s US Notes and other note holders in a similar position to them.
4. The Application raises relatively short but important questions of interpretation.

Factual background

5. The Company was incorporated and has its registered office in Jersey. It is a structured investment vehicle, known as a SIV, which was established for the business of investing in a portfolio of particular types of investments.
6. One of the features of this type of vehicle is that it makes the Company “insolvency remote”, that is to say more difficult to make the subject of insolvency proceedings, and limits the recourse of note holders.
7. The Company has been financed primarily by issuing securities. It issued euro medium term notes (“Euro MTN”), US medium term notes (“US MTN”), euro commercial paper (“Euro CP”) and US Commercial Paper (“US CP”). In addition to the Euro MTN, the US MTN and the Euro CP (“the Senior Notes”), the Company issued capital notes (“the Capital Notes”) that are subordinated to the Senior Notes.
8. The Senior Notes were issued with a variety of maturity dates and interest rates.
9. The Company’s US MTN and US CP were co-issued by a subsidiary company incorporated in Delaware, Whistlejacket Capital LLC (“the Co-Issuer”).
10. The US MTN are governed by the terms of an Indenture dated 19 July 2002 as amended by two subsequent indentures (“the Indenture”), a Global Note (“the US Global Note”) and, in respect of each issue, a Pricing Supplement containing details of the maturity date and the interest rate. The US MTN and the Indenture are governed by New York law. There is no evidence, and no one has contended on the hearing of the Application, that there is any difference between the law of New York and English law relevant to the issues I have to decide.
11. The Euro MTN and the Euro CP are governed by the terms of their respective Global Notes.

12. The Company also entered into four Global Master Repurchase Agreements with various counterparties (“the Repos”), two of which are currently outstanding. It is not necessary, for the purpose of this Judgment, to explain further the objective and operation of the Repos.
13. The Company also entered into five committed liquidity facilities. Again, it is not necessary for me to explain these further.
14. The Company has also entered into eleven derivative contracts with various institutions as counterparties on various dates (“the Derivative Contracts”), ten of which are still outstanding.
15. The Company appointed Standard Chartered Bank as its investment manager (“the Investment Manager”) to provide advice and assistance in relation to its investment activities. The Investment Manager’s duties are set out in an agreement dated 13 June 2007 (“the Investment Management Agreement”).
16. By a security trust deed dated 19 July 2002 as amended by a deed dated 13 June 2007 (together “the Security Trust Deed”) the Company created security over certain assets. The security trustee under the Security Trust Deed is BNY Corporate Trustee Services Limited (“the Security Trustee”). The Security Trust Deed gave the Security Trustee the power to appoint receivers of the assets, property and undertaking subject to the security created by the Security Trust Deed in certain circumstances. The Security Trust Deed also sets out the order of priority in which the Receivers should pay the Company’s creditors.
17. A Master Framework Agreement dated 19 August 2002, as amended on 13 June 2007, contains a schedule of definitions relevant to other transactional documents, including the Investment Management Agreement, the Security Trust Deed and the Indenture.

18. On 12 February 2008 the Security Trustee appointed the Receivers to be receivers and managers of all the undertaking, property and assets of the Company pursuant to the provisions of the Security Trust Deed.
19. The principal amount of Party A's US Notes was not paid on 15 February 2008.
20. At 1.38pm New York time on 15 February 2008 the Security Trustee served on the Company a notice ("the Security Trustee's Notice"), the effect of which under the Indenture, the Receivers say, was in all the circumstances to substitute for the obligation to pay the principal of all outstanding US MTN maturing prior to 16 March 2008, including in particular Party A's US Notes on 15 February 2008 and Party B's US Notes on 25 February 2008, an obligation to pay on 16 March 2008 "the Enforcement Redemption Amount" as defined in the Indenture. Party A and Party B reject that contention. They assert that the service of the Security Trustee's Notice had no effect on the obligation to pay the principal amount of their US Notes (and of any other US MTN the stated maturity dates of which were prior to 16 March 2008) on the respective stated maturity dates.
21. The Receivers further contend that, even if they are wrong about the effect of the Security Trustee's Notice under the Indenture, the Receivers would be acting properly by making pari passu distributions to all holders of Senior Notes ("Senior Creditors"), including Party A and Party B, taking into account amounts owing but not yet due among the whole class of Senior Creditors. Party A and Party B reject that contention. They assert that under clause 6.6 of the Security Trust Deed the Receivers must apply cash received by them in payment of Senior Creditors as their debts fall due, ignoring any amounts not yet due to be paid.
22. Putting to one side the effect of the Indenture and the Security Trust Deed on any Senior Notes with a stated maturity date before 16 March 2008, the

Company faces obligations from 15 February to 16 March 2008 inclusive to pay Senior Creditors as follows.

	<u>US\$</u>
US MTN	673,024,944
Euro MTN	152,747,650
Repos	<u>1,060,324,518</u>
	1,886,097,112

In addition rather smaller amounts become due for payment during that period under derivative contracts.

23. At 16 March 2008 the following further Senior Notes will become due for payment.

	<u>US\$ million</u>
US MTN	3,697.98
Euro MTN	1,914.07
Euro CP	<u>43.78</u>
	5,655.83

24. I have heard the Application over the last two days as a matter of urgency. I have been asked to give my judgment speedily.

The relevant documents and provisions

The Global Note and the Pricing Supplement

25. The US Global Note provides that the holder of US MTN is entitled to the benefit of, and is deemed to have notice of, all the provisions of the Indenture and the Security Trust Deed.
26. In the Global Note the Company and the Co-Issuer jointly and severally promise, in accordance with the Indenture and the Pricing Supplement, to pay to Cede & Co Inc, the New York Depository, on the specified maturity date or on such earlier date as the same may become payable, the principal amount,

interest and all other sums as may become payable pursuant to the terms of the Indenture and the Pricing Supplement.

27. As I have said, in the case of Party A, the specified maturity date in the Pricing Supplement was 15 February 2008. The Pricing Supplement also stated that the aggregate principal amount was US\$220 million, the issue price was US\$ 99.955, the rate of interest was a variable rate payable monthly, and the redemption amount was 100 per cent. In the case of Party B, the specified maturity date in the Pricing Supplement was, as I have said, 25 February 2008. The Pricing Supplement also stated that the aggregate principal amount was US\$150 million, the issue price was US\$99.94, the interest rate was a variable rate, payable quarterly, and the redemption amount was 100 per cent.

The Investment Management Agreement

28. The Investment Management Agreement contains provisions for investment management and other services to be provided by the Investment Manager, including giving notice to the Security Trustee of an “Insolvency Event” as follows:

“12.3 The Investment Manager shall monitor the ability of the Company to pay amounts owing to Senior Creditors as they fall due and shall notify the Security Trustee forthwith upon becoming actually aware of the occurrence of an Insolvency Event.”

“Insolvency Event” was defined in the Master Framework Agreement to mean, so far as relevant, an “Insolvency Acceleration Event”; and the latter expression was defined to mean: “the Company is or becomes unable to pay its debts as they fall due to Senior Creditors and any other persons whose claims against the Company are required by applicable law to be paid in priority thereto”

The Indenture

29. The Indenture was made between the Company (1), the Co-Issuer (2) and the Bank of New York Trust Company NA, as trustee (“the Trustee”) (3).
30. Section 5.07 limits claims by note holders for the appointment of a receiver, a trustee or other remedy under the Indenture.
31. By section 9.02(a) the Company and the Co-Issuer jointly and severally covenanted, for the benefit of every person in whose name US MTN were registered, “duly and punctually” to pay the principal of (and premium or redemption amounts, if any) and interest on the Notes in accordance with the terms of the Notes and the Indenture.
32. Section 9.02(g) contained a joint and several covenant by the Company and the Co-Issuer that, unless otherwise specified with respect to the US MTN, they would designate “as a Place of Payment for each Series of Notes the office or agency of the Trustee in the City of New York and initially appoint the Trustee at its Corporate Trust Office as Paying Agent in such city ...”.
33. By section 9.02 (h) they covenanted:

“Whenever the Co-Issuers shall have one or more Paying Agents for any Series of Notes, the [Company] will, on behalf of the Co-Issuers, before 10:00 am New York City time on each due date of the principal of (and premium, if any) or interest on any Notes of that Series, deposit with a Paying Agent a sum sufficient to pay the principal (and premium, if any) or interest so becoming due, such sum to be held in trust for the benefit of the Persons entitled to such principal (and premium, if any) or interest, and (unless such Paying Agent is the Trustee) the Parent will promptly notify the Trustee of its action or failure so to act.”

34. Section 10.01(c) provided as follows.

“Insolvency Early Redemption. If the Security Trustee delivers to the [Company] notice of an Insolvency Acceleration Event (an “Insolvency Redemption Event”), the [Company] shall be obliged, by giving not less than 20 nor more than 30 days’ notice

to the Trustee or (as applicable) the Registrar and the Holders of Notes (which notice shall be irrevocable), to pay the Holders of the Notes in whole, but not in part, the Enforcement Redemption Amount (as defined below) on the date specified in such notice, which date shall be not later than the date which falls 30 days after the day on which the notice of an Insolvency Acceleration Event is served (the “Insolvency Redemption Date”). In the event that the [Company] does not duly deliver such a notice, the Insolvency Redemption Date shall be the date which falls 30 days after the day on which the notice of an Insolvency Acceleration Event was delivered to the [Company]. The Notes shall be paid at the Enforcement Redemption Amount together with interest accrued at LIBOR (and as aforesaid) on the Enforcement Redemption Amount from the Redemption Price Calculation Date (as defined below) to (but excluding) the Insolvency Redemption Date. Not less than 10 days before the Insolvency Redemption Date, the Fiscal Agent or (as applicable) the Registrar shall give notice to the Holders of Notes of the Enforcement Redemption Amount.”

35. On 15 February 2008 the Security Trustee gave notice to the Company of an Insolvency Acceleration Event; but no notice was then served by the Company under section 10.01(c). Accordingly, the Insolvency Redemption Date in the present case is 16 March 2008.

36. Section 10.01(e), so far as relevant, provided that, for the purposes of section 10.01:

“(1) the “Redemption Price Calculation Date” shall mean ... in the case of redemption pursuant to paragraph (c), the date on which the Insolvency Redemption Event occurred ...

(2) the “Enforcement Redemption Amount” shall be, for each Note, the greater of (a) par and (b) the issue price of the Note (including interest accrued but unpaid, if any) as at 12:00 noon New York City time on the Redemption Price Calculation Date ... were it to be issued at that time by an issuer receiving the highest ratings of the Rating Agencies.”

The Security Trust Deed

37. The Security Trust Deed contains fixed and floating charges over the Company's Assets (cl 3), provision for the enforcement of the security by the appointment of a Receiver on the occurrence of an Automatic Enforcement Event (cll 5, 6, 14 and Schedule 1), and provisions making the Company "insolvency remote" and limiting the recourse of note holders (cl 28).
38. By clause 2 the Company covenanted with the Security Trustee that it "shall duly, unconditionally and punctually pay and discharge in full all monies and liabilities whatsoever constituting the Secured Liabilities which from time to time become due, owing or payable by it at the time and in the manner provided for under the Secured Creditors' Documents under which such Secured Liabilities arise."
39. Clause 3.4 provided:
- "The Security Trustee shall hold the benefit of the Security on the terms of the trusts herein provided and shall deal with the Assets and apply all payments, recoveries or receipts in respect of the Assets in accordance with Clause 6.6 (Application of Proceeds)."
40. Clause 5.1, so far as relevant, provided:
- "If the Investment Manager notifies the Security Trustee of the occurrence of an Automatic Enforcement Event or the Security Trustee actually becomes aware of the occurrence of an Automatic Enforcement Event...the Security Trustee shall forthwith give notice of the same (an "Enforcement Notice") to the Company..."
41. So far as relevant to the issues on this Application, the Master Framework Agreement provided that "Automatic Enforcement Event" meant "breach of the Capital Loss Limit" as defined in Schedule 7 to the Investment Management Agreement or an Insolvency Event. Under Schedule 7 to the Investment Management Agreement there is a breach of the Capital Loss Limit if the Capital Value of the Company is less than 50 per cent of the par

amount of all issued and fully paid up outstanding Capital Notes. The expression “Insolvency Event” was defined in the Master Framework Agreement as I have described earlier.

42. On 11 February 2008 the Investment Manager notified the Security Trustee that the Company had breached the Capital Loss Limit.
43. Under clause 5.3 the Security Trustee, as soon as reasonably practicable after the “Enforcement Date”, shall appoint a receiver. The Enforcement Date was defined to mean the “earlier of (a) the date upon which the Security Trustee delivers an Enforcement Notice pursuant to Clause 5 ... and (b) the date on which an Automatic Enforcement Event occurs”.
44. Under clause 6.3, the receiver is (unless and until an Insolvency Acceleration Event occurs) required to manage the Company’s business in accordance with the “Enforcement Management Procedures”, but authorised to depart from them “to the extent that such compliance... would adversely affect the interests of the Secured Creditors” and, in case of conflict between the interests of Senior Creditors and other Secured Creditors, to “give priority to the interests of the Senior Creditors”. After the occurrence of an Insolvency Acceleration Event the receiver is no longer bound to manage the Company’s business in accordance with the Enforcement Management Procedures or [subject to an immaterial exception] the applicable provisions in the relevant Compliance Manual, and shall be entitled to sell secured assets and apply the proceeds in accordance with clause 6.6.
45. The expression “Senior Creditors” was defined in the Master Framework Agreement to mean:

“Liquidity Providers, holders of Senior Notes, the Custodian, the Security Trustee, any Receiver, Repo Agreement counterparties, Derivative counterparties, the Paying Agents, the ECP Issue Agent, the USMTN Trustee, the WP Indemnified Party and the WP Senior Creditors”.
46. Clause 6.6 (as amended) provided:

“Subject to Clause 16.18 (Deductions on account of Tax), any monies shall be applied in the following order of priority:

6.6.1 first, to pay any fees, costs, expenses and other amounts then due to the Security Trustee or any Receiver in connection with the enforcement of the Security;

6.6.2 second, to pay, pari passu and pro rata in accordance with the respective amounts then owing thereto, (i) all amounts then due to the WP Indemnified Party in respect of any claims under the WP Indemnity and (ii) any fees, costs, expenses and other amounts then due to the Security Trustee or any Receiver (other than those amounts referred to in clause 6.6.1 above);

6.6.3 third, to pay, pari passu and pro rata in accordance with the respective amounts then owing thereto, any amounts due to Senior Creditors other than the Security Trustee and any Receiver and the WP Indemnified Party...”

There follows a list (clauses 6.6.4–6.6.8) of five further types of payment in successive order of priority. The clause then continues:

“For the avoidance of doubt, no such monies shall be applied in accordance with Clauses 6.6.4, 6.6.5, 6.6.6, 6.6.7 or 6.6.8 unless (a) payment and/or provision for all amounts referred to in Clauses 6.6.1, 6.6.2 and 6.6.3 above have been made (and, in the case of the application of monies in accordance with Clause 6.6.5, unless all amounts referred to in Clauses 6.6.1, 6.6.2, 6.6.3 and 6.6.4 have been paid) and all amounts owing to Senior Creditors which are then due and payable have been unconditionally and irrevocably paid in full and discharged or (b) except to the extent that the Security Trustee or, as the case may be, the Receiver reasonably considers that the remaining Assets will be sufficient to enable all amounts owing to Senior Creditors which are not then due and payable to be discharged in full as and when they fall due for payment ... provided that any monies received by the Security Trustee or any Receiver after the Enforcement Date and retained to provide for amounts owing to Senior Creditors which are not then due and payable shall be deposited on a call basis with any Approved Bank or shall be invested in [specified securities having a maturity of not more than 90 days]....

All payments to Senior Creditors shall be made in accordance with the provisions concerning payments contained in the relevant Liquidity Facility Agreements, Euro Notes, US Notes, Derivatives and Repo Agreements.”

47. Clause 6.7. provided that:

“Payments made under this Clause 6 ... shall be made in accordance with the provisions (if any) concerning payments contained in the Secured Creditors’ Documents and this Deed and any payment so made shall be a good discharge to the Security Trustee or, as the case may be, the Receiver”.

48. Clause 6.11 provided that:

“In exercising any of its trusts, powers, authorities or discretions under this Security Trust Deed the Security Trustee is required to have regard to the interests of the Secured Creditors as a class provided that if, in the opinion of the Security Trustee, there is a conflict between the interests of the Senior Creditors and the interests of the other Secured Creditors, the Security Trustee is required to have regard only to the interests of the Senior Creditors...”

49. Under clause 14.3 the receiver is the agent of the Company.

50. By clause 14.3.2 the receiver is vested with the discretions and powers of the Security Trustee, but is required to act under the Security Trustee’s directions or regulations.

51. By clause 14.3.9: “save as otherwise directed by the Security Trustee, all monies from time to time received by such Receiver in respect of the Assets shall be paid over to the Security Trustee to be applied by it as specified in Clause 6.6 ...”

Deed of Appointment of the Receivers

52. As I have said, on 11 February 2008 the Investment Manager notified the Security Trustee that the Company had breached the Capital Loss Limit; and that, in turn, led to the service by the Security Trustee of notice under clause 5.1 of the Security Trust Deed that an Insolvency Acceleration Event had occurred. That, in turn, gave rise to the requirement to appoint a receiver under clause 6.3 of the Security Trust Deed.
53. The Receivers were appointed by a Deed dated 12 February 2008. The Deed of Appointment invested them with all the powers conferred by the Security Trust Deed and by law, as agents of the Company.
54. Clause 3 provided that the Receivers were appointed “in accordance with the provisions of the Security Trust Deed”, as receivers and managers of all the undertaking, property and assets of the Company comprised in and secured to the Security Trustee by the Security Trust Deed, so that they may exercise all the powers conferred by the Security Trust Deed and by law.
55. Clauses 4.1 and 4.2, headed “Specific Terms of Appointment” provided for the management prior to an Insolvency Acceleration Event in terms that mirrored clause 6.3 of the Security Trust Deed.

The Issues

56. The skeleton argument of the Receivers, who were represented by Mr. Simon Mortimore QC and Mr. Barry Isaacs, sets out the two issues of general significance to the receivership on which the directions of the Court are sought. They are:
 - (1) “whether, on the true construction of the conditions of the US MTN, all notes that had not been redeemed before the Insolvency Redemption Event become due to be redeemed on and not before the Insolvency Redemption Date at the Enforcement Redemption Amount calculated as at the date of the Insolvency Redemption Event, even though a particular note may have a stated maturity date on or between 15

February and 16 March 2008. A and B contend that their notes remain due to be paid on the stated maturity dates, notwithstanding the Insolvency Early Redemption provisions contained in Section 10.01(c) and (e) of the Indenture of the US MTN, which they say do not apply to them. The same issue applies to the Euro MTN and the Euro CP”; and

(2) “whether, after an Insolvency Acceleration Event, the Receivers are obliged to manage the Assets so that they pay Senior Creditors promptly as their debts fall due (“Pay As You Go”) or whether they may manage the Assets, including cash, so as to make pari passu distributions to all Senior Creditors, taking into account amounts owing but not yet due among the whole class of Senior Creditors. A and B contend that the Receivers are bound to operate Pay As You Go, even though this may work to the prejudice of Senior Creditors whose debts are not yet due. On 16 March 2008, the Insolvency Redemption Date, all Senior Notes become due for payment. Since there is no prospect of the Company being able to pay all Senior Creditors in full on and after that date, it is inevitable that thereafter all Senior Creditors will receive distributions pari passu and pro rata.”

57. These issues, being of general significance to the receivership, and no “long” note holder having agreed to appear to oppose the arguments of Party A and Party B, the Receivers have taken the view that it is appropriate for the Receivers to do so.
58. In the course of argument I was referred by each of the parties to the judgments of Briggs J in *Cheyne Finance (No. 1)* and *Cheyne Finance (No. 2)*, which concerned an investment vehicle and arrangements in some respects similar to those I am considering on this Application. The critical documents or parts of document in those cases were, however, materially different from those relevant to my decision in this case and so, impressive as those judgments are, I do not propose to refer to them further.

Issue (1)

59. Leaving aside, for the moment, the special feature of Party A’s position that its US Notes matured on 15 February 2008 and were due to be paid by 10 am on that day, the day of the Security Trustee’s Notice, the arguments advanced by Party A, which was represented by Ms. Susan Prevezer QC and Mr. Paul Stanley, and Party B, which was represented by Mr. Stephen Atherton QC, were as follows on this issue.

60. They submit that the terms of Article 10.01(c) of the Indenture only apply to the liabilities of the Company to holders of US MTN which mature after the Insolvency Redemption Date.
61. The effect of the Receivers' interpretation, they submit, would be to postpone the date for payment of Party A's and Party B's US Notes from 15 February 2008 and 25 February 2008 respectively to 16 March 2008 contrary to the plain intention of the Notes and section 10.01(c) of the Indenture.
62. They point out that the Notes themselves state that they will be paid "on the maturity date or such earlier date as the same may become payable" [my emphasis]. There are materially identical provisions in the Euro MTN.
63. Section 10.01(c), they say, is plainly dealing with early redemption, as is apparent from its introduction - "Insolvency Early Redemption" - and from the reference to an "Insolvency Acceleration Event".
64. That interpretation of section 10.01(c), they observe, is consistent with section 10.01(a) and section 10.01(b) of the Indenture. The former, the introduction to which is "Applicability of Article", refers to Notes "which by their terms are redeemable before their Stated Maturity". The introduction to the latter is - "Early Redemption For Tax Reasons".
65. Party A and Party B submit that paragraph 10(a) of the Euro MTN Global Notes is even clearer: unless "previously" redeemed, the Notes will be redeemed on the maturity date, the remaining provisions dealing with circumstances of acceleration ("... there will be no acceleration prior to the Maturity Date except as set out in paragraphs (b), (c) and (e) below").
66. Further, they emphasise that, the obligation to pay the Notes at the stated maturity date being the most basic and fundamental obligation, one would have expected any suspension of that obligation and postponement of payment to be stated in clear and express terms. There are no such clear and express terms in clause 10.01(c) of the Indenture.
67. They submit that postponement of payment of the Notes carries with it significant financial detriment, underscoring the absence of clear and express wording to support the Receivers' interpretation. First, they say that the provisions for interest at LIBOR in section 10.01(c) (on the Enforcement Redemption Amount from the Redemption Price Calculation Date to the Insolvency Redemption Date) would not be as much as the return if the

amount due on the Notes was paid and reinvested and nor is it as high as the default rate of interest payable under section 10.01(e)(5) payable if the due amount is not paid on the Insolvency Redemption Date (LIBOR compounded monthly). Second, bearing in mind the terms of clause 6.6. of the Security Trust Deed, the effect of postponement would be to compel Party A and Party B and others in a similar position to share *pari passu* with holders of later maturing Notes in circumstances where, but for the postponement, they would not have done so. Third, they would see their ability to obtain payment prejudiced by payments becoming due sooner to other Senior Creditors, for example Repo counterparties, payment to whom would not be deferred under Article 10.01(c) or otherwise.

68. In my judgment, notwithstanding those arguments, the provisions of section 10.01(c) apply to Party B and all other holders of US MTN the stated maturity dates of which fall after 15 February 2008. They do not, however, apply to Party A.
69. I approach the issue in the conventional way by seeking to ascertain the intentions of the parties, having regard to the language they have used, the relevant factual background, including the commercial purpose of the arrangements, and the provisions in linked documents. As Ms. Prevezer emphasised, I must, of course, respect the autonomy of the parties to decide whatever they wish, particularly in a case like this in which sophisticated parties are advised by highly experienced and competent advisers, including lawyers. The question is not what the Court considers would be fair or reasonable terms for the parties to have agreed, but what the parties have in fact agreed, including implied terms where necessary to make the agreement work.
70. The starting point, as Mr. Mortimore submitted, is that under the terms of clause 10.01(c), upon the occurrence of an Insolvency Acceleration Event, the Company is obliged to give notice to, among others, “the Holders of Notes” to pay “the Holders of Notes” the Enforcement Redemption Amount on the Insolvency Redemption Date. No category of Holder of Notes still outstanding at the time of an Insolvency Acceleration Event is expressly excluded.

71. At the core of the submissions of Party A and Party B on this issue is their emphasis that references in section 10.01(c) to “Insolvency Early Redemption” and “Insolvency Acceleration Event” clearly indicate early payment and not postponed payment of Note Holders, and that such an interpretation is consistent with provisions in section 10.01(a) and (b).
72. That point, in my judgment, is effectively undermined by the provisions for the calculation of the Enforcement Redemption Amount and the payment of interest on that Amount from the Redemption Price Calculation Date to the Insolvency Redemption Date. The Enforcement Redemption Amount is calculated as at the Redemption Price Calculation Date, which is the date on which the Insolvency Redemption Event occurred (in the present case 15 February 2008), and interest is payable from that date to the Insolvency Redemption Date (in the present case 16 March 2008). The provisions, therefore, substitute for the stated maturity dates of US MTN outstanding on the date of the Insolvency Redemption Event a deemed payment date of the Insolvency Redemption Event, with provision for interest from that deemed payment date to the date of actual payment. I do not consider that this interpretation is undermined by the fact that section 10.01(e)(5) provides for a higher rate of interest in the event of non-payment on the Insolvency Redemption Date.
73. Nor is this interpretation in any way undermined by the provisions of section 10.01(a) or (b), or by the terms of the Global Note. Under its express terms, the latter is to be read in conjunction with the Indenture.
74. The commercial result is not in any sense absurd or unworkable. On the contrary, it provides a coherent scheme for dealing with insolvency or possible insolvency. It puts all holders of US MTN on an equal footing as at the date of the Insolvency Redemption Event. It does mean, on the “Pay As You Go” interpretation of clause 6.6. of the Security Trust Deed (which I consider is the correct interpretation of that clause), that the holders of US MTN will take subject to, and so be prejudiced by, the claims of other Senior Creditors who do not fall within clause 10.01(c). That, however, is the commercial deal which was concluded. Indeed, the interpretation of Party A and Party B would result in a situation in which even more Senior Creditors would be entitled to claim priority over others of the same class so leading to a situation in which

limited assets would be more likely to be wholly consumed in payment of only a proportion of the class of Senior Creditors rather than being shared among the class as a whole. It is not possible to say that is a more commercially likely objective than the Receivers' interpretation.

75. For those reasons, I conclude that Party B and other holders of US MTN with stated maturity dates after the Insolvency Redemption Event fall within the provisions of section 10.01(c) of the Indenture.
76. I consider the position is different, however, as regards Party A. Under the provisions of the Indenture, the Company, acting by the Receivers, should have deposited with its Paying Agent in New York before 10am on 15 February 2008 the amount due on Party A's US Notes. That amount would then have been held in trust for Party A. No such sum was paid even though there were assets to do so.
77. The Insolvency Redemption Event, that is the Security Trustee's letter to the Company under section 10.01(c), did not arrive until 1.38pm New York time.
78. The effect of the Receivers' submissions, so far as concerns Party A, is that, by a deliberate failure to comply with the obligation to pay Party A by 10 am on 15 February 2008, Party A has been pushed into the regime under clause 10.01(a) of the Indenture to its considerable financial disadvantage.
79. Mr. Mortimore submitted that this was not a proper way of looking at the matter since, he said, time for payment was not of the essence. I am inclined to think, however, that time may well have been implicitly of the essence in the light of the covenant in section 9.02(a) of the Indenture to pay "duly and punctually", the provisions of section 9.02(h) of the Indenture, and the covenant in clause 2 of the Security Trust Deed to "duly ... and punctually pay". In any event, whether or not time was of the essence, the failure to pay by 10 am on 15 February 2008 was undoubtedly a breach of contract.
80. Mr. Mortimore also emphasised that the provisions of section 10.01(c) should not be interpreted so as to make distinctions, possibly fine ones, between different parts of a day. That would, he submitted, be contrary to principle and to the likely commercial intention of the parties. Under section 10.01(c) and (e) the Redemption Price Calculation Date in the present case is, the Receivers would contend, the whole of 15 February 2008, and so the holder of

any US MTN outstanding at any time during that day should fall within the section 10.01(c) regime.

81. I do not accept that contention. I agree with Party A and Party B that section 10.01(c) is intended to set in place a regime in which there is an actual or notional acceleration of the due time for payment of the Notes. In the case of Party A, there is no actual or, importantly, even notional acceleration of the time for payment.
82. Distinctions between different parts of the day are important in the section 10.01 regime. So, section 10.01(e)(2) of the Indenture provides that the Enforcement Redemption Amount of each Note shall be the greater of par and the issue price of the Note as at 12 noon New York City time on the Redemption Calculation Date were it to be issued at that time by an issuer receiving the highest ratings of the Rating Agencies. That higher amount was inherently incapable of applying to Party A's US Notes since they matured prior to noon on 15 February 2008 or, at any event, they matured on that day.
83. For those reasons, I conclude that Party A's US Notes do not fall within section 10.01(a) of the Indenture.

Issue 2

84. In the light of my earlier conclusions, this issue only arises in relation to Party A.
85. The Receivers submit that clause 6.6.3 of the Security Trust Deed requires them to make distributions among Senior Creditors on a pari passu basis, taking into account amounts owing but not yet due among the whole class of Senior Creditors, and that they should manage the business of the Company in the interests of Senior Creditors as a whole.
86. In my judgment, that is not the correct interpretation of clause 6.6.3. Rather, I accept the argument of Party A that the obligation of the Receivers is to distribute money received by them pari passu to Senior Creditors whose debts are then due for payment, without taking into account amounts not yet due.
87. The Receivers say that, had they operated Pay As You Go, they would have exhausted the Company's cash by 26 February 2008 and the realisation of breakable deposits by 29 February 2008.

88. Mr. Mortimore's starting point on this issue is his submission that clause 6.6 is a priority clause, which operates as between different classes of Secured Creditors, but not internally between Creditors of the same level.
89. He submitted that the proviso to clause 6.6 (introduced with the words "For the avoidance of doubt...") supports the contention that the Receivers may make provision for Senior Creditors whose debts are not yet due.
90. Mr. Mortimore contended that the interpretation of Party A "contradicts the very nature of the Insolvency Acceleration Event". He submitted that, since such an Event presupposes that the assets are not sufficient to pay all Senior Creditors, it would be absurd for the limited funds to be applied on a first come, first served basis.
91. He submitted, further, that a priority based on timing would create a lottery. Whether or not, and how much, Senior Creditors would be paid would depend on whether and how much cash was available at any time. A delay in applying money under clause 6.6 could have significant implications for the amount received by a particular Senior Creditor.
92. He submitted that Party A's interpretation would have serious implications for the Receivers' management of the assets. On that interpretation, they would have to sell assets in a depressed market quickly in order to make payments to Senior Creditors whose debts are due, regardless of the prejudice to other Senior Creditors whose debts are not yet due for payment.
93. That approach, he suggested would be at odds with the general principles of law concerning the exercise of the powers of a receiver. He referred to the provisions of the Law of Property Act s.109(8) which state how a receiver "shall apply all money received by him". He submitted it is well established that, under that section, a receiver has an element of discretion as to when and to whom payments may be made, and that a creditor of a company, not being the mortgagee, cannot enforce s.109(8) against the receiver. He cited *Sargent v Customs & Excise Commissioners* [1995] 1 WLR 821 and *Brown v City of London Corporation* [1996] 1 WLR 1070 in support of those propositions. Here, he said, Senior Creditors, not being party to the Security Trust Deed, do not have claims that they can enforce against the Receivers personally.
94. Mr. Mortimore also said that in most receiverships creditors are paid after the contractual date for payment, and that companies in receivership frequently

breach contractual obligations to unsecured parties. Similarly, he suggested, after an Insolvency Acceleration Event the Court might consider that the Receivers could reasonably delay in making payments due.

95. Finally, he said that receivers generally should not favour one creditor over another unless it is commercially justified. He submitted that, in the present case, the Receivers owe an equitable duty to the Security Trustee to manage the assets and to exercise their power of sale for the benefit of the Secured Creditors as a class and to try to bring about a situation in which the secured debts are repaid. He referred to various provisions of the Security Trust Deed giving the Receivers the same powers as the Security Trustee, including powers of sale and management of the assets; and then to the provision in clause 6.11 of the Security Trust Deed that “in exercising any of its trusts, powers, authorities or discretion under [the] Security Trust Deed the Security Trustee is required to have regard to the interests of the Secured Creditors as a class” subject to a proviso that, in the case of a conflict between the interests of the Senior Creditors and the other Secured Creditors, the Security Trustee is to have regard only to the interests of the Senior Creditors.
96. In my judgment, the correct starting point is the actual language in clause 6.6 in relation to payment to the Senior Creditors. The clause stipulates that “any monies received by ... any Receiver after the Enforcement Date shall be applied: ... third, to pay, pari passu and pro ratain accordance with the respective amounts then owing thereto, any amounts due to Senior Creditors” [my emphasis].
97. On the literal wording of the clause, money received by the Receivers is to be paid out pari passu and pro rata in respect of amounts then due. There is no provision for money to be held back. The clause, therefore, plainly envisages that, if and when money is received by the Receivers, it is then paid out to Senior Creditors in respect of, and only in respect of, debts then due to be paid, and not debts due to be paid in the future.
98. I see no reason why the proviso to clause 6.6 should undermine that interpretation.
99. It is important to note that the provisions of clause 6.6 apply both before and after an Insolvency Acceleration Event, that is to say it will operate at a time when the expectation is that creditors can be paid in full. The interpretation of

the Receivers is inconsistent with the obligation, at such a time, for payment to, for example, holders of US MTN in accordance with the provisions of their Notes and at the stated maturity dates. So, prior to an Insolvency Acceleration Event, concern about future insolvency would be irrelevant and would not entitle the receiver to refuse to pay the Senior Creditors as the maturity dates of their Notes arrive. The meaning and operation of clause 6.6.3 does not change once an Insolvency Acceleration Event occurs.

100. This interpretation does not produce an absurd or unworkable result. Some Senior Creditors will be paid out sooner than others, but that, again, is consistent with the fact that some creditors, such as Repo counterparties, are not caught by a regime similar to section 10.01(c) of the Indenture, and Party A is not caught by that regime. Indeed, the interpretation of Party A may be said to be consistent with the different way in which, in other documents, different creditors are treated on insolvency. Further, Ms. Prevezer acknowledged that the Receivers are not deprived of their general right to determine the appropriate time to achieve the best realisation of the value of an asset.
101. I do not consider that any assistance, on this issue of interpretation, is to be gained by reference to more general duties of Receivers in relation to the management and distribution of assets. The obligations imposed directly on the Receivers by the Security Trust Deed, and with which they were required to comply by the Deed which appointed them, cannot be qualified or ousted by any general management discretion that might otherwise exist.
102. For those reasons, I conclude that clause 6.6 of the Security Trust Deed is to be interpreted in the manner for which Party A has contended.