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Who Calls the Shots with Trustees and Agents?

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The potential stresses to the capital markets are all too apparent. Significant market adjustments in the form of Brexit, COVID-19, LIBOR discontinuation, the changing landscape of global trade, and the transition to a carbon-neutral economy all have the potential to test the economics underlying existing debt capital structures.

When a structure does come under stress, trustees and agents will often find themselves as the first port of call for solutions. An invariable further factor will be significant commercial pressure from the various parties in the capital structure, not always exerted by those who have strict legal power and control.

This article is the first in a series intended to bring trustees and agents up to speed on their rights and duties in order to navigate the challenges ahead. This article addresses the fundamental relationships between trustees, agents, and their counterparties and the parties who, in legal terms, have the power to instruct.

THE POSITION OF THE NOTE TRUSTEE

The Trustee-Noteholder/Lender Relationship

Trustees, although appointed by the issuer, act on behalf of and owe their duties to the noteholders. They do so through a trustee/beneficiary relationship that will primarily be governed by the terms of the trust deed.

The early relationship

Whilst no duties subsist before the execution of the trust deed, it is nevertheless prudent for the putative trustee and its advisers to seek to ensure that certain terms that may affect potential noteholders are brought to their attention. For example, in a debt instrument where there is only a security trustee (and no note trustee), it is prudent for an offering memorandum, or other similar marketing document, to clearly disclose this fact. That being said, it is of course important to ensure that any notes or comments do not encroach into the arranger's field or imply that the trustee (or indeed agents) is assuming any drafting, structuring, economic, disclosure, or other compliance-related responsibilities for any offering document.

Who will count as a noteholder?

In most cases, notes will be held in global form with the debt issuance represented by a single global note, held by a common depository or nominee. Under global notes, investors will either hold their economic interest through direct participation in the clearing system or through custodians or brokers as part of a chain of intermediaries. Direct participants will have their interest recorded as account holders, but the identity of ultimate beneficial holders will not be apparent within the system. Direct participation can be evidenced through screenshots from the clearing systems. The interests of indirect beneficial holders will in addition need to be evidenced by custodian confirmation letters.

It is therefore important for trustees to establish precisely whom they are dealing with when receiving instructions, and in what capacity. In *Fairhold Securitisation Limited v Clifden IOM No. 1 Limited* and others (unreported, 10 August 2018, HH Judge Kramer), an issue arose as to whether a purported noteholder (Clifden) was entitled to appoint administrators over the issuer. In attempting to do so, Clifden claimed to be an implied agent of the note trustee. In fact, it had no standing as a noteholder at all, let alone as a noteholder acting as an implied agent for the note trustee. The note trustee was entitled to require evidence reasonably satisfactory to it to establish a noteholder's interest. Clifden pointed to transactions and tender offers to acquire the notes as evidence of its interest. However, these transactions had not finally settled or completed, and Clifden had not therefore demonstrated that it was a noteholder.

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In similar circumstances, *Business Mortgage Finance 6 plc v Greencoat Investment Limited* ([2019] EWHC 2128) involved the attempt by Greencoat Investment Limited and others (GIL) to take control of a securitization structure by (among other steps) appointing additional note trustees and receivers and attempting to remove the existing trustee and sell the underlying loan portfolio. In looking to take these steps, GIL claimed to be a noteholder, which GIL alleged followed from the fact that GIL issued a tender offer inviting the existing noteholders to tender their notes. GIL claimed to have accepted certain notes pursuant to this tender offer. Settlement of the tender offer did not occur, but GIL relied on the fact that certain notes had been blocked and held to GIL's order in the relevant clearing systems.

The question was whether GIL had the power to act as noteholder in passing written resolutions. The

relevant definition in the Master Definitions Schedule (for the purpose of written resolutions) provides that 'Instrumentholders' were 'deemed to include references to the holders of the beneficial interests in such Instruments as relevant'. The judge found that whatever interest GIL had in the notes, it was not a beneficial owner within the definition: the 'holder of the beneficial interests' was found only to be those persons in whose name the notes are held in the records of the clearing systems. The judge found that there were 'strong, practical reasons' for this conclusion because the chain of intermediaries through which any beneficial interest sat could be complex.

Secure Capital S.A. v Credit Suisse AG ([2017] EWCA Civ 1486) highlights the importance of the terms of the notes and the relevant legal context when determining the identity of noteholders. An investor in bearer notes held through Clearstream (Secure Capital) brought a direct claim against the issuer of the notes for breach of its terms, despite not itself being the bearer. Secure Capital's interest was held through an account holder in Clearstream, with one permanent global security (PGS) held by the common depository. Under the programme memorandum, the holder of the PGS would be 'deemed to be and may be treated as its absolute owner for all purposes'. Account holders in Clearstream were to acquire direct rights against the issuer in certain circumstances in the event of nonpayment of principal but not for wider claims. The Court of Appeal found that the contractual terms provided that only the bearer of the PGS, the common depository, was entitled to sue the issuer for breaching the terms of the notes.

The common depository

In a global note structure, the only legal holder will often be the common depository (or an associated nominee entity) that holds the global note on behalf of the clearing system. The common depository's position as the actual legal holder has sometimes caused confusion in the market (when, for example, there is no trustee in a transaction) and has on occasion required clarification from the courts.

Ultimately, the common depository is appointed by, and is an agent of, the clearing systems. It provides the clearing systems with certain authentication, safekeeping, and

payment services. The role of the common depository is essentially administrative, procedural, and mechanical. The trustee should, subject to the terms of the trust deed and notes, rightfully see itself as owing its duties to those that have paid for the securities and taken the associated economic risk – meaning the entities sitting behind the common depository that hold the beneficial interest in the notes, rather than the common depository itself. Similarly, common depositories should, as far as is possible, be wary of assuming responsibility for actions typically associated with investors or trustees, such as confirming payment amounts, amounts outstanding, calling events of default, or taking steps to enforce security.

Practical Considerations: In the context of a global note, it is plainly desirable that classes of noteholder are clearly defined. In defining a class of entities that are economically invested in notes and are entitled to instruct a trustee, it is likely that the definition will go beyond the strict legal holder of the notes (often the common depository) to include those entities shown as account holders in the records of the clearing systems and, with clear drafting, the holders of the indirect beneficial interests in such instruments. As far as possible, the power to take action within the structure for the benefit of noteholder investors should be ascribed to the note trustee, acting upon the instruction of the requisite majority of the applicable classes of those noteholders.

Challenges in the noteholder relationship

Trustees will often have to grapple with the conflicting interests of noteholders both within and between classes. Well-drafted transaction documentation should anticipate situations of conflict and clearly set out whose interests are to prevail. In that scenario, clear instructions from the required threshold of noteholders with an accompanying satisfactory indemnity will be the end of the matter; although, in practice, obtaining these in a form satisfactory to both the trustee and noteholders can often present significant challenges (as will be explored in a subsequent article). As the cases below demonstrate, however, setting aside for the time being the question of the trustee's right to an indemnity, noteholder instructions may not always be enough if a trustee is to avert a challenge from other dissatisfied classes.

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It is possible that a trustee will simply be faced with an apparent *fait accompli* in the form of purportedly binding instructions that, on their face, are misconceived. For example, in *Greencoat Investment Limited*, GIL purported to pass a written resolution as holder of the Class A1 Notes directing the trustee to certify that an event of default had occurred that is materially prejudicial to the interests of the noteholders of any class. However, the resolutions did not specify what event of default occurred. The judge found that, even assuming that GIL was a valid noteholder, and in fact had the required threshold of qualifying notes, there was not an event of default. In those circumstances, it is difficult to see how a trustee could determine that an event of default was materially prejudicial.

Similarly, in *Satinland Finance SARL v BNP Paribas Trust Corporation UK Limited* ([2010] EWHC 3062 (Ch)), a qualifying threshold of subordinated noteholders required the trustee to present a winding-up petition against the issuer. The trustee refused to take that step, and the subordinated noteholders sought a direction from the court requiring the trustee to do so. The trustee and the issuer argued that the requirements for a petition were not satisfied under the terms of the conditions and therefore a petition could not be validly requested. The subordinated noteholders argued that the required enforceable obligation or provision under the conditions could be based on a claim for anticipatory breach following a purported repudiation of the subordinated notes on behalf of the issuer. The court ultimately held that the requirements for presenting the petition under the conditions were not met. On the alternative claim, that the court should direct the trustee to accept a repudiation and issue a winding-up petition pursuant to the court's inherent powers over trustees, the court held that the subordinated noteholders needed to show that the decision to accept a repudiation was the only reasonable and proper decision the trustee could have come to. That was clearly not established in this case.

That is not to say that a decision to refuse a direction from qualifying noteholders can be made lightly or would in normal circumstances be recommended. However, these cases illustrate that when a trustee is being directed to do something that is clearly wrong or goes beyond what the notes state can be directed, there may be scope to dispute a direction. A future article will consider this, and the question of whether there is a positive duty on a trustee to refuse a misconceived direction, further.

An illustration of the potential for conflict between different classes of noteholder (or in this case, lender) is *Saltri III v MD Mezzanine* ([2012] EWHC 3025 (Comm)), a case involving a security trustee. The case arose out of the various tranches of lending to the Stabilus Group. An intercreditor agreement provided that the claims of the mezzanine lenders were subordinated to the claims of the senior lenders. The same entity (CORP1) acted as security

trustee and senior facility agent, and group affiliates of CORP1 were (among others) the senior lenders. The Stabilus Group fell into financial difficulty and CORP1, in its capacity as senior facility agent, issued an enforcement notice to itself in its capacity as security trustee to accept an offer to restructure the Stabilus Group by transferring its business to a purchaser related to the senior lenders. The restructuring involved the release by the security trustee of certain transaction securities held on behalf of the mezzanine lenders, leaving them without significant assets. As part of the restructuring, the buyer granted the senior lenders profit participating loans.

The mezzanine lenders argued that the restructuring was nonconsensual and that their economic interests were not taken into account, with the result that the restructuring was void and made for an improper purpose and the security trustee breached the duties owed towards the mezzanine lenders both under the terms of the intercreditor agreement (including duties relating to the enforcement and release of transaction security) and as fiduciary duties.

Against this, the security trustee argued that it was obliged to act on the instructions of the senior facility agent and had no discretion to act otherwise and that the extent of the security trustee's duties were in any event limited under the intercreditor agreement to being no different to those owed by a mortgagee to a mortgagor under general law.

The judge, while broadly agreeing with the security trustee's submissions, found that the security trustee could not simply comply with an instruction from the senior lenders – there was a contractually provided set of duties for the method, type, and timing of enforcement of the transaction security equivalent to those owed generally by a mortgagee to a mortgagor. However, on the facts, there was neither a breach nor any actionable loss because (among other reasons) there was never any realistic prospect of a price being obtained in any sale that exceeded what was already being offered as part of the restructuring process or the value of the senior liabilities.

That left the argument as to the breach of fiduciary duties. The allegations stemmed from the closeness of CORP1 with its senior lender group affiliate, which included a degree of crossover of certain personnel. The judge found that most of the alleged fiduciary duties (relating to conflicts) were validly limited by the terms of the intercreditor agreement. However, the judge did find that there was inappropriate sharing of information between the security trustee and the senior lenders that was to the exclusion of the mezzanine lenders, but this did not cause any loss or otherwise adversely affect the role of the security trustee in the enforcement of security. It was found that a security trustee may have fiduciary obligations in certain parts of its role but not all – the fiduciary relationship comes from what specific duties are imposed on the trustee by the trust deed (or, as applicable, the intercreditor agreement) rather than from the fact of its trustee status in itself.

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Navigating noteholder conflict will often prove challenging for trustees, and careful attention will need to be paid to the effect of instructions from senior noteholders. Trustees will need to remain mindful of arguments by junior noteholders to the effect that the otherwise binding instructions of the senior noteholders could be liable to be set aside as an abuse of majority power, as was the case in *Assenagon Asset Management SA v Irish Bank Resolution Corporation* ([2012] EWHC 2090). This is of particularly acute significance in the context of consent solicitations and other steps taken to restructure underlying debt obligations.

Single noteholders

It is important to remember that, however sophisticated the underlying commercial context may be, the key element of most structured finance transactions is an express trust. It has long been a principle of English trust law that a sole beneficiary has the power to collapse a trust and obtain legal as well as equitable title to trust property (*Saunders v Vautier* ([1835-42] All ER 58)). In *Law Debenture Trust Corp. and another v Elektrim Finance NV & Another* ([2006] EWHC 1305 (Ch)), the issuer of notes to the capital markets (D1) had lent the proceeds to a sister

company (D2), which in turn issued a 'guarantor' bond to D1, D1 being the sole holder. The trustee of both sets of notes commenced proceedings against both D1 and D2 following events of default on both sets of notes. D1 sought to nullify the claim against D2 by giving notice to collapse the trust constituted by the issue of the guarantor bond. The court held that, as a matter of principle, the rule in *Saunders v Vautier* applied. However, it was subject to the express terms of the relevant trust deed, which required the trustee to consent to the collapse of the trust, and no such consent had been given. The decision may not be entirely satisfactory as a matter of legal logic, but the outcome was plainly fair and reasonable given the unusual factual and structural context.

Practical Considerations: Anticipating some of the key disruptions on the horizon (for example LIBOR discontinuation, COVID-19-related pool underperformance) can enable trustees and agents to take a timely view on their position in advance of last-minute requests for consents, amendments, waivers, or acceleration, particularly if the noteholders are divided on the issue requiring determination. Having done so, thought can be given in advance to the optimal route if different noteholders disagree on what steps should be taken if there are such disruptions.

Trustee-Issuer Relationship

The relationship between the issuer and the trustee is based in contract and subject to the terms of the trust deed. Among other obligations, the issuer will provide a payment covenant to the trustee for debts owed under the bonds, will covenant to provide information, and will certify to the trustee that no event of default or potential event of default has occurred.

Although the trustee owes its duties to the noteholders, the commercial importance of the trustee structure to the issuer in terms of marshalling the noteholders, responding to developments quickly, and limiting disparate enforcement steps should not be underestimated. In circumstances where co-ordinating bondholder meetings will be difficult because of the current pandemic, we can expect to see issuers and arrangers making ever-wider requests of trustees. Outside specific intra-contractual arrangements between issuers and trustees (such as those that arise as a result of the former's obligation to remunerate and indemnify the latter, which will be the subject of a future note in this series), trustees must be careful to have regard for the interests of the noteholders.

The Trustee-Arranger Relationship

The arranger is appointed by the issuer through a mandate letter, to which the trustee will not be party. The duties of an arranger in a transaction will include contractual duties to the issuer and potential tortious duties to investors (*Golden Belt 1 Sukuk Company v BNP Paribas and others* ([2017] EWHC 3182 (Comm))).

The arranger will often decide which trustee will be appointed on a transaction and will coordinate the commercial aspects of the transaction, giving the arranger a significant amount of commercial influence, which may be reflected in its communications with trustees.

As with issuers, trustees must be mindful of whom their primary duties are owed to when considering communications and requests from the arranger, particularly if the arranger is purporting to direct the trustee to take certain steps. First and foremost, the arranger is an appointee of the issuer – it does not speak for the noteholders. Trustees will therefore need to be comfortable that any action that is requested of it by the arranger is consistent with the terms of the trust deed and the duties owed to the noteholders.

Of course, this is all very well to assert as a matter of legal principle, but, as a matter of commercial realpolitik,

important relationships exist between arrangers and trustee institutions. Successful relationship management between the two parties is invariably achieved through clear communication at an early stage. In this respect, trustees should be careful to ensure that internal communications should always reflect the legal realities of the relationship between the parties (for example, by being careful to use the term 'client' appropriately). It may still be beneficial to take advantage of the arranger's expertise and intimate knowledge of the product or transaction structure when appraising economic or market impact and whether noteholders will suffer any prejudice. However, even if it is the case that the interests of the arranger evidently align with the noteholders, trustees must be astute to avoid any steps that may lead to a potential conflict of interest with noteholders.

Practical Considerations: Internal communications should reflect decision-making that is consistent with trustees' and agents' relationships with the parties that the relevant duties are owed to. If a dispute is likely, particular care will be needed. Even if many fiduciary duties are excluded by the terms of appointment, the disclosure of documents in public litigation indicating that little regard was had to the essential underlying relationship (for example with lenders or noteholders) will be unhelpful.

The Trustee-Agent Relationship

Agents are appointed under an agency agreement entered into between the issuer, agents, and trustee. The trustee is party to the agency agreement both to allow it to take certain steps in situations of distress and to provide the trustee with rights of action against agents on behalf of the noteholders. Being party to the agency agreement also enables the trustee to consent to any replacement agents or amendments to the terms of the agency agreement. The trustee frequently also takes the benefit of an issuer covenant to procure performance by each of its agents of the obligations set out in the relevant agreements governing their role, which provides a further indirect right of action or direction in respect of the agents for the trustee.

The *Saltri III* case is a good illustration of a common scenario where entities within the same financial institution group perform multiple roles as trustee and agents on a transaction. That case demonstrates the scope for such an arrangement to result in noteholders or lenders challenging the decision of a trustee on the basis that there is a conflict of interest between associated entities of the trustee and the trustee's duties. Such claims may, however, be presented with substantial obstacles in the form of the contractual terms restricting the imposition of fiduciary obligations.

In a situation of distress, one of the key elements of the relationship between the agent and trustee will be the provisions within the agency agreement, and related documentation, that entitle the trustee, when an event of default has taken place, to require the agents to act on behalf of the trustee rather than the issuer and to hold all monies the agent has received under the bonds on behalf of the trustee. One of the primary reasons for giving the trustee this contractual power is to ensure that, if any agent is holding funds from the issuer that have not yet been distributed to the noteholders, those funds cannot be retrieved by a liquidator of the issuer. The exercise of this power also 'flips' the focus from the issuer onto the trustee, since agents will seek to rely upon the directions of the trustee rather than the issuer for all matters where previously the issuer would have been expected to provide directions. The clauses typically provide that the trigger for the change in who the agent acts for will be on service of notice by the trustee: the exercise or non-exercise of this power is therefore a matter of trustee discretion, and care should be taken by the trustee to ensure it considers the exercise of this discretion in a timely and prudent fashion.

Practical Considerations: Parties may act in multiple capacities in the same structure; for example, it is not unusual for a given institution to be the arranger, noteholder, and swap counterparty on a structured issuance. Care should be taken when communicating with all relevant parties to establish with precision in which capacity such party is communicating, since trustees and agents may owe materially different obligations to certain parties depending on the actual capacity in which such party is acting and depending on certain contingencies, for example, the occurrence of an event of default. If a potential conflict could arise between any given roles, suitable and timely internal escalation can save expensive litigation at a later date.

THE POSITION OF AGENTS

In the current economic climate, the nature of agent duties is likely to come under enhanced scrutiny, not least as a result of the growth in covenant-lite lending.

Syndicated Lending

The leading cases on agent duties in financial transactions have arisen in the context of the duties owed by facility agents to the lender syndicates. In *Torre Asset Funding Limited v RBS plc* ([2013] EWHC 2670 (Ch)), RBS was both agent and lender at the junior mezzanine level. Torre Asset Funding Limited was a lender with RBS at the junior mezzanine level. Torre argued that it was not informed of an event of default in breach of an implied duty of the junior mezzanine facility agreement (JMFA) and fiduciary duties that it argued were owed by RBS as agent and that, had it been notified, Torre would have ended its participation at an earlier stage.

In considering the scope of the duties owed by RBS as agent to Torre, the court placed great weight on the express provision within the JMFA that the duties of the agent were 'solely mechanical and administrative in nature'. Various provisions of the facility agreement and related documents, such as the intercreditor agreement showing that that provision could not be taken literally, were prayed in aid by Torre. The judge, whilst acknowledging that the provision was not to be taken literally, found that it 'informed' the construction of the transaction documents. The decision will be discussed further in a later article about the extent of agents' duties.

Bond Issues and Securitisations

The principal duties of the agent (which in addition to paying agents can include listing, transfer, registration, agent bank, and calculation agents and cash managers) will be owed to the issuer and will be documented in an agency agreement with the agent, the issuer, and the trustee. In general, the agents will not owe a duty of care to the noteholders when performing their functions. Following the above cases, the courts will be unlikely to stray far from the agency agreement when construing the agency role, and the existence of any fiduciary duties owed by an agent will be determined by the finance documents. Typically, fiduciary obligations will be excluded and the agent will be expressly permitted in the agency agreement to enter into certain transactions that might otherwise constitute a breach of such obligations.

CONCLUSION

Trustees and agents have been grappling with challenging market conditions and what that means for capital structures since the financial crisis. We nevertheless see clear scope for fresh challenges in the months ahead, which could come from a variety of sources and contexts, some of which were not in existence during the last period of prolonged stress in the fallout from the financial crisis.

It will be critical for trustees and agents to be mindful of whom they act for and the terms of their appointment, even more so in times of economic distress. While this is a basic point, the above cases show that the fundamental questions of 'whom am I dealing with?' and 'whom am I acting for?' may become clouded in fluid, high-stakes situations. If those questions are not answered correctly at the outset, ever-increasing complications can arise leading to litigation and, in the worst-case scenario, legal liability.

In the next article, we will consider the nature and extent of the duties owed by trustees and agents and the approach of the courts to construing those duties in contentious circumstances.

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