Neutral Citation Number: [2013] EWHC 2608 (Ch)

Case No: HC13C03323 & HC13C03109

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/08/2013

Before:

THE HONOURABLE MR JUSTICE PETER SMITH

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Between:

Citicorp Trustee Company Ltd	**Claimant**
- and -	
(1) Barclays Bank Plc & Ors	
(2) Theatre (Hospitals) No 1 Plc	
(3) Theatre (Hospitals) No 2 Plc	
(4) Cooperative Centrale Raiffeisen-Boerenleenbank B.A. (trading as Rabobank International)	
(5) Capita Asset Services (London) Ltd	
(6) Ambac Assurance UK Ltd	
(7) Ambac Credit Products LLC	
(8) XY	**Defendants**

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Mr A Lenon QC & Mr A Clutterbuck (instructed by **Norton Rose Fulbright**) for the **Claimant**
Mr R Salter QC & Mr T Gentleman (instructed by **Weil, Gotshal & Manges**) for the **First Defendant**
Ms C Cooke (instructed by **K&L Gates LLP**) for the **Second and Third Defendants**
Mr R Knowles CBE QC (instructed by **Linklaters and Mayer Brown**) for **Ambac Credit Products LLC and Ambac Assurance Ltd**

Hearing dates: 14th August 2013

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Judgment

Peter Smith J:

INTRODUCTION

1. The Claimant ("the Trustee") is the Trustee under two issues of commercial mortgage backed floating rate Notes, in respect of underlying loans due for maturity in October 2031 in an aggregate amount of £660m ("the Notes").

2. The issuers of the Notes are the Second and Third Defendants Theatre (Hospitals) No 1 Plc ("T1") and Theatre (Hospitals) No 2 Plc ("T2") respectively (collectively the "Issuers").

3. The First and Fourth Defendants ("Barclays") and ("Rabobank") respectively are Noteholders.

ISSUE OF PROCEEDINGS

4. The present Part 8 proceedings were issued on 2nd August 2013 pursuant to a Beddoe order made by Morgan J on 31st July 2013. He also ordered expedition and an accelerated timetable so that the trial could be heard in the week commencing 12th August 2013. The urgency arises out of the fact that the loans underlying the lending structure of which the Notes form part mature on 15th October 2013 ("the Loan Maturity Date"). A restructuring would need to be negotiated and implemented against a very short timetable. If the restructuring is not arranged it appears there is likely to be a security shortfall.

5. The hearing before me which leads to this judgment arises out of the directions made by Morgan J on 31st July 2013.

THE ISSUE

6. The issue is to whether certain Notes held by Barclays and Rabobank (together "the Disputed Notes") are on the terms of the two Trust Deeds disenfranchised upon any Noteholder vote or direction to the Trustee (such a vote or direction being anticipated in the context of the proposed restructuring). The Disputed Notes are senior Notes with an aggregate face value of £442m:-

    i) Under T1 £231m Class A Notes and £57m Class B Notes are held by Barclays Bank Plc. That represents the whole of the 2 senior classes of T1 Notes. Those Notes are referred to as "the Disputed Barclays Notes".

    ii) Under T2 £154m Class A Notes held by Rabobank. These Notes represent the whole of the most senior Class of T2 Notes and are referred to as "the Disputed Rabobank Notes". These are held by Rabobank but are the subject of a total return swap arrangement with Barclays.

PARTICIPATORS

7. The Trustees are represented by Mr Andrew Lenon QC and Mr Andrew Clutterbuck. Barclays are represented by Mr Richard Salter QC and Mr Tom Gentleman. Ms Charlotte Cooke represents T1 and T2. T1 and T2 did not intend to take a position in the proceedings and were represented to assist the Court if and when required.

8. Unfortunately until the morning of the hearing nobody was appearing to make competing arguments against Barclays. This was important as will be seen below because of Barclays' changed stance as to the meaning and effect of the relevant provisions of the Trust Deed. Mr Lenon QC for the Trustees made arguments on behalf of the junior classes of Notes who despite being aware of the proceedings did not intend to participate. He did this pursuant to paragraph 6 of Morgan J's order which enabled the Trustee to advance such argument as it considered appropriate in the interest of unrepresented Noteholders.

9. The junior Noteholders as I have said did not appear. The reason for that is unclear but I suspect that it was because of the later stance Barclays take on this dispute. Barclays somewhat surprisingly before me accepted that the Disputed Barclays' Notes were disenfranchised. However surprising that was it was not necessarily particularly significant in the overall picture as Barclays contended that the Disputed Rabobank Notes which it had a measure of control over were ***not*** disenfranchised.

10. I will elaborate on the alternative arguments further in this judgment.

11. The authority for Morgan J's order is to be found in the decision of the then Chancellor of the High Court (Sir Andrew Morritt) given in the decision ***State Street Bank & Trust Company v Sompo Japan Insurance Inc & Ors [2010] EWHC 1461 (Ch).***

12. In the course of that judgment the Chancellor had something to say about potential arguments being raised by a Trustee at paragraph 28 and following of his judgment in a postscript:-

> ***"28 Not the least surprising feature of this case is the absence of any Noteholder prepared to participate. As the Notes were issued in dematerialised form to Clearstream and Euroclear and are payable to bearer the Trustee is unable to ascertain the identity of all Noteholders. Nevertheless the interlocutory processes, which included advertisement, revealed KBC Investments Ltd, BAWAG, Unicredit, Uniqa and Nataxis as Noteholders. None of them was prepared to take any part in the proceedings. In those circumstances I was grateful to counsel for the Trustee for his very helpful submissions but I think it is necessary to add a few words in relation to the position of a trustee in an application such as this.***
>
> ***29 In view of the absence of any Noteholder prepared to participate I indicated before the hearing that I expected the Trustee to advance any arguments reasonably available to the Noteholders as a class. The response was a letter from the Trustee's solicitors stating***
>
> ***"we are mindful of our duties to the Court, but we write on behalf of our client to request that the Chancellor does not require us or our client's counsel to address the court on any arguments available to any side in this litigation."***
>
> ***The reason for this request was stated to be the wish of the Trustee "to maintain complete neutrality". The letter indicated that if I was not minded to accept their request the Trustee should be formally ordered to make such arguments and an adjournment to enable such arguments to be advanced would be required. In the event I made no such order, granted no adjournment and received considerable assistance from counsel for the Trustee.***

> ***30 Nevertheless I remain concerned that the duties of a trustee in seeking the assistance of the court should be properly understood. In the case of a private trust, including a pension scheme, the trustee has been likened to a watchdog for unrepresented interests, see Re Druce [1962] 1 AER 563, 568. The trustee is expected to assist the court in the varied circumstances indicated in paragraph 21.81 Lewin on Trusts 18th Edition and the cases there cited. Of course there are differences between those trustees and the Trustee in this case but those differences do not, in my view, lead to any difference in the duty of the Trustee to the Court. If a trustee, of any description, applies to the court he is expected to assist the court by bringing to the court's attention any relevant legal proposition or argument affecting the position of unrepresented beneficiaries or parties. This is, in my view, but a specific application of the general duty to which Lord Birkenhead LC referred in Glebe Sugar Refining Company Ltd v Trustees of the Port and Harbours of Greenock [1921] WN 85 to the case of particular fiduciaries. That said I am in no doubt that, in the event, the duty was amply observed and performed by Counsel for the Trustee.***

13. There are striking similarities in the present case. No junior Noteholder is prepared to participate in these proceedings. The identities of the Noteholders is not known to T1 and T2. The only entity having knowledge of who the junior Noteholders actually are is the Servicer as defined in the Servicing Agreement dated 11th May 2007 (the "Servicing Agreement"). The Servicer under the Servicing Agreement was initially a Barclays entity (there being quite a few of those in these documents) Barclays Capital Mortgage Servicing Ltd. It has recently been replaced by Capita Asset Services (London) Ltd ("the Servicer").

14. The Servicer was not a party to the proceedings initially. Nor was any individual or company representing the junior Noteholders nor (initially) was another pair of companies called Ambac Credit Products LLC and Ambac Assurance UK Ltd (together called "Ambac"). However Ambac gave notice of intention to appear at the hearing and appeared by Mr Robin Knowles CBE QC who made submissions on behalf of Ambac. I will set out further below the relationship of Ambac to these matters. Ms Cooke and her solicitors accepted instructions on behalf of the Servicer.

15. The Decision of the Chancellor above enables the arguments that could be put forward by people who are absent to be put forward by the Trustee. I can well understand why the Chancellor permitted the Trustee to do so but there is in my view a potential problem about his direction. Whilst the arguments can be submitted on behalf of such persons by the Trustee and the Court can actually determine them I do not see that any decision can bind the junior Noteholders unless they are party to the proceedings. It follows therefore that in my view it is quite possible for the junior Noteholders to sit on their hands during this hearing and see whether the result appertains which they desire. In the event they do not obtain the result they desire it is open to them to issue their own proceedings and seek to reargue the points.

16. I appreciate that might be a difficult exercise and will undoubtedly be met with a primary argument that such proceedings when they were aware of these proceedings and chose not to participate constitute an abuse. That is all very well. In the context of the present case with the fast approaching maturity date it is quite possible that such proceedings could be issued very late in the day to be used as a negotiating tactic in finalising the terms of any restructuring. It is extremely unlikely that any such proceedings could be heard before the maturity date.

17. Therefore I directed that the Servicer be joined as a party and identify a junior Noteholder to the other parties' lawyers only (the name to be kept confidential to preserve the confidentiality of the investment). That person was then designated as Defendant XY in these proceedings and I joined such Defendant and required the Trustee to serve all the documents in this action upon XY by 10 am 15th August 2013.

18. I directed that XY be joined to represent all junior Noteholders so as to be bound by the judgment in such a class. I gave XY until 10.30 on 22nd August 2013 liberty to apply to vary or discharge this order if they so wished.

19. I dispensed with the need for them to file an acknowledgement of service.

20. I joined Ambac and similarly dispensed with the need for them to file an acknowledgment of service.

21. The result of those preliminary orders made at the start of the trial meant that every conceivable person that could be affected by the decision were joined as parties and given an opportunity to raise such arguments that they thought appropriate. Despite the joinder of XY as it was self evidently not represented the Trustee made submissions on its behalf.

22. Rabobank will be bound by the judgment as it is a party but has chosen not to appear.

CONCERNS

23. Barclays' position was until service of its evidence on 8th August 2013 that none of the Disputed Notes was disenfranchised. However the Trustee was aware via the Servicer that at least one junior Noteholder who has refused to come forward was of the view that the Disputed Notes ***are*** disenfranchised. Faced with the conflict the Trustee issued the present proceedings. The significance is whether or not the Disputed Notes are disenfranchised. With those Notes it would be able to block any restructuring.

24. The Trustee is also concerned that it may shortly receive a direction pursuant to clause 5.1 (d) of Schedule 1 to the Servicing Agreement purporting to be a direction by holders of not less than 50.1% of the aggregate Principal Amount Outstanding of the Most senior Class of Notes then outstanding. At present if it were to receive such a direction the Trustee would be in doubt because of the challenge to the status of the Disputed Notes as to whether such direction was valid.

THE TRANSACTIONS

25. Under the terms of a Facility Agreement dated 6th October 2006 a group of banks (including Barclays) advanced in aggregate £1,650,000,000 ("the Propco Loans") to a group of borrowers comprising companies in the General Healthcare Group which carry on business as providers of healthcare in the UK through a network of private hospitals ("the Borrowers").

26. The Propco Loans were split into senior and junior Loans. The senior Loans are referred to in the documentation as "the Whole Senior Loans". They were further divided with the majority of the lending banks' interest being acquired from the banks (including Barclays) by the Issuers. For this purpose the lending banks sold their participations in the Whole Senior Loans to the Issuers and were designated by the documentation as "the Sellers". In the case of the T1 transaction there are four such Sellers. In the case of the T2 transaction there is one lending bank namely Barclays. Barclays is in addition one of the Sellers in respect of the T1 transactions.

27. The Notes were issued by the Issuers which are SPVs created solely to raise the purchase monies for the majority portion of the Whole Senior Loans being purchased from the Sellers.

28. In addition to being a lender under the Propco Loans and a Seller Barclays was also the Arranger and the Lead Manager of both issues of the Notes. Finally of course as I have set out above another Barclays' company was until recently the Servicer.

29. By a Servicing Agreement ("the Servicing Agreement") dated 11th May 2007 a Master Servicer and a Special Servicer were appointed. Their role was to carry out administrative tasks within the lending structure and act in accordance with the Servicing Standard. Their obligations are to maximise recovery of funds under the Whole Senior Loans and they play (unlike the Trustee) a commercial role in communicating and negotiating with the interested parties.

30. The set up and structure of the various transactions seems to a simple minded property lawyer to be Byzantine in the extreme. This appears to be the nature of these kinds of contracts. However it must be appreciated that there are no special principles that apply to these contracts as regards construction and the construction of them falls to be decided in accordance with the general principles of construction applied by the Courts in respect of any document it is asked to construe.

31. The nature of these transactions is summarised in paragraph 28 of the witness statement of Ms Jacky Kelly dated 8th August 2013 served on behalf of Barclays as follows:-

> ***"It is in the nature of credit derivative contracts that they create synthetic exposures to assets rather than transferring assets (or interests in assets): and it is a common feature of credit derivative contracts that they contain an express statement that there is no requirement for either party to have any exposure to any Reference Entity, or to own or have any interest in any underlying Reference Obligation. Such***

> ***contracts are payable "loss or no loss". That is the case in relation to the TRS."***

32. Thus at least part of the transactions behind the Notes take place in the ether as it were and have their own status irrespective of what is actually going on in relation to the Notes. As will be seen there are various provisions in the documentation which protect the Trustee from having to enquire as to what dealings in respect of the Notes or any other transactions that affect the Notes there might be. The Trustee is entitled to act entirely on certificates provided by the Servicer or an Issuer or the entries shown on the screen shots from (for example) Euroclear or Clearstream Luxembourg ("Clearstream"). The Notes are deposited with the two depositories in accordance with provision 1.1 of the terms of the Notes. The entries on the screen are ***"conclusive and binding for all purposes save in the case of manifest error (including for the purpose of any quorum requirements of or the right to demand a poll at meetings of the Noteholders…)"*** (condition 1.3). The purpose of that provision as I have said is to avoid anybody having to go beyond the screen print of the clearinh houses and become entangled in what transaction if any has taken place in respect of the Notes off the register.

33. In addition condition 6.6 prohibits the Issuer from purchasing any Notes.

34. Further protection is given under the terms of the Trust Deed dated 11th May 2007 (clause 14.1 (c)) whereby the Trustee is entitled to call for a certificate (which was done and which was conclusive) or 14.1 (x) which provides that the Trustee unless notified to the contrary is entitled to assume without enquiry that no Notes are held by for the benefit of or on behalf of the Issuer, any of the Sellers any holding company of any of them or any subsidiary of such holding company. That clause has the words ***"beneficial owner"*** missing from it. I do not think it is significant.

35. Under clause 14.1 (z), the Trustee is entitled to rely on any documents provided to it.

36. The purpose of these provisions is to ensure smooth dealing in the Notes and so that persons dealing with them do not become embroiled in provisions or arrangements which affect those Notes but are not recorded on the relevant register or referred to in the relevant certificate. The purpose of the provision enabling the Trustee to assume without further ado that neither the Issuer nor Seller has acquired Notes is relevant to the present dispute because of the impact of the disenfranchisement provisions.

37. These provisions as I have said are designed to ensure smooth dealings. They are not relevant in my view to the question of construction because they are designed to protect outsiders in dealing with the Notes; they are not relevant for an internal dispute where all the parties are arguing over the ownership or control of the Notes and whether or not the Notes are disenfranchised.

38. The importance of ensuring that these matters are set out conclusively derives essentially from what is set out in paragraph 28 of Ms Kelly's witness statement above. All of the transactions in respect of the Notes are not actually linked to dispositions of the Notes. They are self standing arrangements designed to create obligations as to payment of interest and the like by reference to the Notes but they are self standing.

TRANSACTION STRUCTURE

39. There is appended to this judgment a diagram which sets out the various transactions. This dispute concerns the Notes issued by T1 and T2.

40. The Notes in question were acquired by Barclays and Rabobank in the sums set out in the following table:-

	Initial Principal Amount	**Noteholder**	**Rabobank TRS with Barclays**	**Barclays CDS with Ambac**	**Ambac Guarantee to Barclays**
Theatre 1					
Class A	£231,000,000	Barclays	N/A	£174,300,000	£56,700,000
Class B	£57,000,000	Barclays	N/A	None	£57,000,000
Theatre 2					
Class A	£154,000,000	Rabobank	£154,000,000	£154,000,000	None

41. Subject to an argument on the meaning of the words ***"beneficial owner"*** Barclays has the legal and beneficial ownership of the Disputed Barclays Notes and for extraneous dealings that is evidenced by a screen shot from Euroclear.

42. Rabobank is in a similar position with a similar screen shot from Euroclear in respect of the Disputed Rabobank Notes.

43. The interesting element arises from the fact that the two sets of Notes were packaged as ***"negative basis trades"*** as set out in Ms Kelly's witness statement. Those consist of Notes and credit default protection in respect of the Notes. The credit protection was provided under the Credit Default Swaps ("CDS") and guarantees entered into by Barclays with Ambac. This Byzantine structure which takes place behind the curtain of the register is set out in the second schedule attached to this judgment.

44. I need not go into the detail but under the terms of those arrangements in respect of the Disputed Barclays Notes Ambac can control how Barclays votes in respect of Notes it holds. In respect of the Disputed Rabobank Notes Barclays can control Rabobank but it is also subject to control by Ambac. The only relevance of those provisions is that one argument which was put forward on behalf of the junior Noteholders is that those provisions mean that the persons in whom the benefit of those provisions is vested are to be treated as ***"beneficial owners"*** for the purposes of disenfranchisement. Thus it is argued that Barclays because of the control it had over Rabobank is the beneficial owner as defined of the Disputed Rabobank Notes. The advantage of that argument in respect of the junior Noteholders is that the Disputed Rabobank Notes will also be disenfranchised. In contrast Barclays whilst accepting that its Notes are disenfranchised contends that the Rabobank Disputed Notes are not disenfranchised because Rabobank was neither a Issuer nor a Seller and that its control of Rabobank does not constitute it as a beneficial owner for the purpose of

these clauses. If that is correct Barclays through Rabobank will control as I understand it 50.1% of the relevant Notes and will therefore be able to block any rescheduling despite the fact that its own Notes are disenfranchised. This argument of the junior Noteholders was put forward by the Trustee.

RELEVANT DOCUMENTS

45. The major documents for the purpose of the construction exercise in my view are the Trust Deeds and the T1 Master Definitions Schedule and the T2 Master Definition Schedule. I will deal with the T1 documentation. There is no substantive differences in the T2 documentation and my conclusions on T1 will be equally applicable to T2.

THE TRUST DEED

46. The Trust Deed is dated 11th May 2007 as were the Master Definitions Schedule and the Servicing Agreement and the Loan Sale Agreements. I am told that everything took place on the same day and the monies required to be paid or borrowed were dealt with electronically on the same day.

47. The issue is as to whether any of the Notes are outstanding for the purpose of the Trust Deed. One starts with clause 1.1 which save where the context otherwise requires or save where otherwise defined in the Trust Deed incorporates the meaning ascribed to capitalised terms in the Master Definitions Schedule.

48. Outstanding is defined as:-

> ***"1.2 "outstanding" means in relation to the Notes all the Notes issued other than:***
>
> ***(a) those Notes which have been redeemed in full pursuant to these presents;***
>
> ***(b) those Notes in respect of which the date for redemption in accordance with the Conditions has occurred and the redemption moneys (including premium (if any) and all interest payable thereon) have been duly paid to the Trustee or to the Principal Paying Agent in the manner provided in the Agency Agreement (and where appropriate notice to that effect has been given to the relevant Noteholders in accordance with Condition 15 (Notices to Noteolders) and remain available for payment against presentation of the relevant Notes;***
>
> ***(c) those Notes which have become void under Condition 8 (Prescription);***
>
> ***(d) those mutilated or defaced Notes which have been surrendered and cancelled and in respect of which replacements have been issued pursuant to Condition 14 (Replacement of the Notes);***

> ***(e) (for the purpose only of ascertaining the Principal Amount Outstanding of the Notes outstanding and without prejudice to the status for any other purpose of the relevant Notes) those Notes which are alleged to have been lost, stolen or destroyed and in respect of which replacements have been issued pursuant to Condition 14 (Replacement of the Notes); and***
>
> ***(f) any Global Note to the extent that it shall have been exchanged for another Global Note in respect of the Notes of the relevant class or for the Notes of the relevant class in definitive form pursuant to its provisions;***
>
> ***Provided that for each of the following purposes, namely:***
>
> ***(i) the right to attend and vote at any meeting of the Noteholders of any class or classes, an Extraordinary Resolution in writing, a Qualifying Extraordinary Resolution in writing or a Qualifying Resolution in writing as envisaged by paragraph 1 of Schedule 4 (provisions for Meetings of Noteholders) and any direction or request by the holders of Notes of any class or classes;***
>
> ***(ii) the determination of how many and which Notes are for the time being outstanding for the purposes of Clause 8.1, Conditions 10 (Note Events of Default) and 11 (Enforcement) and paragraphs 4, 7 and 9 of Schedule 4 (Provisions for Meetings of Noteholders);***
>
> ***(iii) any right, discretion, power or authority (whether contained in these presents, any other Issuer Transaction Document or vested by operation of law) which the Trustee is required, expressly or impliedly, to exercise in or by reference to the interests of the Noteholders or any class or classes thereof; and***
>
> ***(iv) the determination by the Trustee whether any event, circumstance, matter or thing is , in its opinion, materially prejudicial to the interests of the Noteholders or any class or classes thereof.***
>
> ***those Notes (if any) which are for the time being held by or on behalf of or for the benefit of the Issuer or each of the Sellers, any holding company of any of them or any other Subsidiary of any such holding company, in each case as beneficial owner, shall (unless and until ceasing to be so held) be deemed not to remain outstanding;"***

49. The question therefore whether or not the Disputed Barclays Notes and/or the Disputed Rabobank Notes are disenfranchised on the basis of the wording at the end of proviso (i) – (iv) namely:-

> ***"those Notes (if any) which are for the time being held by or on behalf of or for the benefit for the Issuer or each of the Sellers, any holding company of any of them or any other Subsidiary of any such holding company, in each case as beneficial owner, shall (unless and until ceasing to be so held) be deemed not to remain outstanding."***

50. One then turns to the Master Definitions Schedule for the meaning of the words Issuer and Seller:-

> ***"Issuer" is defined to mean T1"***
>
> ***"Sellers" means Barclays Bank Plc, a company incorporated under the laws of England and Wales, acting through its office at 1 Churchill Place, London E14 5HP, Dresdner Bank AG London Branch, a company incorporated under the laws of Germany, acting through its branch office at 30 Gresham Street, London EC2V 7PG, The Governor and Company of The Bank of Scotland, established by an Act of Parliament of Scotland of 1695 acting through its branch office at 155 Bishopsgate, London EC2M 3YB and Mizuho Corporate Bank, Ltd, a company incorporated under the laws of Japan, acting through its office at Bracken House, One Friday Street, London EC4M 9JA, each in its capacity as a seller of the Senior Loans (each a "Seller" and together, the "Sellers")."***

51. The contrast between the definition for Issuer and Seller is in my view significant. As I have said Issuers are expressly prohibited from acquiring Notes, Sellers are not. It follows therefore that for the purposes of disenfranchisement all that needs to be said is that under T1 and/or T2 the Issuers are disenfranchised if they hold any Notes. By way of contrast the definition of Seller appear to be given a more limited definition by reference to the capacity in which the Notes are held. This to my mind is important guidance as to the determination of the question of construction. It is by no means definitive but it is as I have said significant for reasons which I shall set out below.

DISCUSSION

52. The object of the disenfranchisement appears clear. Any Notes that come within the definition are deemed not to remain outstanding. There is always a difficulty in my view with clauses that deem things to happen or not happen because it is always artificial. By making the Notes not outstanding artificially they become disenfranchised for the purpose of these major votes. Thus in the context of the present problem these large senior Notes would have no power to vote in respect of a restructuring. Consequently if they are disenfranchised the junior Note holders' powers are promoted.

53. Why should this happen? The most startling fact in this case is that nobody was able to give me any clear basis for the ***purpose*** of the provision. Further if either Barclays or Rabobank's Disputed Notes are disenfranchised that will have a significant impact on Ambac which could find the debts being rescheduled to its detriment but be

powerless to control how they should be voting because the Notes are disenfranchised. The junior Noteholders of course want them to be disenfranchised as it promotes their position.

54. The nearest anybody got to an explanation was by reference to the decision of Briggs J, as he then was, in ***Assenagon Asset Management SA v The Irish Bank Resolution Corp*** **[2012] EWHC 2090 (Ch)** at paragraph 56 where he said this:

> ***"It was, as I have said, common ground that the purpose of the disentitlement to vote in respect of Notes beneficially held by the Bank or for its account was to prevent a vote designed to serve the interests of the Noteholders from being undermined by the exercise of votes cast in the interests of the Bank. Specifically, the prohibition was designed to prevent a Noteholder from succumbing to a conflict between the interests of the Noteholders and the interests of the Bank. It was also common ground that, although the language of the prohibition speaks in terms of the Issuer or its Subsidiary being disentitled to vote, it applies equally to any other person who or which holds his or its Notes for the benefit or for the account of the Bank. It is to be noted that it was common ground that the purpose of the clause was to prevent a vote designed to serve the interested Noteholders from being undermined by the exercise of votes cast in the interest of the bank. This provision, it is said, was designed to prevent a Noteholder from succumbing to a conflict between interested Noteholders and the interested Bank."***

55. Two possible examples were given in the course of argument in this case. First, if one refers to the first witness statement of Ms Bi date 2 August 2013 at paragraph 21 and following, she referred to the fact that Barclays was also a hedge counterparty under certain interest rate swap agreements were entered into with the Borrowers under the Whole Senior Loan. As set out in that paragraph Barclays pays the Borrowers floating rate interest on the notional amount of the loans in return for a fixed rate of interest from the Borrowers on the notional amount of the loans. However, it appears that if the Whole Senior Propco Loan is not repaid in full, and if the hedge agreements are consequentially terminated, the amounts due to the hedge counterparties rank ahead of the repayment of principal and interest in the Whole Senior Loan and therefore ahead of Noteholders. It is suggested in paragraph 22 of her witness statement that a termination by precipiative enforcement of the Whole Senior Loan could bring amounts up to £475 million due to the hedge counterparties. Thus it is suggested that Barclays could do rather well, to put it mildly, if there was a default and it was paid out under the hedging agreements. Thus it is suggested Barclays might use its power under the Notes to block any rescheduling to precipitate enforcement of the Whole Loan for its benefit.

56. It is thus said that the purpose of the clause is to prevent Barclays in this case from doing that because such an action would be for its benefit under the hedge agreements, and contrary to the interests of the Noteholders.

57. My reaction to that is, why should Barclays be prohibited from exercising rights it has in respect of assets or contractual rights it has to ensure a maximum return for it? In this case there is no contractual obligation which requires them expressly not to do

such a thing. Nor is there any fiduciary or other obligation which commits them to do that.

58. I cannot see what advantage Barclays would achieve as senior Noteholder in effect relinquishing its power to vote on these important matters.

59. The other possible reason for the clause, which was referred to by Mr Salter QC in argument, was that the Sellers might be exposed on warranty or misstatement claims under the original sale and could use its majority power under the Notes to block claims to be brought against it.

60. The answer to that is actually provided by the ***Assenagon*** case itself, where the court upheld the challenges to purported votes on the basis that they were oppressive to the minority. As Mr Knowles QC said in argument, that provided the necessary protection for the junior Noteholders in the event, possibly, that the senior Noteholders might exercise their powers as senior Noteholders, to secure a separate benefit of the type contemplated above.

61. It might be that there are other matters in the background of which I am unaware. No party submitted that on the question of construction there was any surrounding circumstances or evidence to guide me or assist me in the construction of the clauses; the case involves a "***pure consideration of the words within the corners of the relevant documentation"***.

62. I suspect that these provisions have evolved over the years and are repeated again and again in transactions like this, with the purpose of them being lost in the mists of time. I do however find it surprising that Barclays is unable to explain to me why it would enter into such an arrangement which on its arguments could be so disadvantageous to it.

BARCLAYS' ARGUMENTS

63. When this matter first arose the Trustee wrote to Barclays on 1 July 2013. In that letter it set out that based on matters which were brought to its attention, an issue arose as to what Notes were "outstanding" in respect of the Trust Deed, and that Barclays, being identified as a Seller, or any of its holding companies, as being holders of the Notes would on the face of it be deemed to be outstanding in accordance with the clause.

64. This in effect meant that the word "Issuer" and the word "Seller" in the clause is merely shorthand for T1 and T2 and the banks identified in the Master Definitions Schedule respectively. Thus if Barclays was a Seller at anytime it is disenfranchised if it holds ***any*** of the Disputed Barclays Notes. This would extend to an acquisition made later on the market.

65. Barclays' response was by a letter dated 5 July 2013. Unsurprisingly, Barclays disagreed with that analysis and contended that the word "Seller" in the definitions, was intended on its wording, to exclude it only when it held the Notes in that capacity. But reflects the wording of the end of the definition "***in its capacity as a Seller of the Senior Loans***". Thus when it is holding the Notes as such Seller it is disenfranchised, but if it does not hold the Notes as a Seller, it is not so disenfranchised.

66. The letter reiterates that the purpose of the provision was to prevent Barclays in its capacity as Seller from exercising its votes attached to its notes in its own interest. However, having purchased credit protection in respect of the T1 Notes from Ambac, it is no longer holding any Notes in its capacity as Seller.

67. This would appear to be an unsurprising stance on the part of Barclays because one would have thought it would not want to surrender its senior position unless it was forced to do so.

68. A request by the Trustee to provide a certificate led to a response which was somewhat opaque. It provided the amount of Notes shown from a screenshot of Euroclear Clearstream, showing the Disputed Barclays Notes and stating "***[it] makes no representation as the capacity in which we hold the Notes***". In other words it left open the question to be determined from its challenge to the construction of the clauses put forward by the Trustee above.

BARCLAYS' SOMERSAULT

69. With the service of its evidence by Ms Kelly, Barclays performed a hundred per cent u-turn. Its stance as a result of that evidence (although there are certain ambiguities in Ms Kelly's evidence, contrast paragraph 6 of Ms Kelly's evidence with paragraph 41) was nevertheless that it was disenfranchised because it currently held the Notes.

70. This was the stance it maintained before me. Thus Mr Salter QC's submission is that the use of the word "Seller" in the clause is simply to identify the Sellers for the purposes of disenfranchisement.

71. I suspect this somersault caused some consternation and amusement. Ambac, at the end of the line, the supposed controller of the way in which these Notes were voted was not in favour of this concession of disenfranchisement. Thus that explains Mr Knowles QC's appearance, in effect to argue that which Barclays put forward in their letter of 5 July 2013, but which it abandoned. By way of contrast, the junior Noteholders no longer had an interest in appearing because as far as they were concerned Barclays' concession was the best that they could hope to achieve. Had Barclays maintained its original stance doubtless the junior Noteholders would appear to argue that which Barclays now argues.

72. Barclays' submission, in my view, has two difficulties. First, if the purpose of the word "***Seller***" was merely to identify Barclays for the purpose of disenfranchising it ***whenever, and in whatever capacity*** it held the Notes, it could easily have done so in clause 1.2 by simply identifying Barclays and saying it was disenfranchised whenever it held Notes in any way, directly or indirectly, which were for its benefit beneficially. It is difficult to say why there would be an elaborate reference back to the Master Definitions Schedule if the purpose of the word Seller was merely to be for that identification. It might be, of course, lazy drafting; there is a Master Definitions Schedule and therefore the draftsman might have simply, rather than create a new express identification, simply referred back to the Master Definitions Schedule.

73. The second, and more damaging consequence, is that it requires the clearly defined definition of the word Seller, limiting it to Barclays in its capacity as a Seller, to be removed. I accept that there is the power under 1.1 of the Trust Deed to ascribe

different meanings from those in the Master Definitions Schedule where the context requires, or where there are other definitions. The latter does not arise. Is there anything in the context to disregard it?

74. No such context has been provided to me and I can see none in clause 1.2. Further as I said above the definition of Seller is neatly contrasted with that of Issuer. The Issuer requires no definition beyond the identification of T1 and T2 because they are not contemplated as buyers of Notes. The Sellers are contemplated as being possible buyers of Notes. Barclays for example took up the large amount of the T1 Notes because they were not taken up by other banks.

75. That shows a purpose behind the definition namely that Barclays is only to be disenfranchised if it is holding Notes as Seller.

76. That seems straight forward and appears fatally to undermine Barclays' reversed stance.

77. There is however a difficulty which Mr Salter QC identified in argument. Barclays never held the Notes in its capacity as Seller when the Trust Deed came into existence. As I have set out above all of the transactions completed simultaneously; the cash was handed over and moved up the chain and the Notes were issued and sold and the Trust Deed came in to existence on the same day. Therefore by the time the Trust Deed came in to force Barclays would never hold the Disputed Barclays Notes in a capacity as Seller.

78. Thus that in his submission reinforces Barclays' stance that the use of the word "Seller" is merely for the purpose of identifying Barclays.

79. The consequence of this argument in respect of the Disputed Rabobank Notes is that as Barclays is not a holder of the Notes (as opposed to controlling how they are voted contractually) but Rabobank is. The Disputed Rabobank Notes are not disenfranchised for that reason. If that contention is correct Barclays exercise a modicum of control as I have said because they can procure the voting of the Disputed Rabobank Notes which amount to 50.1%.

80. There is a separate argument which has been raised by the Trustee on behalf of the junior Noteholders as to the meaning of the phrase "beneficial owner" that has significance as regards the Disputed Rabobank Notes but not as regards the Disputed Barclays Notes.

AMBAC'S POSITION

81. As I have said Mr Knowles QC stepped into the breach at the last minute in effect to revive the Barclays argument. These were amplified in a letter that Linklaters sent to the Trustee's solicitors on 9th August 2013. Mr Knowles QC adopted that as his skeleton argument.

82. His primary submission turns on the use of the words ***"in its capacity as Seller".***

83. Thus he submits there was a clear intent to restrict the definition of Seller whenever the defined word was used to the four banks acting in the capacity of a seller of the

Senior Loans. Thus he submits when Barclays acquires the Notes not as Seller of the Senior Loans (self evidently) but merely on the market for example it is not disenfranchised.

84. The difficulty Mr Knowles QC faces is that outlined above namely that under the structure of all of the documents Barclays could never be a Seller during the period of the existence of the Trust Deed. Thus it is difficult to see what the point of that differentiation in the Trust Deed is meant to cover.

85. Mr Knowles QC said I should just ignore it. The definition in the Master Definitions Schedule is clear and on that basis Barclays is only disenfranchised when it holds Notes in its capacity as Seller.

86. The competing arguments mean I must either ignore the words ***"in its capacity"*** in the Master Definitions Schedule (I have already observed that I can see no reason for displacing that definition) or I ignore the express provisions in the Trust Deed because they can never operate so disenfranchisement can never operate.

87. There is clearly a discrepancy between the two relevant provisions.

PRINCIPLES OF CONSTRUCTION

88. The principles of construction are not in dispute. As I said above there are no particular special rules applicable to these kinds of documents. The principles were summarised in paragraph 19 of Mr Salter QC's skeleton argument as follows:-

> ***"The relevant principles will be very familiar to the Court, and are unlikely to be significantly in dispute.***
>
> ***The ultimate aim is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> ***The process of interpretation is an iterative process involving the checking of each of the rival meanings against the other provisions of the document and investigating its commercial consequences in the context of the overall contractual scheme and purpose of the contract. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose.***
>
> ***Where the parties have used unambiguous language, the court has to apply it. However, where the language used by the parties may be construed in two different ways, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. The greater the ambiguity, the more persuasive may be an argument***

> ***based upon the apparently greater degree of common sense of one version over the other. But "this does not elevate commercial common sense into an overriding criterion, still less does it subject the parties to the individual judge's own notions of what might have been the most sensible solution to the parties' conundrum"***

89. I should add that in circumstances where the documents are ambiguous resort can be had to the surrounding circumstances as an aid to construction if necessary. That has no application as the parties agree.

CONCLUSION

90. No evidence has been led as to the underlying commercial purpose of these transactions. There is no question in my view of a literal construction underlying any commercial common sense which might frustrate or distort the whole economic purpose.

91. There is scanty evidence which I have summarised above which suggests that the purpose of this clause was to disenfranchise a Seller or Issuer if it held Notes. This was as set out in the ***Assenagon*** case to prevent an anticipated conflict of interest. As I said the difficulty is that on the facts of the set up of the documents in this case there was never a prospect of the Seller nor the Issuer in those capacities holding any of the Notes. My conclusion is that fact eluded the draftsman when this probably well trodden clause was incorporated but he kept the wording there as belt and braces position to ensure no one could ague beyond Notes being held as Seller.

92. That does not mean that I accept Mr Salter QC's suggestion of construction. I reject his suggested construction for a number of reasons. First it does not make commercial sense for Barclays to surrender a large investment it makes in the Notes. That has nothing to do with potential conflict; this is a commercial acquisition. No explanation beyond ***"legal advice"*** has been given to me as to why Barclays somersaulted on its case. Barclays' initial stance is to be preferred in my view.

93. Second the tortuous reference back to the Master Definitions Schedule simply to say that Barclays is disenfranchised whenever it holds any Notes is unlikely. It could have easily been said that the Issuer and Barclays (and the other banks of course) are disenfranchised if they hold any of the Notes or any Notes that are held for them in any situation where they are the beneficial owners. I cannot see why a senior Noteholder would agree to subordinate its interests in such a way. It might be I have missed something or I am not being fully put in the picture but it does not make commercial sense.

94. I therefore conclude that Mr Knowles QC's submissions are correct. I give effect to the express definition in the Master Definitions Schedule. It is clear that any disenfranchisement can only apply to a Seller which is defined as being Barclays and the other banks in that capacity. As Barclays does not hold the Notes in the capacity of Seller they are not disenfranchised and the fact that it could never have held the Notes in the capacity of Seller is irrelevant.

95. I therefore conclude that Barclays is not disenfranchised in respect of the Disputed Barclays Notes.

THE DISPUTED RABOBANK NOTES

96. Rabobank was neither an Issuer nor Seller. It acquired the Disputed Rabobank Notes pursuant to the prospectus.

97. The argument that these Notes are also disenfranchised is on the basis that Barclays is for the purposes of the Disputed Rabobank Notes a ***"beneficial owner".*** This is the argument put up on behalf of the junior Noteholders. Barclays does not accept that nor of course does Ambac which as I have said controls the voting of both the Disputed Barclays Notes and the Disputed Rabobank Notes by virtue of the provisions in its CDS and guarantee documentation. It would not wish control to be lost by Barclays as a result of Rabobank not being held to be a beneficial owner of the Disputed Rabobank Notes by reason of the powers Barclays has to direct Rabobank.

BENEFICIAL OWNER DISCUSSION

98. The traditional understanding of property lawyers of the phrase ***"beneficial owner"*** is the identification of the person for whom a property is held by another for the benefit for that person. I was referred to observations in that regard in ***Sainsbury Plc v O'Connor (Inspector of Taxes) [1991] 1 WLR 963*** at pages 969 as follows:-

> "***As Lord Diplock pointed out in Ayerst v. C & K (Construction) Ltd [1976] A.C. 167 at 177, the concept of beneficial ownership owes its origin to the Court of Chancery.***
>
> ***"The archetype is the trust. The 'legal ownership' of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the 'legal ownership' in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust".***
>
> ***The term "beneficial ownership" is therefore very well established. It is first found in a taxing statute, so far as I have been able to ascertain, in section 55 of the Finance Act 1927, where it appears in connection with relief from stamp duty on transfers. But in property legislation the term was already familiar to Parliament from section 7 of the Conveyancing Act 1881. Indeed it had appeared even earlier in section 1 of the Larceny Act 1868, and again in the cross-heading to section 58 of the Merchant Shipping Act 1894. But nowhere did Parliament see fit to define beneficial ownership. No doubt this was because it was already a term of art, well known and understood among lawyers.***

"LORD JUSTICE NOURSE : I agree.

The first question is whether, within the meaning of section 532(3) of the Income and Corporation Taxes Act 1970, the "beneficial ownership" in the five per cent of the shares in Homebase Ltd which were subject to the unexercised put and call options in favour of GB was vested in Sainsburys or not. The broad purpose of section 532(3), which was not, in its application to group relief, modified by the restrictions introduced by the Finance Act 1973, is that in deciding the extent to which one company is owned by another you look not at the legal ownership of the shares but at their beneficial ownership. The only distinction made is between legal and beneficial ownership and there is nothing to suggest that the latter expression is to have some special meaning.

There is no difficulty in ascertaining the legal ownership of shares, which is invariably vested in the registered holder. Equally, it ought not to be difficult to ascertain their beneficial ownership, albeit that it may arise in a variety of ways, for example under a declaration of trust or by operation of law. I therefore approach the construction of section 532(3), a provision having general application for the purposes of the Tax Acts, in the expectation that the extent to which one company is beneficially owned by another was not intended to depend on fine distinctions between different cases.

Although I might not, with Lord Diplock, have gone so far as to think that the expression "beneficial ownership" is a term of art, it is certainly one which has for several centuries had a very well recognised meaning amongst property lawyers. And there can be no doubt that, in enacting a provision such as section 532(3), Parliament must have intended to adopt that meaning. It means ownership for your own benefit as opposed to ownership as trustee for another. It exists either where there is no division of legal and beneficial ownership or where legal ownership is vested in one person and beneficial ownership or, which is the same thing, the equitable interest in the property in another. Thus, to take the simplest case of divided ownership to which section 532(3) can apply, if Company A is the registered holder of shares in Company B as nominee, i.e. as a bare trustee, for Company C, the beneficial ownership of the shares or the equitable interest in them is vested in Company C.

Another case to which section 532(3) can apply is where Company A enters into an unconditional contract to sell shares in Company B to Company C. Shares in Company B not being readily obtainable in the market, such a contract is specifically enforceable at the suit of Company C. By parity

> ***with contracts for the sale of land, it has long been held that the right to specific performance gives Company C the equitable interest in the shares, Company A becoming a qualified trustee in the sense that it must preserve the shares for Company C while remaining entitled to any dividends accruing before completion".***

99. On the facts of this case Barclays held the Disputed Barclays Notes legally and beneficially. The conclusive effect of the screen is irrelevant for these purposes of course. Rabobank held the Disputed Rabobank Notes legally and beneficially.

100. There is no suggestion that Barclays and Ambac by virtue of the derivative arrangements and the other arrangement set out above thereby acquired any interest in either of the Disputed Notes.

101. What is sought to be done in this argument is to stretch the meaning of the words beneficial owner to someone who whilst they have no actual interest in a proprietary sense might have an interest in an economic sense.

102. The origin of this submission is paragraph 63 of Briggs J's judgment in ***Assenagon*** as follows:-

> ***"It remains to consider the competition between Mr Snowden's and Mr Dicker's submissions on the assumption (which I have concluded is correct), that the applicability of the prohibition is to be tested as at the date (or time) of the meeting. I am not persuaded to follow Mr Snowden's purposive line in interpreting the restriction as if it concerned the question whether votes (rather than Notes) were held beneficially for the Bank or for its order, so as to apply in any case where the Bank had obtained a mere contractual commitment from a Noteholder to vote his Notes in a particular way, even if wholly unconnected with any arrangement for the purchase of his Notes, whether by exchange or for cash. Again, I consider that the prohibition must be construed as it stands, so as to relate to the beneficial holding of Notes, either in a proprietary sense or, perhaps, in an economic sense where, without conferring a proprietary interest, the Noteholder is obliged to confer upon or transfer to the Bank the whole of the economic risks and rewards arising from the Notes as at the date of the meeting."***

103. That is in the context of a clause which disenfranchised the Issuer. The provision whilst similar to the present one is not identical:-

> "***Neither the Issuer nor any Subsidiary should be entitled to vote at any meeting in respect of Notes beneficially held by it or for its account.***"

104. It must be seen what arguments were put forward. As paragraph 57 shows Mr Snowdon QC submitted that the description of Noteholders applied either (i) because

the then votes of those Noteholders were held at the direction to the order of the Bank and (ii) because in any event the existence of the Contract for Sale of those Notes to the Bank in return for new Notes meant that the Bank had by then become the beneficial owner of those Notes.

105. The Bank challenged both arguments.

106. In paragraph 63 it is important to see that Briggs J ***rejected*** Mr Snowdon QC's first argument. He did however en passant suggest that the prohibition applies ***"perhaps in an economic sense where without conferring a proprietary interest the Noteholder is obliged to confer upon or transfer to the Bank the whole of the economic risk or reward arising from the Notes….."***

107. Thus it is said Barclays through its provisions as regards the Disputed Rabobank Notes is in the same position and (presumably) Ambac is in the same position as regards both sets of Disputed Notes.

108. It of course is not a Seller but the logical consequence of the analysis means that one should presumably categorise Ambac as being the beneficial owner.

109. I asked Mr Knowles QC to tell me who were the beneficial owners in his view under both transactions. He skilfully avoided answering the question.

110. Mr Salter QC argued against such a construction. Commercially that suited Barclays because it would then be able to control any restructuring by virtue of its control of the Disputed Rabobank Notes (subject to what Ambac might of course tell it).

111. Given the fact that Briggs J rejected the first argument of Mr Snowdon QC the latter parts of paragraph 63 are a dictum. It might be possible in certain unusual circumstances to stretch the traditional and well understood meaning of the words beneficial ownership beyond a proprietary nature (although I cannot conceive of any circumstances where it would) but I do not think that there is any basis for so stretching the words in this case. I would respectfully therefore disagree with Mr Justice Briggs in so far as it is said that his construction has an impact on my construction of an entirely different document if there is any basis for so stretching the words "beneficial owner".

112. It follows therefore that I do not accept that Barclays is disenfranchised because it contractually controls the voting of the Disputed Rabobank Notes.

113. I therefore reject this argument which was in effect put on behalf of the junior Noteholders.

114. The expression "economic interest" is too vague and will give great hostages to fortune and lead to uncertainty. In the present case Barclays can control the Disputed Rabobank Notes but it itself is subject to control by Ambac. As Mr Salter QC said it is caught in the middle. Yet the arguments are that despite the lack of actual control because of the ultimate control by Ambac it is nevertheless a beneficial owner and therefore caught by the disenfranchisement provisions. Why should it be exercising economic control as opposed to Ambac? Is it the possible case that both of them are exercising control for economic interest? If so is there more than one beneficial

owner? This demonstrates graphically how departing from the traditional meaning of the words beneficial owner makes a potentially huge minefield of uncertainty.

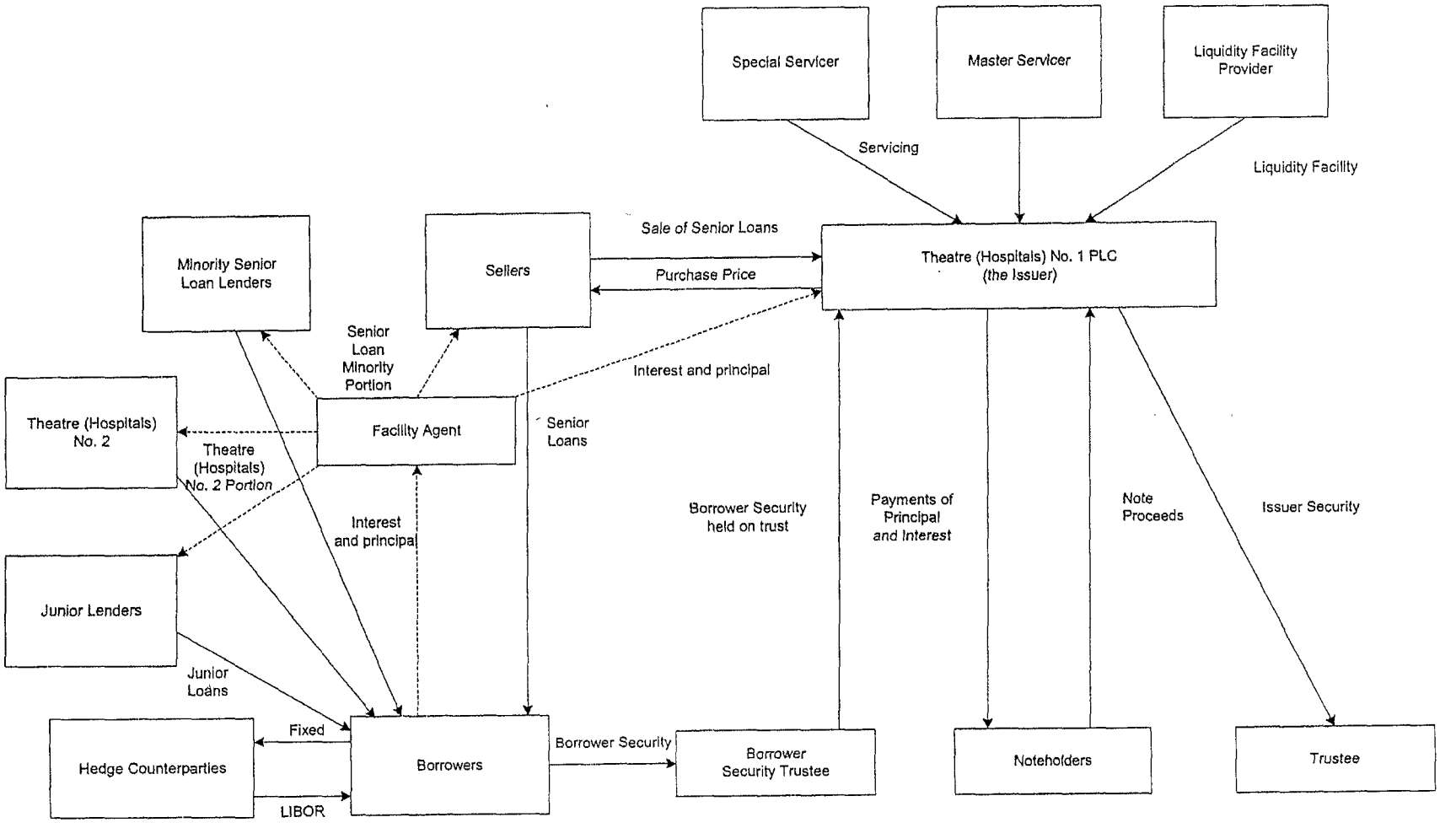
CONCLUSION

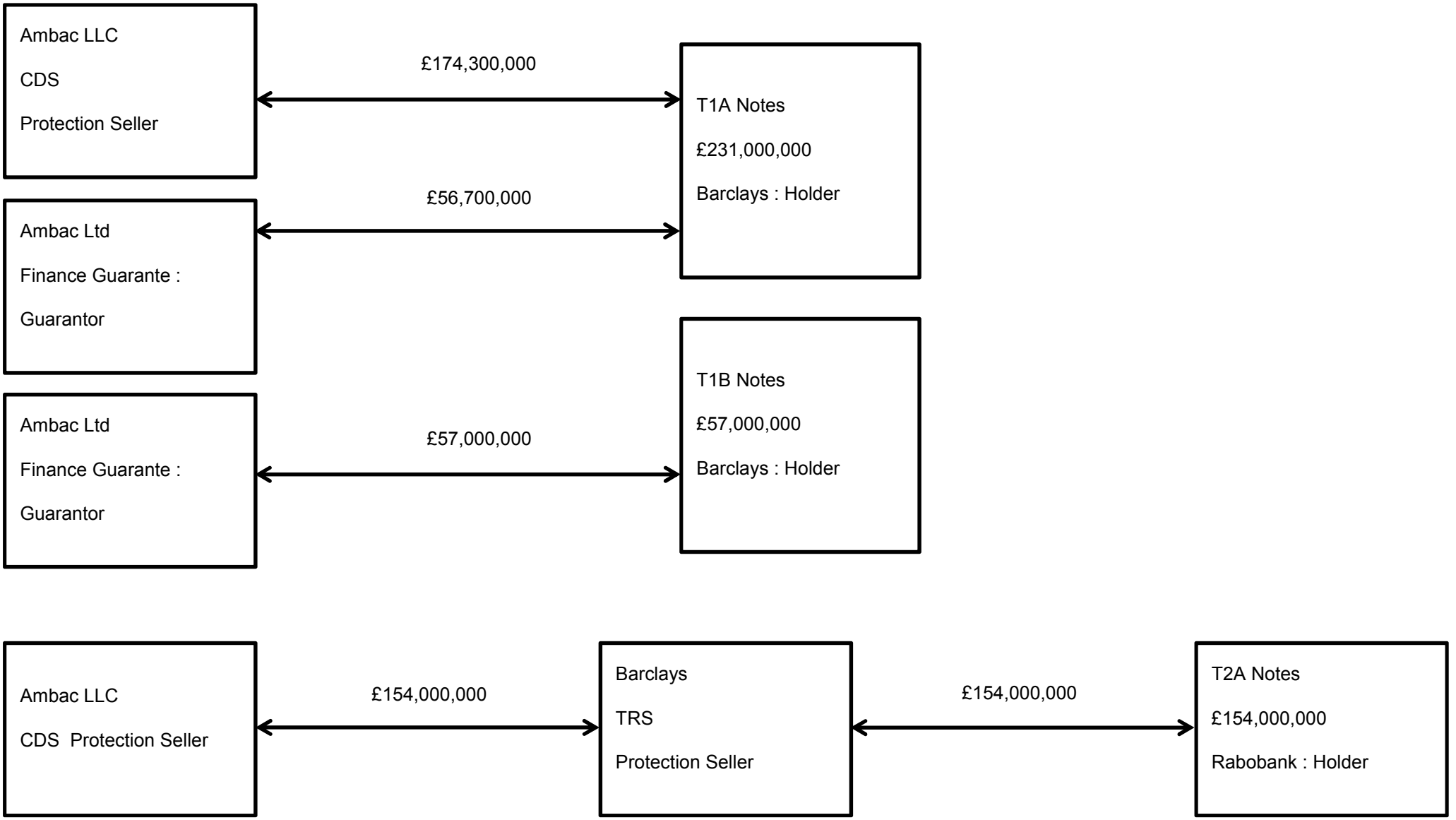
115. I conclude therefore for the reasons set out above that neither the Disputed Barclays Notes nor the Disputed Rabobank Notes are disenfranchised.

116. I will hear submissions as to the consequences of this decision.

TRANSACTION STRUCTURE DIAGRAM

The following diagram sets out the transaction structure relating to the issue of the Notes by the Issuer and the purchase of the Senior Loans by the Issuer. The diagram is qualified in its entirety by reference to the more detailed information appearing elsewhere in this Prospectus.




Ambac LLC
CDS
Protection Seller
£174,300,000
T1A Notes
£231,000,000
Barclays : Holder
Ambac Ltd
Finance Guarante :
Guarantor
£56,700,000
Ambac Ltd
Finance Guarante :
Guarantor
£57,000,000
T1B Notes
£57,000,000
Barclays : Holder
Ambac LLC
CDS Protection Seller
£154,000,000
Barclays
TRS
Protection Seller
£154,000,000
T2A Notes
£154,000,000
Rabobank : Holder