IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10th August 2018

Before :

His Honour Judge Kramer sitting as a judge of the High Court

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Between :

Fairhold Securitisation Limited
-and-
(1) Clifden IOM No. 1 Limited
(2) Michael Bowell (in his capacity as purported administrator of Fairhold Securitisation Limited)
(3) Dermot Coakley (in his capacity as purported administrator of Fairhold Securitisation Limited)
(4) John Hedger (in his capacity as purported administrator of Fairhold Securitisation Limited)
(5) Rizwan Hussain

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Marcus Haywood (instructed by **Akin Gump**) for the **Claimant**
Adam Goodison (instructed by **Stephenson Harwood)** for the **proposed Second Applicant (GLAS)**
Emma Read for the **1st and 5th Respondents**
Marcia Shekerdemian QC (instructed by **Charles Russell Speechleys LLP**) for the **2nd and 3rd Respondents**
Gunnercooke LLP for the **4th Respondent**

Hearing dates: 8th – 10th August 2018

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APPROVED JUDGMENT

HIS HONOUR JUDGE KRAMER Friday, 10th August 2018
(14.02 pm)

1. This is an application by Fairhold Securitisation Limited for declarations that the purported appointments of Michael Bowell and Dermot Coakley, the second and third respondents, and John Hedger, the fourth respondent, as administrators of the company, are void and of no effect and that Clifden Isle of Man No. 1 Limited, who filed the notices of appointment at court, was not the authorised agents of GLAS Corporation Limited ("GLAS"), the second applicant, to appoint administrators or for any other purpose. Other consequential relief is sought, including injunctions in the event that suitable undertakings are not given. These are directed at preventing Clifden, as far as the two applicants are concerned, interfering in the affairs of the company.

   The procedural history

2. The notices of appointment were filed on 12 July 2018 in respect of Mr Bowell and Mr Coakley and 18 July 2018 in respect of Mr Hedger, whose appointment was to be as a joint administrator of the existing administration.
3. On 19 July 2018 the company filed this application. It was sealed on 23 July 201, but on 20 July there was a hearing, firstly before Mr Justice Fancourt. This was an urgent hearing, looking at the documents ex parte on notice in that somebody appeared for Clifden. Looking at the transcript of that hearing it appears that he saw there was a strong case for the grant of the orders that were sought, but he wanted to give an opportunity to those who wished to uphold the appointment the benefit of providing a response.
4. Due to time constraints he was unable to deal with the hearing later in the day when the matter came before a Deputy High Court Judge, Mr John Martin QC, who joined the fifth respondent, Mr Hussain, and accepted undertakings as set out in his order of that day. He granted an injunction against Mr Hedger, who was not present. These undertakings and injunctions were to

hold the ring until this case could be heard. He also gave directions for the filing and service of evidence and directed that the case be listed as urgent business.

5. The hearing started before me on 8 August. It ran for two days. At the beginning of the hearing GLAS, who are represented, made an application to be joined. That was not opposed and an order was made joining GLAS as second applicant.

6. Clifden made an oral application to adjourn the proceedings to further prepare, but for the reasons given in a short judgment on that day I refused the adjournment.

7. The hearing has been conducted on the basis of the written statements. I have been invited, in relation to one particular issue, which is as to whether or not Mr Bowell and Mr Coakley gave consent to act as administrators , to determine that issue of fact on the written statements.

The representation at this hearing

8. The company is represented by Mr Haywood; GLAS by Mr Goodison; Clifden by Miss Read, who is instructed as direct access counsel; Mr Bowell and Mr Coakley by Miss Shekerdemian QC. Mr Hedger has not attended but he has offered undertakings, which are acceptable to the company, and that is the basis on which he has, understandably, not attended. Mr Hussain attended in persona, although it was quite clear during the hearing that he was giving instructions to Miss Read as well, and it will be apparent why that may be when we look at his role in Clifden.

Who are the parties?

9. Fairhold Securitisation Limited is a company registered in the Cayman Islands. It is apparent from the statement of Mr Alan J Carr of Drive Train, which provides corporate services for the company, and is a corporate director of the company, that Fairhold Securitisation Limited issued loan notes. The face values of the notes are in excess of £440 million. There were two issues: the first on 30 March 2006 and the second on 15 May 2007. There are Class A notes and Class B notes, so designated because they have different priorities.

10. The notes oblige the company to pay interest to noteholders and to pay the value of the note on maturity.
11. The notes had a last maturity date of 15 October 2017. The value of the notes were not repaid and, therefore, there has been a payment default.
12. The money raised on the loans was lent to Fairhold Finance Limited, which was obliged to pay interest to the company. They, in turn, made advances to property owners. Apparently these are owners of sheltered housing who have an income stream from ground rents, transfer fees and rentals.
13. In broad terms, the property owners who have had the advances pay interest and repay the loan to Fairhold Finance and Fairhold Finance repay the loans and interest to Fairhold Securitisation, who then pay on the interest to the noteholders of these loans and, on maturity, the loans.
14. The obligations of Fairhold Finance and the property owners are secured by fixed and floating charges over their property, undertakings and assets. The obligations of the company, who are the issuers of the loan notes, are secured in favour of the Note Trustee, who has a floating charge over the undertaking, property and assets of the company.
15. That floating charge is a qualifying floating charge for the purposes of Schedule B1 to the Insolvency Act 1986.
16. GLAS Trust Corporation Limited is the Note Trustee. The statement of Juliette Challenger of that corporation says that it was appointed to act as Note Trustee on 6 October 2015 as a result of an extraordinary resolution, passed on 5 October 2015. As regards the loan notes, in value, there are £413,700,000 worth of Class A notes and £29,800,000 of Class B notes.
17. The original Note Trustee, as shown by the documents in the exhibits, was Deutsche Trustee Company Limited. They became the original trustee by a deed dated 30 March 2006, which is the governing deed as regards GLAS. It is common ground that the qualifying floating charge

upon which the appointment is based is vested in the Note Trustee. I shall deal in more detail with the powers of the noteholders when we look at the arguments between the parties.

18. Michael Bowell and Dermot Coakley are licensed insolvency practitioners and directors of MBI Coakley Limited. John Hedger is a director of Seneca IP Limited, which describes itself as specialists in business recovery and insolvency. Clifden IOM No. 1 Limited is incorporated in the Isle of Man; it describes itself as a principal investor in real estate driven strategies. Then there is Mr Rizwan Hussain; he describes himself as a senior director of Clifden and, on the evidence before me, he clearly is the guiding light in Clifden. The main statements in this case come from him. He has been the principal actor in the events which give rise to the application. Although there are statements from two other individuals, describing themselves as senior directors, Mr Cathersides and Mr Cundy, what those other statements show is that Mr Hussain was leading the discussions with Mr Bowell and other third parties concerning the appointment of the administrators.

What is the stance of the parties? Who is the dispute between?

19. The company, GLAS, and Messrs Bowell, Coakley and Hedger are of one voice. They say that the appointments of Bowell, Coakley and Hedger as administrators are void. The appointments purport to be under paragraph 14(1) of Schedule B1 to the Insolvency Act 1986. That is a process that is available to the holder of a qualifying legal charge. Firstly, they say GLAS, who is the qualifying legal charge holder, did not file notice of appointment, so they did not appoint the administrators; and, as they are the Note Trustee in whom the qualifying floating charge is vested, nobody else could do so on their part.
20. Secondly, as regards Messrs Bowell and Coakley it is said that they did not consent to be appointed as the administrators; and indeed neither did they form the view that the purposes of

the administration were reasonably likely to be achieved. They did not consent to the use of any document in which they had said they consented to act or stated such a view to being used.

21. It is accepted by Messrs Bowell and Coakley that they did give Clifden signed documents containing consents to act and confirmation of their necessary opinion, but they say they were given in escrow and there has never been consent to use those documents.

22. As regards Mr Hedger, it is said his appointment was not valid because he was appointed to be a joint administrator of an existing administration. In that event, there were alternative conditions which had to be met but which were not fulfilled. If there was a valid administration, so there were already two administrators, Messrs Bowell and Coakley, then they had to consent, and they did not consent to Mr Hedger's appointment. Alternatively, there had to be an administration for Mr Hedger to join, if there was no administration he could not be appointed as a joint administrator. So, whichever way one looks at it, Mr Hedger's appointment cannot be valid. Indeed that is not disputed by either Clifden or Mr Hussain. In that they are correct.

23. Next, I will turn to Clifden and Mr Hussain's response to the applicants' case. They say that Clifden did have power to appoint the administrator in the name of GLAS, and they did so, and that Mr Bowell and Mr Coakley did consent to act as administrators and give their necessary opinion.

24. There is a factual dispute as to whether or not Mr Bowell and Mr Coakley consented to be administrators. They deny that. Clifden originally seemed to be saying they were not telling the truth about that, but now that has been modified to simply saying that they are inaccurate in their recollection of events and that they did indeed consent to act and for their written consents to be used.

25. It has been agreed by the parties, as I have indicated, including Mr Hussain, to whom I explained the differences between hearing oral evidence and having cross-examination and

dealing with cases on written statements, that I shall deal with this conflict of fact on the statements without cross-examination.

26. What is said by Clifden and Mr Hussain is that Mr Bowell and Mr Coakley gave permission to use the consents. There is a slight divergence, on one view, on the arguments put forward by Clifden and Mr Hussain. Clifden, through Miss Read, their counsel, accepts that the consents to act were delivered in escrow, but Miss Read argues that these were subject to a permission for these consents to be used on certain conditions which she said were fulfilled.

27. Mr Hussain, when he addressed me, said that he sticks by his statement. He, in short submissions, drew my attention to a few parts of his statement. On the issue of escrow, what his statement says is that there was a meeting on 9 July when a number of documents were handed over. He said that the nature of escrow was not clearly expressed and he understood that there would be some follow-up items to attend to. That is what he says as regards documents handed over on 9 July, which did not include the consent.

28. In his statement, dealing with 10 July, he said when these were handed over, which would have included he consent documents, Mr Bowell told him that once he had seen a draft paper from solicitors called Sidley with advice as to the validity of the appointments, from the point of view of the prospective administrators, that they were "good to go". He says nothing in his statement about that being handed over in escrow.

29. There is, as I say, a slight divergence. Curious in a way, because Mr Hussain is really giving instructions on behalf of the company as well. It does, however, require that I make a finding as to whether not the consent document was provided in escrow in the first place, in addition to making findings relevant to the arguments of Miss Read as to whether it was a conditional escrow where the condition was fulfilled.

The law as to the appointment of administrators

30. The relevant law is to be found in Schedule B1 to the Insolvency Act 1986. Paragraph 2 to the schedule provides that:

"A person may be appointed as administrator of a company-

"(a) by administration order of the court under paragraph 10 [which is not this case]

"(b) by the holder of a floating charge under paragraph 14", [which is directly relevant to this case] It is said that the appointment was under that provision

31. Paragraph 14(1) provides that:

"The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company."

32. 14(2) provides that:

"For the purposes of sub-paragraph (1) a floating charge qualifies if created by an instrument which-

(a)states that this paragraph applies to the floating charge..." [I do not need to go further than that because this floating charge did.]

33. And 14(3):

"(3) For the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company's property if he holds one or more debentures of the company secured—

"(a) by a qualifying floating charge which relates to the whole or substantially the whole of the company's property

"(b) by a number of qualifying floating charges which together relate to the whole or substantially the whole of the company's property" [again, I do not need to go further than that because that is what this floating charge does.]

34. Paragraph 18 deals with the notice of appointment under paragraph (2)(b), appointment. And says that:

"18(1)A person who appoints an administrator of a company under paragraph 14 shall file with the court-

"(a) a notice of appointment, and.

"(b) such other documents as may be prescribed.

"(2) The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment-

"(a) that the person is the holder of a qualifying floating charge in respect of the company's property

"(b) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and

"(c) that the appointment is in accordance with this Schedule."

35. This case is particularly concerned with 18(2)(a) whether the person who sought to appoint was the holder of the qualifying floating charge.

36. Paragraph 18(3) provides:

"The notice of appointment must identify the administrator and must be accompanied by a statement by the administrator-

"(a) that he consents to the appointment

"(b) that in his opinion the purpose of administration is reasonably likely to be achieved".

37. We do not need to look at (c).

38. And I just add paragraph 18(7), although Mr Hussain is not here:

"A person commits an offence if in a statutory declaration under sub-paragraph (2) he makes a statement-

"(a) which is false, and

"(b) which he does not reasonably believe to be true."

39. The sentence for that on indictment is up to two years' imprisonment and/or unlimited fine; and, on summary conviction, six months' imprisonment and a fine to the Magistrates' maximum.

40. Paragraph 19 of the schedule:

"The appointment of an administrator under paragraph 14 takes effect when the requirements of paragraph 18 are satisfied."

41. And paragraph 21:

"(1)This paragraph applies where-

"(a) a person purports to appoint an administrator under paragraph 14, and

"(b) the appointment is discovered to be invalid."

21(2):

"The court may order the person who purported to make the appointment to indemnify the person appointed against liability which arises solely by reason of the appointment's invalidity."

42. Paragraph 103(3) deals with joint appointments:

"Where a company entered administration by virtue of an appointment under paragraph 14, an appointment under sub-paragraph (1) [which is for another joint administrator] must be made by-

"(a) the holder of the floating charge by virtue of which the appointment was made, or

(b)the court on the application of the person or persons acting as the administrator of the company."

43. And 103(6):

"An appointment under sub-paragraph (1) may be made only with the consent of the person or persons acting as the administrator of the company."

44. That, of course, deals with Mr Hedger's situation.

45. As regards the authorities to which I have been referred to, there has not been extensive argument but they appear in counsel's skeletons. It is sufficient to say that there are two authorities to which I have been referred, the Court of Appeal authority of **JCAM Commercial Real Estate Property XV Limited v Davis Haulage [2018] 1 WLR 24,** where, at paragraphs 63 and 64, in the judgment of the court given by David Richards LJ he said:

"There was discussion in argument before us as to whether the filing of the copy of the notice had been an abuse of process and whether it should be removed from the file on that basis. [that was a notice of appointment]. Mr Lopian on behalf of his client was anxious that it should be clearly understood among insolvency professionals that giving and filing a notice when there was not a settled and unconditional intention to appoint an administrator was not permitted. He submitted that this required the filing in this case to be stigmatised as an abuse of process.

"64. The ground for the order to remove the copy of the notice from the court file is, in my judgment, the straightforward ground that the notice was invalidly given, because the statutory pre-requisite of a settled intention to appoint was not satisfied. The notice was not validly given under paragraph 26 nor was a copy of it validly filed with the court under paragraph 27, with the result that the interim moratorium was not validly invoked. To give a notice and file a copy with the court in these circumstances is no doubt, in a technical sense, an abuse of the court's process. But it is not necessary in this case to say more."

46. I was also referred to **Cornercare [2010] BCC 592.** This was a case of successive notices being filed thereby triggering moratoria against enforcement, which could of course be open to abuse. At paragraph 11 is His Honour Judge Purle QC said:

"The contrary argument is that this would give rise" -- this is this repeat notices of intention to appoint -- "to potential abuse because an unscrupulous individual or group of individuals could engineer a continuing moratorium by filing repeated notices of intention to appoint, each giving rise to an interim moratorium under paragraph 44 of Schedule B1. If that did happen I have no

doubt that the court would have adequate power to treat that as an abuse and act accordingly. The court could restrain the lodgement of further notices of intention to appoint unless followed by an actual appointment. It could even, in an extreme case, vacate and remove from the file under its inherent jurisdiction any abusive notice of intention to appoint..."

47. There has not really been any argument to suggest that that is not the case. I have been referred to some law on the issue of escrow. I will deal with that when I come to consider the escrow arguments.

Who is the holder of the qualifying charge?

48. There is no dispute that it is the GLAS Trust Corporation. I say there is no dispute, because not only do everybody who wishes to upset the appointment say that that is the case, but those who sought to appoint Clifden in their notice of appointment say that GLAS is the holder of the qualifying floating charge.

49. I have been referred, very extensively, to the deeds, relevant to these appointments. I am not going to refer to every entry to which my attention has been drawn, but I propose just to deal with the bare essentials, this being an ex tempore judgment.

50. In volume 3, page 522 we have the issuer deed of charge. That is between the issuer of the notes, the company, and the Note Trustee, and various others, but not between them and the noteholders. At page 527, clause 3 relates to security and declaration of trust. There it sets out a number of trusts in favour of the Note Trustee over the property of the issuer.

51. When we come to the floating charge, at 3.5, the deed says that:

"The issuer, by way of security, as continuing security for the payment or discharge in full of the issuer secured obligations, subject to clause 4, release of the issuer charged assets, hereby charges to the Note Trustee, by way of first floating charge, the whole of its undertaking and all of its property and assets whatsoever and wheresoever located at present and future other than"

and then there is a limited carve out, which I have been told is not relevant here and as to which there is no suggestion that is not the case, and:

"(b) the floating charge created by this clause 3.5 is a qualifying floating charge for the purposes of paragraph 14 of Schedule B1 of the Insolvency Act 1986."

52. Hence, it is necessarily a qualifying floating charge under which an appointment can be made by virtue of paragraph 14 of the schedule.

53. At 3.7 of the declaration of trust there is a provision:

"Each of the issuer secured creditors" -- and these are defined as both the Note Trustee and the noteholders, but then it goes on, in brackets- *"(other than the Note Trustee) hereby declares that the Note Trustee, and the Note Trustee hereby declares itself trustee of all the covenants, undertakings, charges, assignments, assignations and other security interests made or given or to be made or given under or pursuant to this deed or any other transaction document to which it is a party for itself and for the benefit of the issuer secured creditors."*

54. So GLAS, who are now Note Trustee, are holding these rights under the deed on their own behalf and for the benefit of the noteholders.

55. It is common ground that GLAS did not file notice of appointment and took no part in that process. There is the unchallenged evidence of Juliette Challenger that GLAS did not appoint. So the starting point in this case is that the qualifying charge holder did not appoint and so the requirements at paragraph 18 or indeed paragraph 14 are not, on the face of them, met.

56. However, the case for Clifden and Mr Hussain is that Clifden had the right to, they say, step over GLAS; in fact, what they are suggesting they could step into the shoes of GLAS, as the Note Trustee, to make an appointment in GLAS's name. They say that is what they did and have, thereby, fulfilled the requirement of paragraph 14 as regards who may make an appointment.

57. Their argument I will come to very shortly, but Mr Hussain referred to background. He said it is important to understand the background. He has set out, in his three statements what he says is quite a bit of the background. My view, however, is that this background is largely irrelevant to the decision I have to make, save that the motive which it evidences can assist in coming to factual conclusions.

58. The background Mr Hussain points to is that he says that the company was insolvent and he alleges it was run to the detriment of the noteholders with the assets declining and excessive professional fees being taken by those who are running the company. He was just trying to redress the balance for the noteholders. And, as the protector of the rights of the various institutions who have invested over £400 million in the company's notes, he says that he was there as a force for good.

59. When one looks at his scheme , which was very simple, he wanted to set up a pre-pack administration, gain control of the assets through the administration and then enter into a sale and purchase agreement to take effect on the administration, under which the company's assets would be sold to Fairhold Investments Limited for £402 million, which, despite having a similar name to the company, is in fact a creature Clifden Isle of Man, having the same registered office and agent.

60. I have to ask myself, if one is assessing whether he was really just trying to sort matters out for other people, why would he buy into a company and attempt to purchase loan notes in this company which was so troubled and, on his view, ill managed? Why would he go to all that expense and trouble? Then I look at what he has proposed, which is that he, or a company which was related to his company, would be able to get hold of the assets for £402 million. That does rather point to the more likely explanation for his involvement in the company is that he saw a profit could be made by gaining control of this company's assets, rather than that he was

stepping in simply to sort out what was essentially, up to his involvement, somebody else's problem.

61. As I say, motive can be of some assistance, albeit limited assistance, because, of course, a profit motive inspires temptation and I bear that in mind.

62. The first respondent's argument, from Miss Read, is that although the Note Trustee is the holder of the qualifying floating charge, if one turns to the note trust deed, which is in volume 2 at page 174, paragraph 7, there is a provision there under the heading "Proceedings" that says:

"The Note Trustee shall not be bound to take any such proceedings, action or steps as referred to in condition 10 'Enforcement of Notes' and clause 6 'Enforcement and subordination of the issuer deed of charge' or any other action..."

63. And then it goes on:

"Unless:

(a) subject to the proviso below, and other than in the case of declaring the notes to be due, it is directed to do so by an extraordinary resolution of the Class A noteholders or the Class B noteholders or in writing by the holders of at least 25% in aggregate of the principal amount outstanding of the Class A notes or the Class B notes then outstanding."

64. What she relies upon is the part of this sub-clause which says that Class A noteholders who have at least 25% can give this direction.

65. The second proviso is that:

"The Note Trustee shall have been indemnified as secured to its satisfaction against all actions, proceedings claims and other losses..."

I do not need to read on.

66. Then she takes me to clause 18 which is headed, "Limited recourse and non-petition", which says:

"No noteholder shall be entitled to proceed directly against the issuer or any other party to the transaction documents or to enforce the issuer security unless the Note Trustee, having become bound to do so, fails to do so within a reasonable period and such failure shall be continuing ..."

Then there is a provision about Class B notes and Class A notes that I do not have to read.

67. Miss Read says the effect of these paragraphs is that there must be an implied term that where the Note Trustee has become bound to act but does not act, a noteholder can, in the name of the trustee, appoint an administrator. She calls this outcome a form of implied agency. She goes on to say that, as a matter of fact, the Note Trustee had become bound to enforce the security against the issuer and had not acted within a reasonable time, having become bound, and therefore had failed to act.

68. As a result, Clifden, who Mr Hussain says holds 67% of the A notes in the company valued at around £276 million, were entitled to and gave the direction that the Note Trustee was to enforce the security. The Note Trustee failed to act within a reasonable tim, and, as a result, it was open to Clifden to act in the name of the holder of the qualifying legal charge to appoint the administrator.

69. The company and the Note Trustee take issue with every part of that argument, both legally and factually.

<u>The evidence upon which the first and fifth respondent's argument is based.</u>

70. Mr Hussain says in paragraph 47 of his first witness statement that Clifden holds £276 million of the notes which he alleges are blocked and held to the company's order. He says that £141 million worth of the notes had been purchased in trades executed with what is called the ad hoc group. I should explain that the ad hoc group are a group of noteholders represented by Freshfields Bruckhaus Deringer solicitors. Two members of the ad hoc group relevant to this case are called, for the benefit of brevity, Hayfin and Avenue.

71. Mr Hussain says that on 5 February 2018 he entered into a trade to purchase Hayfin and Avenue notes, which was to be settled on 20 February 2018. Due to regulatory problems, which he does not specify in his statement, the trade could not be completed, but, by virtue of a contractual term, a copy of which has also not been provided, the settlement date was prolonged and during the extended settlement period Clifden have to be consulted by Hayfin and Avenue about any voting they undertake, which has to be ratified by Clifden.

72. According to Mr Hussein, there is also a reverse ratification procedure under which these two holders of the notes are obliged to ratify anything Clifden does in relation to the notes as regards both what is said in relation to Clifden's ratification of the Hayfin/Avenue actions and vice versa. Although reliance is placed on this term no document has provided which contains any such a term.

73. At the hearing it was said that Mr Hussain and Clifden had had inadequate time to obtain the relevant documentation. That is not what they say in their statements. As I said in my earlier judgment concerning the adjournment, if they needed further time they should have asked for it when directions were given. The fact is that these have not been provided. I am bound to say that, on a transaction with a £141 million trade, which actually is at the centre of the events which gave rise to the purported administration, I would have expected the purchaser and their brokers, to be able to produce relevant documentation as to their rights in relation to the trade with some speed, but they have not done so.

74. So that is one set of notes which Clifden claim to have some power over.

75. A second set are what are called the tender trades. On 19 February 2018 a tender was issued on behalf of Clifden by its tender agents. The tender offer is at page 586 of volume 3. It provides that:

"The commencement date of the tender offer is 19 February 2018; settlement date on or around 23 May 2018. Rationale for the offer: the offeror wishes to establish a holding in respect of each series of notes."

76. Mr Haywood, for the company, has drawn my attention to the tender at page 590 in the bundle which provides that:

"Until the offeror procures the announcement of whether it has decided to accept valid tenders of notes pursuant to the offers, no assurance can be given that any of the offers will be completed."

77. He says there is no evidence that the tenders have indeed been completed. The only document which evidences that there has been some transaction which has involved Clifden in the acquisition of notes, or certainly the only document to which I have been referred and which Mr Hussain, when he was making submissions, conceded was the only document that he can point to within all these documents, was in volume 7at page 561. This is a letter dated 31 May 2018 from Morrow Sodali.

78. The was a letter written to GLAS by Morrow Sodali who introduced themselves as tender agents. They say that they:

"Hold no less than £40 million of Class A notes irrevocably tendered and held to the order of Clifden for a period no sooner than 28 September 2018".

79. They go on:

"The beneficial holders have appointed Clifden as their duly authorised agent for the purposes of any correspondence and discussions with the Note Trustee."

80. Mr Haywood points out -- I think it was Mr Haywood but it may have been Mr Goodison actually -- it does not say anything about voting rights or anything else; it just says they can correspond. When you look at the schedule that is attached to the Morrow Sodali letter, you see

that the beneficial owners are not Clifden or any company associated with Clifden but Royal London Mutual Insurance and other well known financial names.

81. There was another letter written to GLAS for and on behalf of Clifden claiming that Clifden were noteholders and complaining fees and requesting a breakdown. They did include, it is right, with that letter a document which they say is from Credit Suisse and is a confirmation letter directly from the custodian of a noteholder confirming their holdings in the Fairhold notes and requesting a breakdown. When you look at the Credit Suisse custodian confirmation letter, it is impossible to ascertain from the letter who actually holds the notes because the Euroclear/Clearstream account number is blank, as is the settlement date, securities balance, last load date and full description of holding. They all seem to be left blank; and nobody has been able to explain that particular page to me.

82. Perhaps it is worth, at this stage, giving a little further explanation that Euroclear and Clearstream are registers which hold details of who are the holders of the notes on their books. Apparently nobody actually walks round with a Fairhold Securitisation Limited piece of paper saying, "This is a loan note". These are electronic transactions; and they are held on the registers of Euroclear and Clearstream and brokers who subscribe to Euroclear and Clearstream. The relevance here is that if you want to know if, or prove that, you are the owner of a note, you can ask Euroclear or Clearstream or a subscribing broker to produce a screenshot to demonstrate that fact.

83. That is the sum of the evidence as to Clifden's ownership or control of the loan notes. The evidence against this comes principally from Mr Tett, of Freshfields, who act for the ad hoc group. He says that Avenue and Hayfin did, indeed, agree to sell £141,700,000 worth of A notes and £18,500,000 worth of B notes to Clifden but they were not paid for by the settlement date. On 7 March Freshfields wrote to Clifden, telling them that they were in repudiatory breach of contract and that the vendors had elected to accept that breach as discharging them from further

performance under the contract. That they did so is evidenced from the correspondence I have been shown; and nobody drew my attention, so I assume there is not any, to any challenge to that election within the correspondence. That is one piece of evidence.

84. Another piece of evidence is that following the Hayfin and Avenue deal apparently going off and after there had been some further correspondence coming in from Clifden, there were meetings of the Class A and Class B noteholders, at which a resolution was passed to increase the percentage which a noteholder had to have before it could provide a binding directive to the Note Trustee to enforce.

85. The variation was to lift the requisite percentage from 25% to 50.1%. The outcome of that meeting was recorded; and the result, as recorded, was that 76.99% of the Class A noteholders took part in that ballot and 100% of them were in favour of raising the percentage. Mr Haywood then took me to volume 4, page 681, which was the report of tender offer. What this shows is that as at the expiration of the offer, which was 4 June 2018, what was being said by Clifden was:

"As at the expiration date, the principal amount of Class A notes tendered for purchase was insufficient to allow the offeror to establish its required holding of £104 million of the Class A notes."

86. Mr Haywood asks, does that not rather put into doubt the suggestion made by Mr Hussain that, as a result of the 5 February trade, he had £141 million of the Class A notes? It goes on to mention the meeting of noteholders which is to take place on 11 June 2018 and states that where Cifden had a beneficial interest in notes, they will be voting against this proposal. There, again, Mr Haywood points to the fact that nobody voted against the proposal. Therefore, the inference must be that Clifden did not have any beneficial interest in Class A notes to vote with. He goes on to say that since 11 June 2018 there is nothing in the evidence to say that Clifden had been

acquiring notes after that date. So he says, clearly, Clifden are not the owner or in control of 25%, let alone 50.1%, of the loan notes issued by the company.

My conclusion on this particular dispute?

87. I should say the way I am approaching this dispute, since I did not invite the parties to agree whether I should decide the issue as to Clifden's actual holding without there being cross-examination, I am looking at this from the point of view is there a realistically arguable case or a seriously arguable case maintained with sufficient conviction? Which is really a summary judgment test.

88. Mr Haywood has made some telling points which I have just gone through. There we have Mr Tett's clear evidence that there has been a repudiatory breach and that that accepted as discharge which, to some degree, is actually confirmed by the announcement by the company that it does not have the 104 million that it wants. I should say that the 104 million would represent the 25% which it thinks it can use to direct the Note Trustee to act.

89. I do not have to accept something as a fact, just because it appears in Mr Husain's witness statements. I am struck by the lack of documentary support for these very substantial trades and the reliance upon terms, and the need to rely upon terms, which have not been produced, in circumstances where, in my view it is not credible that these could not have produced in time; there is nothing in the statements as to where these documents are to be found and what the problem is for Clifden and Mr Hussain obtaining the relevant documents containing these terms -- which would be unusual terms I am bound to say.

90. In the result, I am not satisfied that it is realistically arguable, on what has been put before me, that Clifden owns, either by way of beneficial ownership or legal ownership or some form of ownership where they havecontrol over the notes to the point at which they can treat themselves as the owner of loan notes, even 25% of the loan notes or that any of the beneficial owners have

transferred to Clifden the right to act in their name. Without that factual basis, of course, they were not in a position to give the direction.

91. That would be an end of their case. But I take the view this has been fully argued and I must go on to look at the matter further, the legal arguments and also the factual issue which I am asked to resolve, which may also resolve the case.

92. I turn now to the notice which was served because to see, if Clifden had sufficient note holding, whether it put the trustee in a position where it was bound to enforce. I will also add, at this stage, that although Clifden, in their report on tender, did not suggest that the meetings of 11 June to discuss the increase in percentage were, in any way, invalid by virtue of being called by the wrong procedure, they are now saying that. I do not take the view, given my conclusion, that makes any difference.

93. Let us look at what Clifden did to seek to bind the trustee. What would they need to do? They would have to serve a direction and provide an indemnity to the reasonable satisfaction of the Note Trustee.

94. The next stage, if you look at the trust deeds and other documents surrounding the trust security, are that, once a notice was served, then the trustee would need to serve an enforcement notice on the issuer. You can find that process in clause 8 of the issuer deed of charge and condition 10 of the conditions of charge.

95. Then, under clause 18, having been served with this direction, the trustee would only become bound to act on it after a reasonable time had passed. That is to say that after a reasonable time the Note Trustee would have to serve the notice of enforcement and then decide how to proceed. <u>When was the direction, if any, given in this case?</u>

96. Remarkably, this is not really dealt with in much detail by Mr Hussain and the other witnesses who are the senior directors of Clifden. In paragraph 107 of his first statement -- and I bear in mind that Mr Hussain, Mr Cundy and Mr Cathersides, who are the directors who have given

evidence on behalf of Clifden, have provided their statements after they have seen the first round of statements from the other parties, Mr Hussain says, in relation to the giving of the notice, that they carried out the enforcement steps. They sent the exhibits 491 to 511 to his statement (included in there was the direction to the Note Trustee). Clifden took the other legal steps. That is all he says about that. He does not say how it was done, when it was done. We shall see that could be crucial. Indeed, it is crucial.

Mr Cathersides at paragraph 20 says the notices were dispatched as required.

Mr Cundy says on 12 July 2018 there was a meeting.

"The notices and other papers were collated and hand delivered or posted as required."

So he has given an alternative there.

97. We then have Mr Proctor, who represents GLAS, at paragraph 40. He says that exhibits 491 to 511 were letters and attachments which were received -- so these are the documents received from Clifden -- after business hours on 12 July 2018. That is in his statement of 2 August 2018. On 6 August 2018 Mr Hussain made a statement and he did not deal with the point being made by Mr Proctor at all as to the date or time at which the notices were received.

98. The timing is crucial because the notice of appointment was filed at court on 12 July at 1.44 pm. Thus, if the direction to enforce was received after that time, on no possible view could it be said that the Note Trustee had failed to act within a reasonable period.

99. In his first statement Mr Hussain records that their advisers, solicitors called Sidley Austin LLP, said that 24 hours had to be allowed to respond to the direction; but in his statement he goes on to say that, as Clifden had made previous complaints to the Note Trustee, the figure he gives, I recall, was three hours would be quite sufficient.

100. Miss Read, very sensibly, does not seek to suggest some particular time frame in which to respond. But the suggestion that the Note Trustee could have any less than 24 hours to consider the direction, to see how they should proceed, to look at the indemnity, well, frankly,

the suggestion that it should be any less than 24 hours unarguable. In fact, 24 hours is unlikely to be long enough for the Note Trustee to weigh up the options, take advice, investigate the indemnity; and, on the facts of this case, investigate whether they were actually dealing with somebody who is entitled to give a direction at all.

101. My conclusion on the question as to whether a binding direction was given to the trustee, is that, on the evidence, the purported direction was probably made after the filing of the notice of appointment. Thus, it could not possibly be said that the trustee was given a reasonable time to respond. He was given, as I said in argument , a negative time to respond. But, even if it was given earlier in the day, it is not realistically arguable that the trustee would be in breach of his obligations to act on the direction and thereby become bound and also be said to have failed to comply thus springing the clause 18 freedoms on the noteholders by virtue of a notice served on the 12th, even if it was before 1.44 pm that day. So Clifden do fail on that point as well.

The legal point that has been argued as to an alleged implied agency .

102. On the facts as found, my conclusion as to there being no reasonable arguable case concerning the level of note holding, one does not need to make a decision on the point of law raised. But Miss Read did make the argument and it seems to me she is entitled to have the argument considered and dealt with.

103. It is a simple argument. She says that there is this implied term in clause 18 which gives rise to an implied agency. I do not need to decide whether it is an agency or actually some form of subrogation because, although Miss Read talks about stepping over the Note Trustee, what Clifden wants to do is stand in the shoes of the Note Trustee so as to say it could do what the Note Trustee can do, which is, in the name of the trustee as qualified floating charge holder, exercise the power of the qualifying floating charge holder. But I do not need to decide that particular point because her main point is that one has to imply a term because, she says,

otherwise the relaxation on the ban on proceedings against the issuer which is to be found in clause 18 is ineffective. Her clients would have a right but no remedy.

104. Mr Goodison, for GLAS, contradicts this view. Firstly, he took me to the various trust instruments, all of which show that it is the trustee who has the discretion whether to bring proceedings and nobody else. He went through the mechanics of that: how there are circumstances where, when called upon to do so, if the trustee does not act, then there are limited circumstances in which a noteholder can act. But he makes the point that if the deeds intended that a noteholder could step into the shoes of the trustee, the deed would have said so.

105. In fact, if you look at clause 18 -- and I compare Mr Goodison argument to what clause 18 says -- there it talks of the issuer proceeding directly. It does not say the issuer proceeding in the name of the trustee.

106. Further he makes a general point that, under the law of trusts, since we are dealing here with a trustee and beneficiary, a trustee is the only person who has the legal title to enforce. It is the holder of the qualifying legal charge. There is a remedy open to the beneficiary. If the trustee is recalcitrant, the beneficiary can go to court and get a direction the trustee get on with performing their duties or, if they are contemptuous of their duties, that they be replaced.

107. Finally on this point that there is a right here without a remedy, this has been put forward on the basis that business efficacy requires that the term be implied on the general Moorcock principles, where one looks to see if it is apparent that there is a complete bargain between the parties but that the contract will not work without this additional term.

108. Mr Goodison points out that if Clifden wants to put the company into administration, if that is how they wish to proceed, they can do so as a creditor. They can make an application to this court. Therefore, the contract works perfectly satisfactorily without the implication of such a term.

109. I agree with Mr Goodison. When you look at clause 18, it prevents the noteholder acting against the issuer unless the trustee wrongfully declines to act. In the ordinary course a creditor, which would be the noteholder, could proceed against the borrower, but this right is restricted. When that restriction is removed, they just fall into the position of the ordinary creditor who can proceed directly against the borrower. But that does not mean that they then are entitled to do so in the name of the trustee; and that is not what clause 18 says. If they, as a creditor, wish there to be an administration, they can make an application to the court under paragraph (2)(a) and paragraph 10 of Schedule B1.

110. Accordingly, on the terms of clause 18 and clause 7, to which I have been taken -- indeed, I have been taken to quite a few terms by Miss Read but they seem to be the relevant ones- on those terms, and in the context in which those terms are set, there is no reason to imply the term contended for by Miss Read.

111. My conclusion is that Clifden's argument that they were entitled to act in the name of GLAS, whether as agent or under some subrogated rights, fails both on its facts and in law.

Did Mr Bowell and Coakley consent to act?

112. Let us now look at part 2 of the argument, that is the appointment of Mr Bowell and Mr Coakley. This is the question which I have been invited to determine on the written evidence. There is an issue here as to whether the consents were handed over in escrow.

113. I have been referred to **Silver Queen Maritime Limited v Persia Petroleum Services plc [2010] EWHC 2867**. The issue there was whether the settlements of a dispute contained in a deed bound the parties.

114. Those relying on the deed argued that if the settlement deed was not unconditionally delivered it was delivered in escrow subject to a condition and that the delivering party could not unilaterally withdraw from the conditional escrow deed whilst the condition remained unfulfilled and, in that case, the party in reliance said that the condition had been fulfilled.

115. But that particular issue was not disputed by the counterparty. They argued that if the deed was in escrow, the condition had not been fulfilled; although their main point was there had never been a binding agreement.

116. In this context of escrow, I was taken to paragraph 111 of the judgment where there is a reference to something that was said by Farwell LJ in **Governors and Guardians of the Foundling Hospital v Crane,** where he says:

"There are two sorts of delivery, and only two known to the law, one absolute, and the other conditional, that is an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated as a complete delivery, cadit quaestio; if it did not, then it must be either an escrow or a nullity. The mode in which it in fact operated is a question of intention, primarily of the grantor, and secondly of the grantee; nothing passes out of the grantor against his intention, and no one can be compelled to accept an assignment of any property, onerous or otherwise, without his consent. Now an escrow or script is not a deed at all; it is a document delivered upon a condition on the performance of which it will become a deed, and will take effect as from the delivery, but until such performance it conveys no estate at all..."

117. There was an interesting argument before me as to whether the test for intention as to the delivery of the document was objective or subjective. There was a further argument about whether there was an objective or subjective test relating to compliance with paragraph 18 in relation to confirmation of the administrator's opinion.

118. It does not affect the outcome at all of this case, but my self direction is that in determining whether the party who delivers the document delivered it unconditionally or delivered it in escrow subject to some condition is an objective test. That is the contractual approach which is consistent with the fact that what is being examined is a contractual intention. One has to look at what the other party was entitled to conclude from that which was said and

done by the person who was delivering the document, set in the factual context in which it was done. But, as I say, it makes no difference to the outcome here.

119. Miss Read's argument in relation to this escrow is this: she said on 10 July 2018, when the consents were signed, they were handed to Mr Hussain on the condition that they could be used, subject to one or two matters being attended to. She said this was a conditional delivery and that after these documents were delivered it was not open to Messrs Bowell and Coakley to withdraw them.

120. She relies, in part, upon what Mr Hussain says in his statement at tab 20, paragraph 87.12, where, in fact, he was talking about the events of 9 July, in which he says various documents were handed over to him, signed documents, he said:

"Whilst the nature of any escrow was not expressly clear to myself, it was generally understood that there were some follow up items which needed to be provided/addressed before any enforcement action begins and we aiming to reconvene the next day to complete the signings and enforce on the same day."

121. Then, in relation to the 10th he said at paragraph 93:

"We met later that afternoon and Mr Bowell provided all the Mr Coakley signatures and agreed that once he saw the draft of the Sidley paper covering off the points he wanted we were 'good to go'."

122. She then referred me to Mr Bowell's statement where he said he had wanted to see legal advice to see that his appointment was valid. He was, on the 11th, sent a draft memo by Sidley. There was then a telephone call on 11 July where Mr Hussain indicates that Mr Bowell was content with what he had from Sidley and was essentially saying they should just get on and execute the arrangement the next morning.

123. So she says that these conditions, under which the consent was handed over, were satisfied and accordingly consent was given.

124. Mr Bowell and Mr Coakley have a different account of the telephone call. Most of the evidence is from Mr Bowell because Mr Coakley was not at the meeting on 9 and 10 July; although he was on the telephone on the 11th. They both say that they required the Sidley pre-appointment confirmation to see that their appointment was valid; to confirm the validity of the process; and to do a conflict check. Other matters were discussed and some of it was committed to the e-mail, upon which reliance has been placed by Miss Read as indicating that Mr Hussain's account of this discussion on the phone is correct.

125. So there is a factual question: were the consents provided in escrow? Clifden now accept that they were, but Mr Hussain's evidence is not really that clear on the point. And, if it was in escrow, was it a conditional escrow? And, if so, what was the condition?

126. It is best to start, instead of going over the whole history, on 9 July 2018 when the main meetings started. But it is worth recording that there had been a meeting on 5 July 2018 between Mr Hussain and Mr Bowell and Mr Coakley. Mr Hussain says that at that meeting he told them, "This will not be a walk in the park", which you might think is some indication that they had to proceed with some caution.

127. But, starting on 9 July 2018, there was a meeting at the offices of Dentons solicitors in London. Mr Bowell and Mr Hayter and solicitors for the proposed administrators, Mr Hussain, Mr Cundy and Mr Cathersides, the directors of Clifden, were there in the meetings. Documents were provided to Mr Bowell in the meeting. Documents were signed but not dated. We have a list of those documents at paragraph 24 of his statement. I am not going to read them out. They did not include the consents to act. There was going to be a problem with that anyway because Mr Coakley was not there to sign.

128. Mr Bowell says that, in relation to the documents which were signed on the 9th, not only were they not dated but it was agreed that CMS solicitors would hold them in escrow. Mr Hayter also says that was the position.The next day he e-mailed CMS to say that Mr Hussain had

been given documents which were going to be conveyed to CMS to be held in escrow. CMS replied that they would do so.

129. What is Mr Hayter's evidence of that meeting? And let us then compare it with the evidence from others.

130. Mr Hayter's statement is dated 19 July; thus, it is another statement that Mr Hussain, Mr Cathersides and Mr Cundy would have known about when they came to do their statements. Mr Hayter says that:

"At the meeting on 9 July" -- this is paragraph 8 of his statement -- *"Rizwan informed those present at the meeting as follows:*

"8.1. Clifden owned more than 50% of the loan notes and as part of that process it had made an open tender offer for the loan notes".

131. So there he was saying he owned more than 50% of the loan notes. As I have said, I do not even think that is arguable.

132. He goes on, at paragraph 9:

"The core of discussion in the meetings related to the methodology to make demand, as to a pre-requisite to the appointment of the joint administrators, the validity of the joint prospective administrators' appointment over Securitisation. In answer to these two points, Rizwan stated that GLAS Trust were obliged to comply with a request from the holder of more than 50%. If GLAS did not do so, Clifden could step into their shoes as holders of more than 50% of the loan notes. With regard to the demand on the validity of the joint administrators' appointment, he would obtain two legal opinions. One legal opinion would be obtained from Sidley Austin LLP ('Sidleys') who had previously been involved in the matter and produced a 'legal steps' paper and also had obtained advice from legal counsel as to the centre and main interests of Securitisation. A second legal opinion would be obtained from CMS. Rizwan also stated Clifden held a memo from Sidleys dealing with these issues and said Clifden wanted the comfort

of knowing the appropriate steps had been properly taken to demand repayment and then to appoint the joint administrators."

133. Mr Hayter goes on:

"After this meeting with Mr Peter Voisey [who joined the meeting later] *and against the background of what had been said before it was made perfectly clear, both by me and Mr Bowell, to Rizwan and the others attending the meeting, that the proposed joint administrators were not in a position to move forward prior to the receipt of the two legal opinions from Sidleys and CMS relating to the demand for repayment and the validity of any appointment of joint administrators. Rizwan was also expressly told, both by me and by Mr Bowell, that the following information/documentation would be required as a precursor to any further progression let alone an appointment: due diligence on Fairhold Investments Limited, the prospective purchaser under the proposed pre-pack; due diligence on Clifden Tactical Opportunities II Limited ('Tactical') as a guarantor under the sale and purchase agreement, who was also the counterparty to the Administration Funding Agreement; a statement of net assets of Tactical from its auditors; know your client (KYC) on the Tactical directors; the GLAS appointment document; and the comfort of knowing that all of the rights of the Note Trustee and the charge vested in GLAS. The step over provisions entitling the owner/holder of 50% plus of the loan notes to appoint administrators by stepping over the Note Trustee. Rizwan also confirmed all of the above information/documents would be provided and proposed that, pending the receipt of the two legal opinions and the other requested information/documents, certain documents should be executed but remain undated in anticipation of progression of the matter. This was agreed and the documents executed on the basis of my suggestion that the executed but undated documents would then be held in escrow. It was Rizwan who suggested that these documents be held by CMS and Rizwan said he would arrange for all of these*

documents to be delivered to CMS. I believe I asked Rizwan for the name of the person at CMS who would hold the documents in escrow and he told me the person was Neil Hamilton."

134. That is Mr Hayter's account of that particular meeting. I compare that with Mr Hussain's statement, where he says that it was not really clear whether it was to be in escrow but there were certain things to be done. It is entirely vague and he has not sought to challenge the detail which was set out in Mr Hayter's statement.

135. You then add that the following day Mr Hayter did e-mail CMS to report that documents which they had signed in escrow were going to be sent to them by Mr Hussain; and CMS confirmed that they would hold them pending permission to release them. Of course that was just between CMS and Mr Hayter, but that does rather confirm that there was a discussion about escrow and that it was agreed that the documents be provided to CMS because why else would Mr Hayter have sent such an e-mail?

136. On 9 July at 19.19 pm Mr Hussain sent to Mr Bowell an e-mail to which a Sidley e-mail was attached. Mr Bowell deals with this in paragraph 29 of his statement. It was an e-mail from Philip Taylor at Sidley. In summary it stated that Sidley could provide advice to the administrators regarding the ability of the Note Trustee to enforce the transaction security by an appointment of an administrator over the issuer and a receiver over the shares in the borrower.

137. He goes on:

"The e-mail confirmed that Sidley would need to clear conflicts once the identity of the proposed administrators was known."

138. The e-mail also attached a letter from CMS to Clifton bearing the e-mail address of Neil Hamilton in which CMS provided advice regarding the rights of the noteholders of FSL to enforce issuer securities where the Note Trustee has failed to serve an enforcement notice.

139. There were some further e-mails the following day. So that is on the 9th. On the 10th Mr Bowell, at 9.40, e-mailed Mr Hussain. He said, having received this limited information from Sidley and from CMS:

"What you have provided is not what I understood you would be obtaining. So we can be clear, I need written advice from lawyers, addressed to myself and Dermot as proposed administrators, and to Clifden:

"1. Confirming the validity of the issuer deed of charge.

"2. That the issuer deed of charge is a QFC for the purpose of appointing administrators out of court.

"3. That under the valid QFC there is a right to appoint the administrators out of court.

"4. That GLAS has the requisite authority to make the appointment.

"5. If GLAS does not have the requisite authority to make the appoint who does? And with unequivocal advice that the appointer has the requisite authority.

"6. Confirmation of the demand process and time lines."

And he goes on:

"This is the very least any prospective administrator would expect prior to accepting an appointment. I cannot believe that the two sets of lawyers, who have had such in-depth involvement with the matter, will not have given these matters very careful consideration as part of their instructions and [and he puts this in capitals] MUST surely be able to provide the necessary comfort for you and I. Needless to say, it is in everyone's best interest to start off on the correct footing.

Regards Mike."

140. That does rather set out his view as to what he required before he would commit. The response to this from Mr Hussain does not provide the lawyers opinions. He says:

"Mike.

"We have no concerns and are comfortable with the fact that Sidley and CMS will provide appropriate legal opinions in due course. Hence our comfort in being able to provide the indemnity to the insolvency practitioners. Sidley have confirmed in the e-mail they can provide the relevant comfort to the insolvency practitioners after the appointment. They will not be able to provide any opinions to the IPs prior to the appointment because they do not want to find themselves conflicted if the appointment does not go ahead with you for any reason. We also do not want that as they will no longer be able to work with any placement we also do not want that as they will no longer be able to work with any replacement IPs for us. CMS have provided a short memo, which will be supplemented with a full legal opinion in due course, on the ability for us to step into the shoes of GLAS as an agent if they do not make an appointment as directed by us."

141. I am not going to read the whole of that, but it is perfectly clear from that that Mr Bowell did not get, on this occasion, what he was asking for.

142. The next event is that on 10 July at 2.45 pm there was a meeting. Mr Hayter was at that meeting. He gives evidence about what happened there in paragraphs 15 and 18 of his statement. He says there was this further meeting at 2.30. He says how they got the e-mail, that the e-mail with Sidley and CMS response had been provided.

He goes on:

"These did not constitute the promised legal opinions. The meeting started at 2.45. It was initially attended by the same attendees at the meeting on the 9th although then various people from Dentons joined" -- incidentally none of whom have given evidence for Clifden in this particular hearing -- "at this meeting the signed proposed administrator statements and consents to act, along with the written acceptance of appointment by receiver and the signatory page of the Administration Funding Agreement were handed to Mr Rizwan by Mr Bowell who

said that they would be held with the other documents in escrow by CMS. This was agreed by Rizwan.

On this occasion, after accepting that the two promised legal opinions had not been produced, Rizwan agreed that he would speak with Philip Taylor or Sidleys and obtain the promised legal opinions stating whilst Sidleys had declined to provide it because of a perceived conflict of interest, he acknowledged they had been intimately involved in the process and prepared the legal steps paper and obtained leading counsel's opinion and ought to be able to produce the required legal opinion.

At no time during either of these meetings was any indication given, whether expressly or by implication, that Messrs Bowell and Coakley were agreeing to their appointment as joint administrators of Securitisation and absolutely no authority was given for the release of any of the signed documents which, so far as I was concerned, and based upon Rizwan's statements, were either held by or were being delivered to CMS to be held in escrow."

143. Mr Bowell gives a slightly less detailed account, but, a nevertheless not inconsistent account, at paragraphs 32 to 34. In paragraph 34 he says that:

"The meeting on 10 June concluded within an hour and matters were left on the basis that I and DC [that is Coakley] *could not possibly accept the appointment as administrators without, amongst other things, obtaining pre-appointment clear legal advice that the whole proposed course of action was legal and valid", which, of course, is entirely consistent with the e-mail that he had sent that morning.*

144. How does Mr Hussain deal with this? His evidence is very sketchy. He does not really -- to use the expression -- engage with the detailed account that has been given by Mr Hayter. He deals with the whole of this in three very short paragraphs. At paragraph 92 her refers to the e-mail timed at 9.40. At paragraph 93 he says:

"We met later that afternoon and Mr Bowell provided all the Mr Coakley signatures and agreed that once he saw the draft of the Sidley paper covering off the points he wanted we were 'good to go'. Mr Bowell was also made aware that he had all the know your client information he needed. He agreed and stated if there was anything missing he can get it after appointment."

145. So that is a very different account, but it also does not deal with the detail as to what had been requested in the e-mail at 9.40 or indeed what was said by Mr Hayter.

146. As regards his other directors, Mr Cathersides says that the consents were signed but not dated. He makes no reference in his statement to the word "escrow"; but he gives no explanation as to why the documents were not dated when they were signed. He thought the appointment was agreed at that stage, according to his statement.

147. Mr Cundy says the consents were signed and handed over. He does not remember anything being said about escrow. He also says that they were not dated but he does not give any explanation for that.

148. After the meeting there is another e-mail from Mr Bowell to Mr Hussain, in which he said:

"I think today's meeting clearly showed the level of comfort the administrators could expect from Dentons. I say this without any suggestion of lack of professionalism or unwillingness to assist on their part in the process, but I think you can appreciate they see themselves coming in very much after the key action had been taken. Accordingly, the Sidley draft letter of advice addressed to the administrators dealing with the validity of the QFC, the demand process, the step in rights and the appointment itself is a key document that the administrators and of course Clifden will need to rely upon going forward. We have never questioned the strength of the indemnities on offer. I think we are still awaiting something on the guarantor company, but, to us, as prospective administrators, indemnities in themselves do not offer the real protection we look for should it ever be the case that our conduct is seriously questioned by a licensing body.

We fully believe that the proposal for taking control and selling the assets as per the SPA is in the best interest of the creditors, but we clearly wish to eliminate or minimise, as far as possible, challenges to the validity of the appointment."

That is, of course, consistent with what Mr Hayter says, that they are still looking for these legal opinions.

149. On 11 July 2018 the draft Sidley memorandum was produced. This was referred to by Miss Shekerdemian. She pointed out that it was not addressed to Mr Bowell and Mr Coakley, which is what he had been asking for. It does not confirm the validity of the issuer deed of charge, that GLAS had the authority to appoint and, if not GLAS, someone else. Furthermore, she points to the legal steps plan within that document which provided that there was to be 24 hours' notice to the Note Trustee and she said there was no compliance with that.

150. Following the receipt of the Sidley draft memo there was a telephone call. Mr Bowell made a handwritten note that was shown to me. There seem to be headings with some entries put in as he went along. There is a dispute as to what was said but, looking at the notes, it does not appear that there was confirmation that the draft Sidley memo was satisfactory for the administrators' purposes as to advising them as to their legal position and whether this was going to be a valid appointment.

151. This was followed by an e-mail at 16.46 to which I have been referred. It is set out in the witness statement of Mr Hussain at paragraph 100. I should indicate Mr Hussain's outcome of this discussion on the phone: he says it was agreed that the Sidley memo was in good shape and in the form that they required. Of course that is completely contrary to what they had been saying up to that point. In the email he said:

"Given the above we are to proceed to execution and once we have completed all the steps we will let MB know", MB being Michael Bowell.

If one was to take that on face value it would appear that, in that conversation, Mr Bowell had expressly said: "yes, we can now proceed with the administration."

152. We then see the at 16.46 a futher email from Mr Bowell. He said:

"Dear Rizwan referring to the conversation:

I thought it would be useful to write down the points made. The draft Sidley memo to be finalised and issued to the joint administrators" -- he is clearly saying that has yet to be done He went on:

"On the day of appointment Sidley to provide the joint administrator with the written confirmation of the validity of their appointment in terms of the process of their appointment, ie confirming that the relevant notices and filings were served in accordance with documents as defined in the memo". Then he indicated he wanted to speak to Philip Taylor at Sidleys "*once you have confirmed all the ducks are in a row…Once points 1 and 2 have been achieved the sale and purchase agreements can be released or resigned."*

So, again, he is suggesting that they are held until this question of legal advice has been completed. There are one or two other matters he dealt with to which I do not need to refer. He added in paragraph 7:

"I would like to be able to have a brief chat with the JAL contact once all ducks are in a row."

He referred to other information that he was looking for and ended:

"I look forward to hearing from you."

153. That e-mail would not be consistent with the earlier discussion on the telephone during which it had been agreed that the Sidley memo was sufficient and that Clifden were to proceed to execution.

154. Mr Hussain makes the point that at midday Mr Bowell suggested alterations to the sale and purchase agreement and they were done. I think Mr Bowell says he did not get that back.

But it is common ground that, without further reference to Mr Bowell and Mr Coakley, at 1.44 pm the notice of appointment was filed at court.

155. Let us look at the response. Mr Bowell did not become aware of the appointment until he was notified. He was sent notification by e-mail late on the 12th, at about 11 pm, but he did not open it until 13 July. His responses in e-mails after that, save for one which I will come to, were to say he did not consent to act as administrators and there had been a breach of the escrow undertaking.

156. Miss Shekerdemian took me to the response to his e-mail on 13 July, which I have down as tab 25, page 25, when he was saying:

"We spoke to you briefly. You are going to telephone us at 14.30. Under no circumstances is the SPA agreement is to be dated or released. The SPA and all other documents remain in escrow."

157. The response from Mr Hussain, about 30 minutes later, is:

"All documents have been dated. Court filing has been filed. We will send across final versions of all the signed documents. Savills and CBRE have added the insolvency practitioners to the reports. They are signing them. We shall send across final versions when received. Sidley are checking conflicts and, when free, they will send across a signed copy of the legal opinion and confirmation of steps. Talk at 2.30. Please do not write any e-mails or speak to Akin."

Akin are the solicitors for the company.

158. There Mr Hussain is behaving as if nothing had happened; as if he was just getting on with it. Even though Mr Bowell had just emailed him referring to the documents being in escrow. That is some indication that Mr Hussain was seeking to proceed with the administration whatever Mr Bowell said.

159. The overall picture, up to that point, is that prior to 1.44 on 12 July you have the evidence of Mr Hayter concerning documents on the 9th and 10th being in escrow. We have the

CMS e-mail, which is some support for Mr Hayter's evidence. Then we have the evidence of Mr Bowell. The claimants' directors, in relation to the 9th, don't give evidence that this was some sort of conditional escrow because they do not evidence a discussion about any talk of escrow. I think one of them mentions that some documents might have been in escrow.

160. But what is said about the 9 July meeting and indeed the 10 July meeting by the claimants' directors, including Mr Hussain, is not a sound basis for making a factual finding that there was (a) a conditional escrow agreement from which those handing over documents could not resile and, once the conditions were met, those to whom the documents were handed could use them to make the appointment.

161. Similar considerations apply to the meeting on the 10th. The evidence on the Clifden side is extremely vague as to what happened on the 10th, apart from the "good to go" comment, which is actually not consistent with the e-mails either before or after that particular meeting or with what Mr Hayter has to say.

162. So, looking at the parties' positions against the overall picture, and seeing what picture does this paint, one would expect the administrators and their legal advisers to want to be sure that the appointment was valid and that Clifden could do as they intended. As I have said, Mr Hussain, himself, in his written evidence said that he had told the administrators this "was not going to be a walk in the park". That is likely to have led to a degree of caution. The fact they took their solicitor with them is some indication that they were exercising due caution -- not overcautiousness, but due caution. The e-mail of 11 July 2018 calling for more information, more to be done; and what is said about legal advice. That all points away from the suggestion that Mr Bowell said it was good to go or he gave his permission for use of any documents. Then the position after the appointment, immediately once they became aware of the appointment, Mr Bowell was making the point that documents were held in escrow. So that is the overall picture

which points to acceptance of the evidence given on behalf of applicants, Mr Bowell and Mr Coakley in preference to that of the witnesses for the first and fifth respondents on this issue.

163. There is only one fly in the ointment, which I am going to have to deal with, which is possibly Clifden's best point, which was actually left until last, but the best points often are. It is at p 649. This was the e-mail of 15 July 2018. It is here to be read. The judgment has gone on long enough and I do not need to read out what it says. But the terms of this e-mail clearly suggest that Mr Bowell is seeking to pursue the appointment and he is asking, for instance, for £1 million to be put in the administrators account.

164. The significance of the contents of this e-mail is that it could be seen as evidence that what Mr Bowell and Mr Coakley are saying about their consent being given in escrow is not correct and that this is evidence that there is a counter narrative which needs to be given serious consideration. It could be an indication that they, as prospective administrators, saw this as a very attractive administration to be running because there seemed to be a lot of money about - not the sort of administration, for instance, where you have to chase errant directors or employ lots of people and worry about losing money. But when they realised that the company was saying that their appointment was not lawful they got cold feet and now see it as convenient to deny that they gave consent.

165. Miss Read says another relevance is that it shows is that, even if consent to use the forms of consent had not been forthcoming before the appointment, it clearly was after the appointment and so this was some sort of retrospective consent. As to that second argument, the e-mail does not actually say it is to be regarded as retrospective consent. Further, the paragraph 18 notice has to be valid when it is served and if there is no consent to act, frankly, I cannot see how that can be cured by saying although it is not a consent at the time, I have made it a consent after the event.

166. The first point is of more concern. This has been explained by Mr Bowell in his statement. He says that he was leading Clifden on. He was doing this on legal advice. He did not genuinely want the administration to proceed, but he wanted to see how far Clifden were prepared to take it. He did not think that they were going to do any of this because he thought the whole thing, essentially, to use a colloquialism, was a bluff, and there was no money there.

167. Looking at this e-mail in isolation, I can why importance has been placed upon it by Miss Read. But when you look at it with all the other e-mails, it is contrary to the approach of all the e-mails before the appointment and the other e-mails post appointment and either side of it.

168. The terms of this e-mail are not sufficient to change the overall picture. I am sufficiently satisfied that there is a credible explanation for this e-mail which is that given by Mr Bowell.

169. I conclude that Messrs Bowell and Coakley were approaching the appointment with care. They wanted advice before any step was taken in the appointment. They wanted advice directed to them upon which they could rely and therefore complain if it was not given competently.

170. I conclude, looking at their behaviour and caution that it is more likely than not that they did ask for the documents to be held in escrow in relation to all documents they signed. And, insofar as the escrow was conditional, it was conditional upon them giving express agreement to the document being used. They did not intimate, by word or deed, in such a way that Clifden could have concluded that they could use those documents if certain events happened outside of the control of Mr Bowell and Mr Coakley.

171. Accordingly, on the balance of probabilities, I find that the consents were handed to Mr Hussain in escrow. They were not be used without the express consent of their authors. Such express consent was not given. Neither was any implicit consent given. We therefore have an appointment by somebody who had no power to appoint and administrators who did not consent

to act. So the appointment was totally flawed and therefore the appointment is void and of no effect.

Approved

HHJ Kramer

17th October 2018