



Neutral Citation Number: [2008] EWCA Civ 575

Case No: A2 2008/0631 and 0801

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE ETHERTON
[2008] EWHC 463 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2008

Before:

LORD PHILLIPS OF WORTH MATRAVERS, LORD CHIEF JUSTICE
LORD JUSTICE JACOB
and
LORD JUSTICE LLOYD

IN THE MATTER OF WHISTLEJACKET CAPITAL LTD (IN RECEIVERSHIP)

Between:

(1) NEVILLE BARRY KAHN
(2) NICHOLAS GUY EDWARDS
(3) NICHOLAS JAMES DARGAN
- and -

INTERESTED PARTY A
THE BANK OF NEW YORK

Claimants
Appellants in appeal 0631
Respondents to appeal 0801

Respondent to appeal 0631
Intervener
Appellant in appeal 0801

Robin Dicker Q.C. and Barry Isaacs (instructed by **Clifford Chance LLP**)

for the Receivers, Appellants in appeal 0631 and Respondents to appeal 0801

Susan Prevezer Q.C. and Paul Stanley (instructed by **Bingham McCutchen (London) LLP**) for
Interested Party A, Respondent to appeal 0631

Thomas Ivory Q.C. and Orlando Gledhill (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for
the Bank of New York, Appellant in appeal 0801

Hearing dates: 12 and 13 May 2008

Approved Judgment

Lord Justice Lloyd:

Introduction

1. This is the judgment of the court. These appeals from an order of Mr Justice Etherton arise from the insolvency of a company incorporated in Jersey which is of a kind known as a structured investment vehicle. It is in receivership, and the proceedings were brought by the receivers for directions as to how they should proceed, in circumstances where the assets of the company are inadequate to meet its liabilities. The particular liabilities with which the case is primarily concerned are those under US Medium Term Notes (USMTNs), with a total nominal value of over \$4,300 million, but with different maturity dates.
2. The dispute is one as to priority as between different creditors. It turns as to one point on the wording of the documents which set out the terms of the relevant debt obligations, in particular an Indenture, and as to the other on the document by which security was given for those and other obligations, the Security Trust Deed (STD).
3. The holders of USMTNs are one of several groups of creditors who are called Senior Creditors of the company. Others include the holders of Euro MTNs, the holders of US and Euro commercial paper, Liquidity Providers, Repo Agreement Counterparties, and Derivative Counterparties. The company also had subordinated creditors, who were the holders of Capital Notes.
4. We have seen the documents relating to the USMTNs, and some relating to the Euro MTNs. We have not seen any relating specifically to any of the obligations owed to the other kinds of Senior Creditor, but we know that they are affected by the construction of the STD. We know that some of the other Senior Creditors had different maturity dates, and that, depending on the correct reading of the STD, they may also be affected by, or their rights may in turn affect, the position of the holders of some of the series of USMTNs. Both of the provisions with which we are concerned need to be considered in relation to each other. The USMTN holders would have known or had access to the documents which we have seen governing the Notes and the STD and other documents governing the position generally. We do not know how much such holders would have known, or would have been able to find out, about the rights of other types of Senior Creditor before they committed themselves to the transaction, but they would have known that there were other kinds of Senior Creditor, with whom they would be in competition in a position in which the assets of the company were insufficient to pay all its liabilities to Senior Creditors. Equally, we do not know, but the position may have been similar as regards the knowledge, or lack of it, on the part of other types of Senior Creditor in respect of the terms of the MTNs.
5. The US and Euro MTNs were joint obligations of the company and of a US incorporated subsidiary. For the purposes of these appeals it is unnecessary to distinguish between them, and we will not refer to the US subsidiary.
6. The obligations of the company were set up in such a way as to be, so far as possible, proof against enforcement proceedings other than receivership. The principal liabilities of the company are secured, and the rights and obligations in respect of the security are set out in the STD, which is one of a raft of documents of substantial

length and complexity which are relevant to the appeals. It is governed by English law. Other documents which we have had to consider include, first and foremost, an Indenture and a Global Note which set out the terms of the USMTNs (these are governed by New York law), an Investment Management Agreement, and a Master Framework Agreement (MFA) which, among other things, contains a huge list of definitions applying to the other documents, and no doubt to yet other documents which we have not had to look at.

7. The USMTNs were issued in several series, with the same general terms but with different stated maturity dates. The same was true of the Euro MTNs which, it seems, were issued on very similar general terms to the USMTNs. Different series of these two kinds of Notes were due to mature on ten dates from 15 February to 25 March 2008. In addition, during that period, obligations of the company became due under four Repo Agreements. The aggregate sums becoming due under the MTNs and the Repo Agreements during this period exceeded \$2,842 million, of which some \$1,582 million was due under USMTNs, \$199 million under Euro MTNs and \$1,060 million under the Repo Agreements. We do not know the position as regards any obligation to other types of Senior Creditor arising during that period. The MTNs maturing during that period do not seem to have been by any means all of the Notes outstanding at that time.
8. Essentially, the issues before the judge and on these appeals concern the respective rights as between the holders of different series of USMTNs, but the position is likely to be the same as regards Euro MTNs. There will or may also be issues as between the holders of these Notes and other Senior Creditors, including the Repo Agreement Counterparties, but we do not know how the rights of these parties interact with those with which we are concerned specifically.
9. The facts which led to the situation in which the receivers sought the court's assistance arose in the following way. On 11 February 2008 the Investment Manager (Standard Chartered Bank) notified the Trustee of the STD (the Security Trustee) of the occurrence of an Automatic Enforcement Event. (This, like other phrases, is a defined term; we will come to the meanings of the various terms, so far as necessary, in due course). This consisted of the breach of a Capital Loss Limit. In effect, the assets held by or for the company had declined in value so far as to breach certain agreed ratios designed to ensure the adequacy of the assets held for the time being. The Security Trustee (BNY Corporate Trustee Services Ltd) appointed receivers, as it was required to under the STD, on 12 February. On 15 February the first series of USMTNs mentioned above was due for payment. On that date (at 08.52 New York time), the Investment Manager notified the Security Trustee, with a copy to the receivers, that it considered that an Insolvency Event had occurred, which was an Insolvency Acceleration Event, because it was more likely than not that the company would not be able to meet its present and future debts as they fell due to Senior Creditors, and to others entitled to be paid in priority to them. (The Investment Manager had told the receivers by telephone on the previous evening that it was minded, on the balance of probability, to do so the next day.) Later on 15 February (at 13.58 New York time) the Security Trustee gave notice to the company (and to others concerned) that it had received this notice from the Investment Manager.
10. The Indenture obliged the company, on receipt of this last notice, to give notice of not less than 20 nor more than 30 days to the Trustee of the Indenture of a date on which

it (the company) would be obliged to pay the holders of the USMTNs, in whole, an amount calculated in accordance with the Indenture by way of redemption of the Notes, that date being no later than 30 days after the service of the Security Trustee's notice on the company. If the company did not give such a notice (as in fact it did not) the due date for payment of the amount so calculated was 30 days after the Security Trustee's notice: 16 March in the present case.

11. Those provisions would undoubtedly accelerate the date on which Notes were payable which had a stated maturity date later than 16 March 2008. One of the questions which the judge had to consider is whether it also postponed the due payment date for Notes whose stated maturity date was before 16 March, and if so whether this also applied to the first series of Notes, which was due for payment on the same day as the Security Trustee's notice. On this issue three classes of Noteholders had different interests: the holders of the first series, the holders of other series with maturity dates after 15 February but before 16 March, and the holders of other series with later stated maturity dates. The resolution of this issue turns on provisions of the Indenture.
12. The other issue on the appeal arises from the terms of the STD. It too involves competition between different series of MTNs with different maturity dates, and it affects the priority of other Senior Creditors as well. The STD sets out an order of priority for payments by the receivers or the Security Trustee, as between different creditors of the company. The question is whether, and if so how, it creates an order of priority as between different Senior Creditors, where amounts are due and payable to one class but not yet to others. The receivers contend that it does not create any such order of priority within the class of Senior Creditors. If they are right on this point, the point arising under the Indenture is much less important than it would otherwise be.
13. Before the judge, the interests of the holders of USMTNs which matured on 15 February 2008, and of those which matured between 15 February and 16 March, were represented by two parties who, pursuant to confidentiality agreements between them and the receivers, were not named in the proceedings, and were identified as Interested Parties A and B. The interests of those who held longer-dated Notes were, in effect, represented by the receivers.
14. The receivers' application for directions was issued on 28 February. The judge dealt with the case with impressive speed, in response to the urgency with which the case had been brought on. He heard the application on 3 and 4 March, handed down his judgment on 5 March, and decided on the correct form of order at a further short hearing on 7 March. Thus he had heard and decided the points at issue before the 30 day period under section 10.01(c) of the Indenture had expired. In his judgment ([2008] EWHC 463 Ch) he decided in favour of Party A and, in part, adversely to Party B. He held that the STD does require the holders of different series of USMTNs to be treated differently according to when their Notes were payable, and by reference to when the receivers received money after the Enforcement Date, that the Indenture has the effect of making Notes whose contractual maturity dates were after 15 February but before 16 March payable on 16 March, but that this does not apply to the first series of Notes which was payable on 15 February. He said that the receivers have no Power to hold money back from distribution to those then entitled. He gave permission to appeal to the receivers and to Party B. The latter, however, chose not to appeal. The Bank of New York (BNY), which is in a similar position to that of Party

B, obtained leave to appeal, and to be joined for the purposes of that appeal. Thus we have to consider the receivers' appeal (appeal 0631) against the judge's order, in respect of the effect of the STD, and as to the priority given to Party A, and also BNY's appeal, in place of Party B, against his decision on the Indenture that, apart from Party A, all the Noteholders rank together for priority (appeal 0801). His order does not, in terms, deal with the question of timing, nor with the question whether or not the receivers can hold money back rather than distribute it. The receivers are, however, worried by his observations on the latter point, and have therefore raised it as part of their appeal. The timing point is bound up in his decision, and therefore arises in any event, even though not separately articulated in his order.

15. As already noted the points interact, in that if the receivers are right about the provision in the STD, the point under the Indenture is much less important and, conversely, if they are right about the Indenture, the point on the STD is of less importance, at any rate as between the holders of MTNs. We propose therefore to outline the points arising under the STD, and then those on the Indenture, before proceeding to our conclusions.

The Security Trust Deed, clause 6.6

16. The Security Trust Deed was dated 19 July 2002, but applies for present purposes in a form as amended by a Supplemental Deed dated 13 June 2007. It has some definitions of its own but otherwise applies the definitions in the Master Framework Agreement. It contains a covenant with the Security Trustee to pay all relevant liabilities (clause 2). The creation of the security is in clause 3, and requires no special attention here. Clause 4 deals with the initiation of enforcement, clause 5 with enforcement notices and clause 6 with enforcement in general. Clause 4 allows for the service of a Default Notice on the basis of an Enforcement Event, other than what is called an Automatic Enforcement Event. These events are for the most part concerned with defaults in payment. Under clause 5, an Enforcement Notice is to be served by the Security Trustee on the company and others either if it is required to do so following the service of an uncontested Default Notice, or if it is notified of, or becomes aware of, an Automatic Enforcement Event. Such events include breach of capital loss limits and other related ratios, as well as Insolvency Events and downgrading, below a given level, of the rating of the MTNs or the Capital Paper. Once such a notice has been served, the Security Trustee is bound by clause 5.3 to enforce the Security, in particular by the appointment of a receiver under clause 6.3.
17. It is in that context that clause 6.6 arises, on which this aspect of the appeal turns. The clause is in the following terms, omitting irrelevant text:

“Subject to Clause 6.18 ... , any monies received by the Security Trustee or any Receiver after the Enforcement Date shall be applied in the following order of priority:

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

6.6.2 second, to pay, *pari passu* and *pro rata* in accordance with the respective amounts then owing thereto, (i) all amounts then due to the WP Indemnified Party in respect of any claims under the WP Indemnity and (ii)

any fees, costs, expenses and other amounts then due to the Security Trustee or any Receiver (other than those amounts referred to in clause 6.6.1 above);

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

6.6.4 fourth, subject to clause 6.12 ... to pay, pari passu and pro rata in accordance with the respective amounts then owing thereto, any amounts due to Secured Creditors (other than the Capital Noteholders and the Senior Creditors) ...

6.6.5 fifth, subject to clause 6.10 ... to pay, pari passu and pro rata in accordance with the respective amounts then owing thereto, any amount of (i) principal then due and payable to the Capital Noteholders and (ii) ...

6.6.6 sixth, subject to clause 6.12 ... to pay, pari passu and pro rata in accordance with the respective amounts then owing thereto, (i) any amounts due to the Investment Manager [in respect of one entitlement] ... and (ii) subject to clause 6.10 ... any amounts due to ...

6.6.7 seventh, any amounts due to the Investment Manager on account of [an additional entitlement]; and

6.6.8 eighth, to pay the surplus (if any) to the Company

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

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

18. Some other provisions of the STD were relied on. The provisions of clause 6 apply after the Enforcement Date, whether or not the stage of insolvency has been, or ever is, reached. Unless and until an Insolvency Acceleration Event occurs, the receivers have particular obligations under clause 6.3 as to the management of the business of the company. In relation to that they have to consider the interests of the Secured Creditors and, if there is a conflict, also the interests of the Senior Creditors as a whole, to which they have to give priority.

“6.3 The Security Trustee, as soon as reasonably practicable after the Enforcement Date, shall appoint a Receiver in accordance with Clause 14 (*Appointment and powers of Receiver*). The Security Trustee shall ensure that the terms of appointment of such Receiver provide that, unless and until the occurrence of an Insolvency Acceleration Event, the Receiver shall use best endeavours to ensure (subject to his duties at law) that the Company’s business is managed in accordance with the Enforcement Management Procedures and the applicable provisions in the Compliance Manual relating to Sub-Portfolios; *provided that* any such Receiver shall not ensure compliance by the Company with the Enforcement Management Procedures or relevant provisions of the Compliance Manual to the extent that such compliance (in the reasonable determination of the Receiver) would adversely affect the interests of the Secured Creditors. Where the Receiver is required to make such determination and there exists a conflict between the interests of the Senior Creditors and the interests of the other Secured Creditors, the Receiver shall give priority to the interests of the Senior Creditors.

For the avoidance of doubt, following the occurrence of an Insolvency Acceleration Event, the Receiver shall no longer be bound to manage the Company’s business in accordance with the Enforcement Management Procedures or (except as required for the purposes of determining amounts payable to CN Holders whether by way of principal, interest or otherwise to the extent any Senior Liability remains outstanding) the applicable provisions in the Compliance Manual relating to Sub-Portfolios and shall be entitled to sell any Secured Assets and apply the proceeds in accordance with Clause 6.6 (*application of Proceeds*). ...”

19. The Security Trustee has extensive powers as mortgagee, under clauses 11 and 12, as receivers do also under clause 14. By clause 16.26 the Security Trustee is free from any duty to ensure that any financial benefit in respect of any Asset is paid duly and punctually.
20. Importantly, under clause 28 various provisions are set out which prevent the Security Trustee from instituting any insolvency proceedings against the company, and clause 28.2 sets out rules as to limited recourse, as follows:

“Notwithstanding any other provision of this Deed, any other Transaction Document or otherwise, if the net proceeds of the realisation of the Security constituted by this Deed upon enforcement hereof are less than the aggregate amount payable by the Company to the Noteholders and to the other creditors of the Company (including the Security Trustee) (such negative amount being referred to herein as a “shortfall”), the obligations of the Company in respect of the Secured Liabilities and its obligations to the other creditors of the Company (including the Security Trustee) in such circumstances shall be limited to such net proceeds which shall be applied in accordance with the Priority of Payments. In such circumstances the other assets (if any) of the Company (including the ordinary share capital of the Company) will not be available for payment of such shortfall, which shortfall shall be borne by the creditors of the Company (including the Security Trustee) in accordance with the Priority of Payments (applied in reverse order), the rights of such persons to receive any further amounts in respect of such obligations shall be extinguished and none of such creditors may take any further action to recover such amounts.”

The Priority of Payments is defined as being the order of priority set out in clause 6.6.

21. Manifestly, clause 6.6 is a priority provision. It sets out a series of tiers of liability, which rank in turn for payment. It applies both before and after insolvency has arisen, and it is of most significance after insolvency, but it has to be read in such a way that it will work sensibly before insolvency. The particular question that arises is how, after insolvency, clause 6.6.3 applies, where different Senior Creditors have different amounts owing to them, and with different maturity dates, some of which have not yet arisen.
22. For the receivers, Mr Dicker Q.C. submitted that the clause is only concerned with priority, and that it does not impose any obligation to pay money out at any particular time. All it does is prescribe to whom money should be paid out as and when it is available to be paid out. He submitted that, although no money can be paid out in respect of amounts owing by the company which have not yet fallen due for payment, nevertheless, when deciding how much is to be paid out, the receivers must take into account liabilities to Senior Creditors which have yet to fall due for payment. He argued that, whereas “any amounts due” to the Senior Creditors means “amounts due and payable”, so as to exclude from payment any liabilities not yet due for payment, “the respective amounts then owing thereto” means something different, namely, all sums due (whether or not yet payable) to the Senior Creditors as a class. For their part, Miss Prevezer Q.C. for Party A and Mr Ivory Q.C. for BNY submitted that, according to its natural reading, the clause not only fixes the priority but also imposes a specific obligation on the receivers to pay out the money received by them.
23. It is noticeable that the clause uses quite a variety of phrases as regards debts. In 6.6.1 the phrase is “then due”. In 6.6.2 that phrase is used again, together with “the respective amounts then owing thereto”. The latter phrase comes into the wording at that point because the sub-clause covers two potentially competing sets of liabilities; in case the funds available were not sufficient to pay both, it is necessary to prescribe how the available money should be distributed as between them, whereas in 6.6.1 there is only one payee (the Security Trustee and the receiver being, essentially, the same for this purpose). In 6.6.3 as well as in 6.6.4 and 6.6.6, as well as the phrase about respective amounts owing, the words used are not “amounts then due” but “amounts due”. By contrast in 6.6.5 the words used in the equivalent context are “any amount of principal then due and payable”.
24. The section of text which follows 6.6.8, starting “For the avoidance of doubt”, has several different phrases. This passage was referred to as a “proviso” in argument, but (apart from the last few lines) it is not properly so called. It reinforces the priority laid down in the sub-clauses, and we will refer to it as the reinforcement provision. It refers expressly to amounts owing to Senior Creditors “which are then due and payable” and other such amounts “which are not then due and payable”. It also refers, apparently with a different meaning from “amounts due and payable”, to “all amounts referred to in” 6.6.1 to 6.6.3 and 6.6.4. It refers expressly to the possibility of providing for amounts referred to in clauses 6.6.1 to 6.6.3, and to the retention of money to provide for amounts yet to become due and payable to Senior Creditors. (There is another reference to providing for liabilities referred to in clauses 6.6.1 through to 6.6.4, in clause 6.12.)

25. Despite the discrepancy between the use of “due” in 6.6.3, 4 and 6 on the one hand, and “due and payable” in 6.6.5, on the other, all Counsel agreed that “amounts due” in 6.6.3 and the other similar sub-clauses mean “due and payable”. Their disagreement was over the meaning of “the respective amounts owing thereto”: both as to “owing” and as to “thereto”.
26. Miss Prevezer submitted that the clause does impose an obligation of payment, and does not allow for retention of sums, at any rate so as to withhold payment which can and should otherwise be made in respect of sums already due for payment. She argued that, just as “amounts due to Senior Creditors” means amounts due and payable to them (at a given date), so “the respective amounts owing thereto” is directed to quantification, only for the purposes of abating as between two or more creditors, who cannot all be paid in full, and is therefore to be understood as referring only to the Senior Creditors to whom sums are then due and payable, and only to the amounts owing in respect of those sums.
27. Her argument does raise the timing question, namely as at what date is it to be determined what sums are due and payable to Senior Creditors. On this her contention was that it must be the date of receipt of the relevant money by the receivers, for two reasons. One is that it fits best with the opening wording of clause 6.6. The other is that, even though a receipt-date test is capable of being affected by choices made by the receivers, for example as to when and how to realise assets, the alternative of reference to the date when the receivers come to apply the relevant money makes the determination of the priority as between Senior Creditors too dependent on choices by the receivers which are not, or not sufficiently, based on objective criteria. Though the receivers have a good deal of freedom of choice as to how and when they realise assets, there are objective factors by reference to which their choices are to be made, above all the need to achieve the best realisation reasonably possible. Although this may allow a choice between early and late realisation, and between a sale for immediate payment or alternatively for deferred consideration, she submitted that in each of those cases the receivers would be motivated by an objective of achieving the best result reasonably possible for the class of Secured Creditors in general, and that of Senior Creditors in particular, as a whole. On the other hand, if the receivers could hold sums already received and, by the process of holding for a shorter or longer period, could affect the respective priorities of sub-classes within the overall class of Senior Creditors, that would be, to say the least, a surprising conclusion, and an unnecessary one.
28. Mr Ivory was mainly concerned with submissions about the Indenture, but in supporting the judge’s decision about clause 6.6.3 he placed particular reliance (as also had Miss Prevezer) on the proposition that the receivers’ interpretation of the clause did not work during any period of enforcement before insolvency. How long that might be would not be foreseeable in any particular case, but section 10.01(d) of the Indenture expressly envisages the possibility that enforcement might last for at least one year, and possibly several years, without an Insolvency Acceleration Event occurring.
29. The reinforcement provision poses issues of construction of its own, not all of which need to be resolved for the purposes of these appeals. Among these, it is not altogether clear whether the words introduced as (a) and (b) respectively, though linked by the word “or”, are really alternatives. Disregarding that point, limb (a)

contains two separate protections: all amounts “referred to” in clauses 6.6.1 to 6.6.3 must have been paid or provided for, and all amounts owing to Senior Creditors then due and payable must have been paid in full. (In turn, the protection for those interested under clause 6.6.4 against payments to those in clause 6.6.5 is expressed by reference to all amounts referred to in 6.6.1 to 6.6.4 having been paid, with no reference to providing for them.) Limb (b) requires that the receivers should reasonably consider that the assets which will remain after any contemplated payment will be sufficient to enable all amounts due to Senior Creditors which are not then due and payable to be paid in full as they fall due. The true proviso at the end also refers to retention to provide for amounts due to Senior Creditors not then due and payable. No part of this provision could ever be satisfied in insolvency, because in that situation the sums due to Senior Creditors cannot, or at the very least may not in future, be paid in full as they fall due. The reinforcement provision therefore makes a specific distinction between amounts due and payable, and amounts not yet due and payable, to Senior Creditors, and also includes the phrase “amounts referred to” in the various sub-clauses, which cannot be limited to amounts already due and payable, because otherwise the second part of limb (a) would be unnecessary. It seems to us therefore that these “amounts referred to” must mean those already due and those yet to become due, of the kinds referred to in the respective sub-clauses. This does not affect the reading of “any amounts due to Senior Creditors” in clause 6.6.3; as all Counsel submitted, this must mean amounts already due and payable. However, it would be capable of affecting the meaning of “the respective amounts then owing thereto”.

30. The judge dealt with clause 6.6.3 at paragraphs 84 and following of his judgment. He accepted Miss Prevezer’s argument that “the obligation of the receivers is to distribute money received by them *pari passu* to Senior Creditors whose debts are then due for payment, without taking into account amounts not yet due” (paragraph 86). Starting with the language of clause 6.6, he said (paragraph 97):

“On the literal wording of the clause, money received by the Receivers is to be paid out *pari passu* and *pro rata* in respect of amounts then due. There is no provision for money to be held back. The clause, therefore, plainly envisages that, if and when money is received by the Receivers, it is then paid out to Senior Creditors in respect of, and only in respect of, debts then due to be paid, and not debts due to be paid in the future.”

31. He found nothing in the reinforcement provision to undermine that interpretation, and he said that the receivers’ interpretation was inconsistent with the obligation to pay Noteholders on their respective maturity dates while the company is still solvent. He also noted that a situation in which some Senior Creditors are paid out in priority to others, as between the holders of USMTNs, is consistent with the fact that other kinds of Senior Creditors have different maturity dates, not affected by a regime similar to that of section 10.01(c) of the Indenture.

The Indenture: section 10.01(c)

32. Before we discuss further the arguments arising on clause 6.6.3, we must outline the position as regards the Indenture. The directly relevant provision is section 10.01(c), as follows:

“Insolvency Early Redemption. If the Security Trustee delivers to the [Company] notice of an Insolvency Acceleration Event (an “Insolvency Redemption Event”), the [Company] shall be obliged, by giving not less than 20 nor more than 30 days’ notice to the Trustee or (as applicable) the Registrar and the Holders of Notes (which notice shall be irrevocable), to pay the Holders of the Notes in whole, but not in part, the Enforcement Redemption Amount (as defined below) on the date specified in such notice, which date shall be not later than the date which falls 30 days after the day on which the notice of an Insolvency Acceleration Event is served (the “Insolvency Redemption Date”). In the event that the [Company] does not duly deliver such a notice, the Insolvency Redemption Date shall be the date which falls 30 days after the day on which the notice of an Insolvency Acceleration Event was delivered to the [Company]. The Notes shall be paid at the Enforcement Redemption Amount together with interest accrued at LIBOR (and as aforesaid) on the Enforcement Redemption Amount from the Redemption Price Calculation Date (as defined below) to (but excluding) the Insolvency Redemption Date ...”

33. By virtue of this provision, and in the events which happened, including the company’s failure to serve a notice, it is clear that Notes which otherwise had a Maturity Date later than 16 March 2008 became payable on that date, which was the Insolvency Redemption Date. Mr Ivory submitted that there is nothing in the text which permits a conclusion that Notes otherwise payable at an earlier date would become payable on that later date. That would be a postponement, not an acceleration, which would be inconsistent with a number of provisions in the text, including the heading “Insolvency Early Redemption” and the phrase “Insolvency Acceleration Event”.

34. The latter phrase is defined in the MFA, from which one may presume that it applies for the purposes of other transaction documents as well. Its definition is that:

“the Company is or becomes unable to pay its debts to Senior Creditors and any other persons whose claims against the Company are required by applicable law to be paid in priority thereto”

It is likely that the Investment Manager will become satisfied that this position has been reached either on, or immediately before, a date on which a liability to one or more Senior Creditors becomes due for payment.

35. In support of his argument, Mr Ivory referred to the other parts of section 10.01. Of these, 10.01(a) refers to redemption in accordance with the terms of Notes, a possibility which did not exist in the case of these particular Notes, 10.01(b) refers to early redemption in the event of fiscal changes by which payments of interest might become subject to withholding tax, and 10.01(d) refers to redemption by way of enforcement, where insolvency has not supervened, which must also be redemption in advance of the contractual date for payment. All of these, and other provisions of the Indenture less directly analogous, indicated that if redemption occurred it would be before the contractual maturity date. That, it seems to us, is what one would expect from the use of the word redemption. If the Note is to be paid in full on maturity, that is payment, rather than redemption; redemption means satisfying the obligation for payment prematurely, as compared with the basic contractual obligation. We note, however, that the definition of “outstanding” in the MFA refers to securities which

have been “redeemed in full” in terms which plainly includes payment on the contractual maturity date. There are many references to redemption which are neutral on the question whether it can only occur before the contractual maturity date.

36. He also pointed to the formulation of the basic provision as to payment, in the Global Note, as follows, in which we have emphasised the words on which he particularly relied:

“The Co-Issuers, for value received, hereby jointly and severally promise, all in accordance with the Indenture, Pricing Supplement and Annex 1 hereto, to pay to Cede & Co., Inc. or its registered assigns, on the maturity date specified in Annex 1 hereto *or on such earlier date as the same may become payable in accordance therewith*, the principal amount and to pay interest and all other amounts as may be payable pursuant to the terms of the Indenture, Pricing Supplement and Annex 1 hereto, all subject to and in accordance therewith.”

37. He also referred to other provisions, all of which, it is common ground, indicate that redemption would take place (if at all) earlier than the contractual maturity date, not later. (Counsel agreed that a reference in section 10.06 which might appear to be to the contrary is to be explained as referring only to the separate Maturity Date for interest payments; Mr Dicker accepted that this did not provide separate support for his argument.)
38. The judge accepted the principle that this provision “is intended to set in place a regime in which there is an actual or notional acceleration of the due time for payment of the Notes”: paragraph 81. In the case of all series of Notes other than the first, he found a notional acceleration by reference to section 10.01(e) which governs the amount payable on the Insolvency Redemption Date, as well as on the Enforcement Redemption Date under 10.01(d), that is to say the Enforcement Redemption Amount, referred to in 10.01(c).
39. This amount is “for each Note, the greater of (a) par and (b) the issue price of the Note (including interest accrued but unpaid, if any) as at 12.00 noon New York City time on the Redemption Price Calculation Date ... were it to be issued at that time by an issuer receiving the highest ratings of the ratings of the Rating Agencies”. In the case of Insolvency Redemption, the Redemption Price Calculation Date is the date on which the Insolvency Redemption Event occurred, that is to say, in the present case, 15 February. Section 10.01(e) also provides that, if the Note is denominated in a currency other than US Dollars, the Enforcement Redemption Amount is to be converted into dollars, by a specified process. The effect of this provision, apart from the conversion to dollars, is that what is payable on redemption is either the nominal value of the Notes or a higher sum, but the latter only if a Note issued on the same terms at that time by an issuer with the highest possible rating would carry a premium. That is likely only to have been the case if the Note carried interest at a fixed rate which was above the current market rate. In the present case, where the Notes carried interest at variable rates, there is no indication that there could be a premium, so the sum payable would be par, and the “Redemption Price Calculation Date” would be of no relevance to the calculation, except that, under (c), interest would run at LIBOR from that date instead of at the rate payable under the Notes (if that were different from LIBOR).

40. The judge said of these provisions, at paragraph 72:
- “The provisions, therefore, substitute for the stated maturity dates of US MTN outstanding on the date of the Insolvency Redemption Event a deemed payment date of the Insolvency Redemption Event, with provision for interest from that deemed payment date to the date of actual payment.”
41. He is correct to say that interest accrues at what might in theory be a different rate (though in fact interest was payable on the USMTNs at 1 month LIBOR in any event) from the date of the Insolvency Redemption Event. In circumstances in which there is no recalculation of the sum due (because it is par), and in which, in all likelihood, the interest rate does not change either, it seems to us that to treat the Insolvency Redemption Event as a notional or deemed payment date is, with respect to the judge, somewhat artificial. It does not seem to us sufficient in itself to override the express provisions of section 10.01(c) by which a new date for obligatory payment is substituted, namely the Insolvency Redemption Date.
42. Mr Dicker advanced a different argument, namely that, regardless of the significance of the potential recalculation on the date of the Insolvency Redemption Event, the terms of 10.01(c) are clear and specific, and they substitute the new payment date (the Insolvency Redemption Date) in relation to the holders of all Notes. The company’s obligation under the section is to give notice to the Registrar and to “the Holders of Notes”, and the effect of the notice is that it will pay “the Holders of Notes” on the Insolvency Redemption Date. How, he asked rhetorically, can that be read as referring only to the holders of some Notes, rather than of all which are still outstanding? In fact all Notes are held by the Depository Trust Company in Global Note form, so that only one notice would be necessary, but that does not seem to us to alter the position, because the obligation applies in relation to each series of Notes and if the requirement to give notice does not apply in relation to a given series of Notes, then a notice given in relation to that series would be ineffective, and the default provision would not apply to that series.
43. There are at least two odd features of section 10.01(c), if the Insolvency Redemption Date matters for purposes of priority as between different Senior Creditors according to the date on which the obligations to them become due and payable. One is that the priority of different groups of Senior Creditors would be determined according to information which would, or at least might well, not be available to them at the time when they entered into their transactions. Holders of MTNs might know what other series of Notes were already outstanding, but whether they would know about the maturity dates of obligations under other obligations whose holders ranked as Senior Creditors, and vice versa, is altogether unclear. It seems to us that this would be a surprising consequence.
44. A much odder position still is that the company might be able to affect the position of some of its Senior Creditors as between each other, although admittedly only within a narrow range. If the company did give a notice, as required to do under the section, it had a choice as to the date to be specified in the notice, which could not be later than 30 days after the date of the Insolvency Redemption Event, but could be as early as 20 days after it. To that extent, the company would be able to choose as to how far the longer-dated USMTNs were accelerated. Mr Dicker submitted that this was bizarre, and that it was a reason for holding that the precise date on which the Notes became

payable under this section should not be taken to matter for purposes of priority. In effect he took it as an argument in favour of his case on clause 6.6.3.

45. Miss Prevezer and Mr Ivory both argued that, if Mr Dicker was right on clause 6.6.3, it is hard to see what point there was in section 10.01(c). His answer was that it would assist the holders of later-dated Notes, by bringing forward the date for payment of their Notes so that they could share in any distribution sooner rather than later, whether or not it also postponed earlier Notes to the same date, and either one or both of these effects would also be convenient for the receivers, so as not to leave Notes outstanding for an unnecessarily long time, and so as to stipulate one payment date for all outstanding Notes. It would also convert all debt obligations under Notes into dollars.

Discussion

46. The number, length, complexity and, in some cases, lack of consistency of the documents which we have had to consider have not made it easy to arrive at a conclusion as to the questions posed in the proceedings. They are, essentially, short questions of construction, but the competing entitlement of different creditors to very large sums of money turn on them. We are glad to have had a little more leisure than the judge had to consider and reflect on them. With the benefit of that opportunity, and of the clear and helpful submissions of all Counsel, we have come to conclusions which, on two of the points, differ from his.
47. It is certainly an important feature of the interpretation of these two provisions that section 10.01(c) is much less significant if clause 6.6.3 means what the receivers say it does. Miss Prevezer and Mr Ivory contend that clause 6.6 provides not just for priority but also for payment, and is intended to achieve timely payment of Senior Creditors. For his part Mr Dicker argues that clause 6.6 is only concerned with prescribing priority as between successive classes of creditor, and that it has nothing to do with the timing of payment. He points to the definition of Priority of Payments in the MFA as “the order of priority of payments set out in clause 6.6” of the STD, and to two parallel provisions: clause 28.2 of the STD and section 1.16 of the Indenture. Both of these are concerned with limiting the recourse of creditors so that their only claims are to the secured assets, in the specified order of priority. We have set out clause 28.2 above (at paragraph [20]). Section 1.16 of the Indenture is in very similar terms.
48. Nothing in clause 6.6 deals expressly with the timing of any payments to be made. If it is intended to oblige the receivers to ensure timely payment, it creates a striking contrast, Mr Dicker suggested, with clause 16.26 of the STD, under which the Security Trustee is under no duty to ensure that any payment or other financial benefit in respect of any of the assets is duly and punctually paid, received or collected as and when it becomes due and payable. Moreover he pointed to the reinforcement provision, with its reference to retention, as inconsistent with the idea that all available sums must be paid out without holding anything back. On the other side it is said that such retention only applies to sums which cannot be paid out earlier, because all sums due and payable have already been paid out in full. It seems to us that this must be correct, because, as noted already, the reinforcement provision could only be complied with so as to permit payment to a lower tier of creditor if the company is solvent, at least as regards Senior Creditors.

49. We do not find the use of the definition “Priority of Payments”, referring to clause 6.6, as being indicative either way. On any footing the clause does deal with priority. The question is how it does so, and whether it imposes an obligation as to payment, which would involve setting out an order of priority of payment within the class of Senior Creditors under clause 6.6.3, as well as between different classes mentioned in the successive parts of the clause. However, there is force in the argument that, if clause 6.6 is aimed at imposing an obligation of prompt or timely payment, it is odd, first, that it does not say so in terms and, secondly, that it contrasts strongly with clause 16.26.
50. Much of the argument turned on how the clause would apply in the context of Enforcement when insolvency has not happened, and may never do so. How likely that is, and how long the company might remain in Enforcement without insolvency (bearing in mind that the only insolvency that counts for this purpose is that as regards Senior Creditors) is not clear. Mr Dicker’s position was that, as soon as Enforcement occurs, there is at least cause for concern as to whether the company will be able to meet its relevant obligations as they fall due in the future, or how long it will be able to do so. As a general comment, that is no doubt fair. However, section 10.01(d) of the Indenture, headed Enforcement Redemption, expressly provides for the possibility of redemption of Notes to happen on any anniversary of the Enforcement Date, provided that up to that anniversary no Insolvency Acceleration Event has occurred. As already noted the reinforcement provision could only be satisfied so as to permit payment to a lower ranking tier of creditors if there is not yet an insolvency. Thus the express provisions of the documents allow for the possibility that a period, which may be up to one or more years, may go by after the Enforcement Date without insolvency supervening. The possibility of sums falling due for payment to Senior Creditors, during enforcement, at a time when the company is able to pay them, must therefore be considered. Of course if the company fails to pay any such sum, insolvency will then arise, so the regime must be capable of operating in a way which does not automatically lead to that.
51. In short, Mr Dicker submitted on this that, so long as the receivers are reasonably confident that the assets as a whole will be sufficient to cover future liabilities as they fall due, they can distribute cash assets in payment of current liabilities on the due date for payment. They do not have to hold cash sufficient for all liabilities, present and future. He likened the case to a members’ voluntary liquidation, where the liquidator can distribute cash as liabilities arise for payment, if he is reasonably satisfied that the remaining assets will be enough to cover future liabilities. He could pray in aid, at least by analogy, limb (b) of the reinforcement provision, with its test as to whether the Receiver “reasonably considers that the remaining Assets will be sufficient to enable all amounts owing to Senior Creditors which are not then due and payable to be discharged in full as and when they fall due for payment”. That is the same approach as he submitted would be applied in practice as between debts to Senior Creditors due currently, on the one hand, and those due in the future on the other.
52. He gave much the same answer to another point made, namely that the amount of the liabilities which might arise under clause 6.6.2 is inherently uncertain and difficult to quantify. So far as clause 6.6.1 is concerned, those liabilities are for costs to do with the enforcement of the Security, and it is therefore likely that they will be known at or

soon after the date when they arise. But indemnity liabilities under clause 6.6.2 might be highly contingent, in their nature, and therefore unknown for a considerable time, and unquantifiable as well. We were told that the liabilities referred to in the first limb of that sub-clause are of a comparable nature to those referred to in the second limb. The WP Indemnified Party was the Security Trustee under other similar arrangements in relation to a company called White Pine Corporation Ltd, the two companies and arrangements being merged in 2007. The White Pine Security Trustee was then entitled to an indemnity, and required to have that right preserved, against possible claims, in the new documentation.

53. In that context, it is interesting to note that the reinforcement provision entrenches the order of priority, but only at the levels of clause 6.6.3 and 6.6.4. It does allow for the possibility that sums may be paid under clause 6.6.3 even though sums might yet become due under clause 6.6.1 and 6.6.2 for which no provision has been made. Maybe this is because of the potential, under clause 6.6.2 at least, for those liabilities to arise late and unforeseeably. If nothing could be paid under clause 6.6.3 unless all sums which might become due under clause 6.6.2 were fully provided for, or unless the receivers reasonably considered that the remaining assets would be sufficient to enable all sums which might become due under clause 6.6.2 to be paid in full as they arise, the uncertain content of the clause 6.6.2 obligation might prevent any payment under clause 6.6.3, and therefore generate insolvency, even if there were no other reason for it.
54. It seems to us that Mr Dicker's submissions as to how Enforcement can work before an Insolvency Acceleration Event occurs are correct. Likewise, we accept his main proposition, that clause 6.6 does not impose an obligation to pay money, but rather an obligation as to how money is to be paid as and when it comes to be paid. Clause 6.6 deals only with priority of payment, not with time of payment. As regards priority of payment it prescribes the position as between successive classes of creditor, as set out in the several sub-clauses, not within such classes.
55. The clause could only have the effect of prescribing priority within such classes if it imposed an obligation as regards the timing of payment, in addition to an obligation as to who should receive payment. The clause does two things: first, it sets out the order of priority as between classes of creditor; secondly, it prescribes how to calculate what is to be paid to each of them if the funds available are not sufficient to pay them in full, and if there is more than one such creditor to whom payments are due. Evidently it does so in a context in which there may be sums already due and payable and others not yet due and payable, owed to members of the same overall class of creditor. It recognises that payment cannot be made in respect of a liability not yet due for payment. To construe it as regulating the priority within a particular class on the basis of the chronological order of payment dates, could only be as a result of, at most, an incidental effect of the clause.
56. We do not consider that the provision can properly be construed as having such an effect, because if it had been intended to, the clause would have been more explicit about how it works. It does not say whether the governing date is the date of receipt or the date of application: either could be drawn from the opening words of the clause, which refer both to receipt and to application. It may be that there is no great scope for doubt as to what constitutes "monies", in relation to which alone the obligation would operate. But there could be a number of problematical issues as to when

particular sums are received, if that is the crucial date. Mr Dicker showed us clause 8.4 of the MFA, under which, if a Secured Creditor receives or recovers money (other than by payment from the Security Trustee) in respect of any of the Secured Liabilities after an Enforcement Notice has been served, such money is to be paid to, and in the meantime to be held on trust for, the Security Trustee. When, he asked, would such moneys be treated as received: when actually received by the Secured Creditor (and therefore held on trust from that moment) or only when actually received by the Security Trustee or the receiver? He also submitted that it is improbable that different priorities were intended to apply, potentially, to every successive separate receipt. The information in the papers as to the accrual of maturity of MTNs and Repo agreements between 15 February and 25 March showed maturity dates on 13 days in that period: 15, 20, 22, 25, 27 and 29 February and 3, 7, 12, 17, 19, 20 and 25 March, though the last four dates, which were all for MTNs, would have been accelerated to 16 March. Depending on what assets there were to realise and when and how they were collected in, that could in theory mean that different sums of money could be applicable in up to ten different ways as between these particular groups of Senior Creditors, if the date of receipt is determinative.

57. Another of his submissions seems to us less cogent. He pointed out that the Security Trustee has power to carry on the company's business under clause 12.1.19 of the STD, and the receiver would have the same power by virtue of clause 14.3.2. If that were done, there would be receipts from the business, presumably in cash form, which, he argued, could be within the express terms of the opening words of clause 6.6. Could they be intended to be caught by the mandatory payment obligation which the Noteholders' representatives contended for as imposed by clause 6.6? We doubt whether that is a real point, first because, if an Insolvency Acceleration Event has not yet occurred, and all sums falling due for payment to Senior Creditors can be paid, this does not matter, and secondly, because it seems unlikely that the receivers would carry on the business of the company once an Insolvency Acceleration Event has occurred, especially in the light of clause 6.3, set out above. Perhaps curiously, this seems to be the only provision of the STD which makes any reference to insolvency as such.
58. However, we are persuaded by his arguments that the clause cannot be read as having been intended to prescribe priority within the class of Senior Creditors, first because, whether the order of priority is determined by reference to receipt or to payment, the effect is likely to be haphazard, arbitrary and unpredictable as to who gets paid what and, secondly, because it is, to say the least, bizarre that action on the part of the company, as debtor, could influence the respective priorities within the class of Senior Creditors, by virtue of the choice as to the length of notice to be given under section 10.01(c) of the Indenture. He also pointed out that, if timing matters, there could be anomalous and arbitrary differences of outcome especially if there were successive realisations and a sequence of partial payments, with more Notes having become due for payment by the time of later payments (or later receipts, according to which is the determining factor). We have set out in an Appendix some illustrations of the way in which the parties' respective submissions would work in relation to highly simplified examples, similar to some discussed during the hearing of the appeal.
59. It seems to us that these arguments on Mr Dicker's part are convincing, and his contention as to the effect of clause 6.6 is correct. It sets out the order of priority as

between successive classes of creditors, but it does not impose any particular obligation as regards payment, other than to comply with the order of priority, and certainly not any obligation as to time of payment. This reading seems to us to work during the period of enforcement, even if insolvency never arrives, or if it does not arrive for a substantial period. During the period before insolvency, when, necessarily, the view will be taken that the company's assets are sufficient to enable it to discharge its obligations of payment to Senior Creditors (and those with a higher priority) as and when they fall due, the receivers will be able to pay out sums as they fall due for payment, relying on the adequacy of the remaining assets for future payments. Once insolvency arrives, if it does, the receivers will be able to exercise a discretion normal on the part of receivers as to how to realise assets, what reserves or retentions they should make, and what they can properly pay out. They will not pay out to any creditor whose debt has not yet become due for payment, but in paying out they will need to be aware of the obligation to pay each class of creditors pro rata and pari passu, including for any debts due but not yet payable. Depending on the state of the assets in their hands, and the obligations outstanding, they may need to withhold sums in hand from distribution in order that they can be sure that they will be able to meet that obligation in relation to debts falling due for payment in future. It would be possible to construe clause 6.6 as creating an obligation as to payment, but we do not find that the natural reading of the clause, given the factors to which Mr Dicker drew attention, both as to what one would expect to, but does not, find in it on that basis, and as regards the anomalous and problematical consequences to which it would give rise.

60. As already noted, on the basis that Mr Dicker's submissions as to clause 6.6 are correct, as we consider to be so, the position under section 10.01(c) of the indenture is much less important, because it would not affect priority of payment in any event. Its effect would be to assist in the convenient administration of the receivership, not least by bringing forward the maturity date of longer-dated Notes. The terms of section 10.01(d) show that there could be Notes whose contractual Maturity Date is long delayed. Under section 2.01(c) of the Indenture, Notes issued under it will have maturity dates of 270 days or longer. So far as we know there is no prescribed maximum term. Therefore there could be a real point in the acceleration of the maturity date. In turn, if priority is not affected, there would be no real disadvantage in postponement, by up to 30 days, of earlier maturity dates. That would, at most, affect the date of payment and, in the early days or weeks of administration by receivers in insolvency, it may be that, as Mr Dicker submitted, the main concern of the creditor is not when, but whether, it is to get paid.
61. Accordingly, a decision on either of the points argued under this provision is barely necessary. However, having heard argument on the point, in our judgment the correct answer is that the effect of the section is to impose a new obligatory payment date, whether as specified in a notice given by the company, or in default at the end of the 30 day period, as in fact happened, and that this applies to all Notes which are outstanding, not having been paid in full, including those falling due for payment on the date of the Insolvency Acceleration Event.
62. Mr Ivory's submission that nothing in the documentation suggests that the maturity date of Notes can be brought forward is powerful so far as it goes. But it is a much less cogent point if, as we consider, it does not affect priority of payment. Moreover,

on that basis, we cannot find anything in the Indenture or the context which can qualify the plain words of section 10.01(c) requiring notice to be given to the holders of Notes, so that they can be read as requiring notice to be given only to the holders of some Notes, rather than to the holders of all Notes. If priority of payment out of an inadequate fund did depend on the maturity date, there would be more to argue about on this point, though it would still be difficult to override those words. As it is, we read the provision as one of convenience of administration in the receivership, which does not affect the substantive rights of any creditor, other than, theoretically, to delay by a short time payments that might be made in the early period of the receivership to the holders of Notes with a maturity date which is postponed by up to 30 days.

63. We take the same view in relation to the first series of Notes, due on the day on which the notice of the Insolvency Acceleration Event was given, and for the same reason. If the effect of clause 6.6 were otherwise, this point would be more difficult, and we could see some force in the judge's view that section 10.01(c) could not substitute a later maturity date in relation to Notes which were already due for payment. On the other hand, since notice to the company of an Insolvency Acceleration Event is likely to be given either on, or immediately before, a day on which some obligation to a class of Senior Creditors arises for payment, it is not obviously sensible that that particular group of Senior Creditors should be regarded as having priority over others. Moreover, it would be odd that the question of priority should depend on whether the notice is given to the company on the day beforehand, or before 10am New York time on the day itself. In the present case, it was known, at least by the Investment Manager and the receivers, before 15 February that notice was likely to be given on that day; notice was given to the Security Trustee before 9am New York time on 15 February. It would seem rather arbitrary that whether the consequent notice is given, in turn, to the company before or after 10am should make a difference as to the priority as between Senior Creditors. Whether the correct reading of the Indenture, in particular section 9.02(h), is that those Notes were already due for payment at 10am New York time, before the notice was received, is not straightforward. Since it does not matter for present purposes, we do not propose to lengthen this judgment still further by expressing a view on it.
64. For the reasons given above, we hold that the judge was wrong about clause 6.6 and also about section 10.01(c) in relation to Party A, with the consequence that the declarations he made were not correct. We therefore allow the receivers' appeal and dismiss that of BNY.

Appendix: illustrative figures

Hypothetical facts

For the purposes of these illustrations there are two series of notes only, and four noteholders. There are no other senior creditors, and any sums due under clause 6.6.1 and 6.6.2 are adequately provided for. All figures are of millions of US dollars.

Series 1 has a nominal value of \$200 and is due on 15 February; series 2 has a nominal value of \$100 and is due on 16 March.

Party E holds \$100 of series 1 and \$30 of series 2

Party F holds \$60 of series 1 and no others

Party G holds \$40 of series 1 and \$20 of series 2

Party H holds none of series 1 and \$50 of series 2.

Receivers have been appointed; they have in hand a given sum, ready for distribution, and they hold other assets as well.

Example 1: solvent enforcement

The sum in hand is \$250 million, available in time to pay series 1 in full on the due date.

According to the receivers, so long as the other assets are sufficient so that they can reasonably expect to be able to pay future liabilities to senior creditors when they fall due, they pay the full amount due on series 1, and place the balance of \$50 million on call to be ready for paying future liabilities.

Party A and BNY would agree, but they contend that the receivers' construction does not permit payment unless they have cash in hand sufficient to pay the whole of the current and future liabilities to senior creditors.

Example 2: insolvent enforcement

The sum in hand is \$150 million, available between 15 February and 16 March. (The example disregards section 10.01(c) of the Indenture.)

According to Party A and BNY, the receivers should pay that whole sum to parties E F and G, in proportion to the sums then due and payable to them respectively:

Party E	\$75
Party F	\$45
Party G	\$30

According to the receivers, they should pay the sum out in proportion to the overall sums due, including those not yet payable, reserving the proportions for future payments:

	Pay	reserve
Party E	\$50	\$15
Party F	\$30	
Party G	\$20	\$10
Party H		\$25

Example 3: Insolvent enforcement – successive payments

A further example assumes that, after the first amount has been distributed, a second distribution of \$100 million is to be made, after 16 March.

According to the receivers, that sum is allocated on the same basis as the first, save that nothing has to be reserved, and the sums reserved on the first occasion will have been paid out on or after 16 March.

Thus:

	Pay 1	reserve 1	pay 2	Paid overall
Party E	\$50	\$15	\$43.5	\$108.5
Party F	\$30		\$20	\$50
Party G	\$20	\$10	\$20	\$50
Party H		\$25	\$16.5	\$41.5

According to Party A and BNY, the first distribution would have used up the whole \$150 million then available, leaving each of E, F and G short, but H altogether unprovided for. On the second occasion the distribution is to all four (since all four now have debts due and payable) in proportion to the amounts then owing to each of them. Those take into account the sums already distributed but also those which have recently become due. Thus:

	Pay 1	balance	pay 2	Paid overall
Party E	\$75	\$30	\$30.5	\$105.5
Party F	\$45	\$15	\$25	\$70
Party G	\$30	\$10	\$16.7	\$46.7
Party H			\$27.8	\$27.8

Example 3 – variant – payments received later

If instead of being received between the two maturity dates, both of the receipts in question came in after 16 March, the distribution would be the same, in the final outcome, as on the receivers' construction in the last example.