

Neutral citation number

[2023] EWHC 2102 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No. BL-2023-000640

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

**Royal Courts of Justice
Strand, London WC2A 2LL**

Date 16 August 2023

Before:

**ANDREW LENON KC
(sitting as a Deputy High Court Judge)**

BETWEEN:

**(1) CPF ONE LIMITED
(2) FFF CAPITAL LIMITED**

- and -

**(1) OSF (UK) II LIMITED
(2) ORTUS SECURED FINANCE I LIMITED**

**Lesley Anderson KC
instructed by Taylors Solicitors appeared for the Claimants**

**Zoë Barton KC and Lee Jia Wei
instructed by Spector Constant & Williams appeared for the Defendants**

Hearing date: 4 July 2023

JUDGMENT

Introduction

1. This judgment follows the Defendants' application for an order striking out the claim alternatively summary judgment.
2. The claim arises out of the parties' participation in a syndicated loan arrangement and raises issues as to the duties owed by the senior participant and by the security trustee

to the junior participant in such an arrangement.

3. The claim arose in the following circumstances. The borrower under the loan arrangement defaulted. The Second Defendant (“Ortus”) as security trustee accepted a settlement offer to compromise the debt owed by the borrower and released the securities. The settlement agreement resulted in the First Defendant (“OSF”) as the senior participant recovering the majority of its capital commitment but left the Second Claimant (“FFF”) as the junior participant with no recovery.
4. The Claimants allege that Ortus and OSF breached various fiduciary and equitable duties in accepting the settlement offer and releasing the securities. Ortus and OSF contend that there is no real prospect of the Claimants establishing that they owed such duties and that, further or alternatively, the First Claimant (“CPF”) has no real prospect of establishing that it suffered any loss.

The Facts

5. Each of the Claimants and the Defendants carries on business as (amongst other things) providers of commercial loans. In March 2019 CPF agreed to provide a bridging loan of £2.75m to a company called Laner Limited (“Laner”) (“the Loan”). Laner required the Loan in order to refinance a property in Dagenham (“the Property”). The terms of the Loan were set out in a facility agreement made between CPF and Laner and dated 25 March 2019 (“the Loan Facility Agreement”). The Loan Facility Agreement made provision for security to be provided by Laner, including a charge over the Property, a cross-guarantee and a personal guarantee.
6. As CPF did not have the capital required to fund the loan itself, it approached OSF and FFF with a view to structuring the Loan as a syndicated loan. The structure that was eventually agreed was that OSF would be the senior participant in the arrangement, providing funding of £2,414,968, and FFF would be the junior participant, providing funding of £335,301.84. CPF would assign the benefit of the debt payable under the Loan Facility Agreement to OSF and FFF in proportion to their respective contributions and CPF would be appointed as security trustee.
7. On 4 June 2019 CPF advanced the Loan to Laner. On the same day the following arrangements were entered into:

- (1) By way of security for the loan, Laner granted CPF a mortgage over the Property and a debenture over its assets and procured a cross-guarantee and a personal guarantee in CPF's favour.
- (2) By two assignments in writing, ("the Assignments") CPF assigned to FFF and OSF respectively its beneficial interest in the debt payable by Laner pursuant to the Facility Agreement ("the Debt") in proportion to OSF's and FFF's respective contributions to the Loan made by CPF.
- (3) By a Security Trust Deed, OSF as Senior Participant and FFF as Junior Participant appointed CFP as Security Trustee to hold the Trust Property, as defined below, on trust for them. The Security Trust Deed governs how decisions were to be made in relation to the Trust Property.

8. The Security Trust Deed includes the following defined terms:

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|-----------------------|---|
| "Advance" | the loan to be made by the Borrower under the Finance Documents |
| "Assigned Debt" | such aggregate amount of the: <ol style="list-style-type: none"> (i) principal amount of the Advance; (ii) interest, fees, commission and other amounts payable to the Security Trustee in its capacity as lender under the Loan Facility Agreement, the benefit of which has been assigned to the respective Participants pursuant to the Deeds of Assignment; |
| "Finance Documents" | together the Loan Facility Agreement and the Security Document; |
| "Secured Liabilities" | all the amounts outstanding from time to time from the Borrower to the Security Trustee (in its capacity as lender) under the Finance Documents including without limitation the Assigned Debt; |
| "Security" | any mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect; |
| "Security Documents" | each and every document including but not limited to those specified in the Loan Facility Agreement, creating or evidencing the creation of a guarantee and/or encumbrance in favour of the Security Trustee as security for the obligations of the Borrower under the Loan Facility Agreement concluded from time to time; |

“Trust Property” together:

- (i) such amount of the Assigned Debt as is held by the Security Trustee or to its order from time to time;
- (ii) all rights to receive payment of any part of the Assigned Debt;
- (iii) all rights, titles and interest that may now or in the future be given, mortgaged, charged or assigned in favour of the Security Trustee by or pursuant to the Security Documents, and the proceeds of enforcement of the same.

9. An important feature of the Security Trust Deed is that the right to give directions to the Security Trustee was vested solely in OSF as the Senior Participant. FFF as the Junior Participant had no equivalent right. The Security Trust Deed includes, in particular, the following provisions:

2. DECLARATION OF TRUST

- 2.1 The Security Trustee shall hold the Trust Property pursuant to the terms of this Deed for the Participants from time to time and the obligations, rights and benefits vested or to be vested in the Security Trustee in its capacity as lender and chargee by the Finance Documents shall (as well before as after enforcement) be performed and (as the case may be) exercised in accordance with the provisions of this Deed. Unless otherwise expressly provided or otherwise agreed by all the Participants, the Security Trustee shall perform such obligations and exercise such rights in accordance with the instructions of the Senior Participant.

3. DEFAULT PROCEDURE

- 3.1 If at any time there is any default by the Borrower in the performance of any of the Secured Liabilities (the "Breach"), the Security Trustee shall notify the Participants within two Business Days of becoming aware of that fact, specifying the nature of the default. Following such notification the Security Trustee shall consult with the Senior Participant with a view to determining the action to be taken in relation to such Breach.

4. ACTIVITIES OF THE SECURITY TRUSTEE

- 4.1 The Security Trustee shall seek instructions from the Senior Participant as to the manner in which it should endeavour to carry out any course of action

which it is obliged to carry out pursuant to this Deed or the Finance Documents.

4.2 Subject to the provisions of this Deed and, in particular but without limitation, to the provisions of this clause 4, the Security Trustee shall:

4.2.1 act as Security Trustee in accordance with any instructions given to it by the Senior Participant;

4.2.2 if so instructed by the Senior Participant, exercise or refrain from exercising a right, power or discretion vested in it as lender and/or charge[e] under the Finance Documents; and

4.2.3 not exercise any right, power or discretion as lender and/or chargee under the Finance Documents otherwise than in accordance with the instructions of the Senior Participant, provided that if the Senior Participant has failed to supply instructions *to* the Security Trustee within ten Business Days of being requested in writing to do so, the Security Trustee may exercise such rights, powers and discretions in such manner as the Security Trustee considers in good faith to be in the interests of the Participants.

4.4 The Security Trustee shall not be obliged or required to act in accordance with the directions of the Participants given otherwise than through the Senior Participant.

4.5 The Security Trustee shall have all the powers and discretions conferred upon trustees by the Trustee Act 1925, the Trustee Act 2000 and general law (to the extent that they are not inconsistent with the terms of this Deed) and upon the Security Trustee by this Deed”

16. AMENDMENTS AND WAIVERS TO FINANCE DOCUMENTS

Each Participant authorises the Security Trustee to enter into any amendment to the Finance Documents or to grant any waiver of any obligation of any Obligor under the Finance Documents which in either case has either been approved by the Senior Participant or is, in the opinion of the Security Trustee (acting reasonably), of a minor or technical nature and not likely to have any material effect on the obligations of the Obligors under the Finance Documents.

10. The Security Trust Deed also includes provisions entitling OSF to require the Security Trustee to resign:

7. RESIGNATION OF THE SECURITY TRUSTEE

7.3 The Senior Participant may, by notice to the Security Trustee, require it to resign:

...

7.3.2 for any reason, at the Senior Participant's discretion, following an Event of Default.

11. By Clause 8 of the Security Trust Deed, all amounts received or recovered by the Security Trustee in connection with the realisation or enforcement of all or any part of the Security constituted by any of the Security Documents were to be applied towards payment in full of the proportion of the Debt assigned to OFS as Senior Participant before payment of the proportion of the Debt assigned to FFF as Junior Participant.
12. By late 2019, it became apparent that Laner would not be able to repay the Loan. Laner went into default on 3 January 2020 whereupon the full £2.75m together with interest, then running at some £55,000 per month, fell due.
13. In October 2020, OSF decided to replace CPF as Security Trustee as it was entitled to under the terms of the Security Trust Deed. By a Deed of Retirement and Appointment of Security Trustee dated 26 October 2020 ("the Deed of Retirement"), CPF retired as Security Trustee, and the Second Defendant ("Ortus") was appointed by OSF in CPF's place. Under the terms of the Deed of Retirement, title to the Trust Property (as defined in the Security Trust Deed) was assigned to Ortus with effect from that date.
14. At about the time the Deed of Retirement was entered into, an Amendment Agreement was negotiated which purported to amend the assignment by CPF to OSF so as to allow for the retention by OSF of a share of the interest component. OSF has an updated copy of the Amendment Agreement in its possession that was signed by CPF only. Mr Salisbury, the Defendants' witness, said in his statement that OSF would not have had any inherent objection to the Amendment Agreement but that the Defendants have been unable to locate any dated copies or any copy counter-signed by OSF. Mr Fairfax, the Claimants' witness, said in his statement that he does not believe that he ever received a counter-signed version back from OSF and that no counter-signed copy has been found on CPF's files despite searches being carried out.
15. Negotiations between Ortus (as the new Security Trustee) and Laner continued. In or about August 2021 Ortus, acting on OSF's instructions, accepted a proposal by Laner to pay to Ortus £3.5m in full and final settlement of the Debt. On 31 August 2021 a

settlement agreement was entered into between Ortus and Laner (the “Settlement Agreement”) under which Ortus agreed to discharge Laner from its obligations under the Facility Letter and Security Documents in consideration for payment to it of the sum of £3.5m. OSF was by this time owed £3.54 million. Under the terms of the Security Deed set out above, OSF was entitled to payment of its share of the Debt in priority to FFF. The terms of the Settlement Agreement therefore meant that FFF was not repaid anything.

16. OSF accepted the proposal, notwithstanding representations on behalf of CPF and FFF that the Property was worth at least £5.7 million and that enforcement by way of appointment by a receiver was necessary to protect the interests of both participants.

The Statements of Case

17. The Claimants’ Claim Form alleges breaches of duty on the part of the Defendants in accepting Laner’s offer to redeem the security for a sum which is said to be more than £2m less than the best price reasonably obtainable for the Property, thereby causing loss to the Claimants as “subsequent mortgagees”.
18. The Claimants’ case as to duties and breaches of duty is set out at paragraphs 27 to 31 of the Particulars of Claim as follows.

“27. In exercising its powers as Senior Participant, OSF and Ortus as its agent owed to CPF and FFF the same fiduciary and/or equitable duties owed between successive mortgagors when exercising a power of sale.

28. Although the power of sale was given to OSF for its own benefit to enable it to realise its debt, once OSF decided to exercise the power of sale, it was under a duty to obtain the best price reasonably obtainable for the Property.

29. OSF owed a general duty in equity to CPF and FFF as subsequent encumbrancers with an interest in the equity of redemption to act in good faith and to use its powers for proper purposes.

30. By accepting Laner's offer to redeem at £3.5m, OSF and Ortus acted in breach of its fiduciary and equitable duties and in bad faith and/or were grossly negligent:

30.1 OSF failed to take any steps to obtain the best price reasonably obtainable for the Property. On the information presently available, it appears that the sum accepted by it to redeem the Loan was more than £2m below the best price which was reasonably obtainable, but CPF/FFF will seek permission to rely on expert evidence at the trial or other hearing.

- 30.2 OSF knew that by accepting the offer and requiring CPF to release its security over the Property, CPF and FFF would sustain a total loss of recovery on the Loan.
 - 30.3 OSF acted in the face of specific representations made by CPF to consider whether the best price for the Property could be achieved by the appointment of experienced receivers.
 - 30.4 CPF and FFF draw the inference that the incoming lender which funded the redemption payment to OSF regarded the Property as adequate security for an amount in excess of the redemption payment because such lender is likely to have granted a loan based on LTV of no more than 80% against the market value of the Property.
 - 30.5 Further, they infer that OSF was content not to seek enforcement because it was charging significant default interest under the facility.
31. Further or in the alternative, by so acting and accepting Laner's offer to redeem, OSF and Ortus have acted in breach of their duties as trustees under the Trustee Act 2000. Specifically:
- 31.1. Section 15 of the Trustee Act 1925 contains a general power on a trustee to compound abandon or otherwise settle any debt, account, claim or thing whatever relating to the trust
 - 31.2 Paragraph 4 of Schedule 1 of the Trustee Act 2000 applies the duty of care when exercising the powers under section 15 of the Trustee Act 1925 or when exercising an corresponding power, however conferred.
 - 31.3 Section 1 of the Trustee Act 1925 requires that whenever the duty applies to a trustee he must exercise such care and skill as is reasonably in the circumstances having regard in particular (a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to an special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession
 - 31.4 For this purpose, OSF and/or Ortus hold themselves out as being specialists in the complex commercial lending market especially in relation to bridging loans and were acting in the course of the business or profession of doing so.”

19. As to loss and damage, the Claimants' claim is pleaded as follows:

“32. By reason of the breaches of duty on the part of OSF and/or Ortus, CPF and FFF have suffered loss and damage and are entitled to an order that OSF and/or Ortus make good their security and/or they claim equitable compensation and/or damages measured by the extent of the damage to their respective equities of redemption as follows:

- 32.1 Loss and damage suffered by CPF of £102,116.54 (comprising interest of £43,795.61; default interest of £44,175.93 and fees of £14,145.00).
- 32.2 Loss and damage suffered by FFF of £501,818.49 (comprising principal of £335,302.00; interest of £60,938.43 and default interest of £105,578.05).”
20. In the Defence, the Defendants deny, amongst other things, that any of the alleged duties arose or that the Property was sold at an undervalue (or that it was sold at all). They also deny the claim for loss and damage asserting in particular that CPF had ceased to have any legal or beneficial interest in any part of the Debt so could not have suffered any loss as a result of the settlement with Laner.
21. In response to the Defendants’ denial of duties, the Claimants plead in the Reply as follows:
- “19.1 It is the Claimants’ case that the same or equivalent duties are owed as when exercising a power of sale, not that a power of sale was actually exercised. It cannot be the case that lesser duties arise in law when agreeing to redemption of the Security and releasing rights over security as when exercising a power of sale.
- 19.2. It is the Claimants’ case that the position of a mezzanine or junior participant is akin to a party with an interest in the equity of redemption (as set out in paragraphs 27 to 29 of the Particulars of Claim).”

The Defendants’ Application

22. The Defendants’ application for an order striking out the claim pursuant to CPR r3.4(2) and/or for summary judgment pursuant to CPR r24.2 was supported by the witness statements of Richard Spector and Jon Salisbury and opposed by the Claimants on the grounds set out in the witness statement of Christopher Fairfax.
23. In addition to identifying a number of procedural deficiencies in the application, the Claimants contested the appropriateness of the summary procedure on the grounds that the application raised disputed issues of fact and complex issues of law and construction which cannot be satisfactorily determined without a trial. I was referred

to the opinion of Lord Hodge in *Hallman Holdings Ltd v Webster* [2016] UKPC 3 at para 17:

“... it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court is satisfied that there is no need for an investigation into the facts which would require a trial: *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 Ch, para 15 propositions (v) – (vii) per Lewison J. Where, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue ...”.

24. The Defendants submitted that this is not a case where there was any need for a factual investigation and there is no reason to believe that new material, not currently before the court, might turn up in the course of disclosure that would have a bearing on the issues; the application raised short points of law and construction and that the Court has before it all the evidence necessary for the proper determination of the questions raised; the Court should therefore grasp the nettle and decide the issues now:

“The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.”

per Moore-Bick LJ (with whom Buxton LJ and Ward LJ agreed) in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at para 31.

25. In my judgment, the factual issues raised by the Claimants do not impinge on the issues raised by the application. The Claimants contended, in particular, that there was a factual issue as to whether the Amendment Agreement was ever signed by both parties which made the case unsuitable for summary judgment. I disagree. The Amendment Agreement, had it been entered into, would have been relevant to CPF's claim to have suffered loss. However, neither party alleges that the Amendment Agreement was ever signed by OSF and no copy signed by OSF has been located despite searches being carried out by all parties. The Amendment Agreement is not referred to in the Particulars of Claim and is not relied on by the Claimants as having any legal effect. Applying the test approved by the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC at para.128, there are, in these circumstances, no reasonable grounds for believing that

further disclosure in relation to the Amendment Agreement might materially add to or alter the evidence relevant to whether CPF has a real prospect of success in relation to its claim to have suffered loss.

26. The issues of law and construction raised by the Defendants' application are not so complex as to be inappropriate for summary determination. I have all the evidence necessary to decide the issues and the parties have had an adequate opportunity to address them in argument. The procedural deficiencies raised by the Claimants do not preclude the determination of the issues although they may be relevant to costs.

The Issues

27. The essential issues which arise on the application are as follows:

- (1) Do the Claimants have a real prospect of establishing that, in accepting Laner's offer to settle the Debt and to release the securities, OSF and/or Ortus owed to the Claimants equitable duties akin to those owed by a mortgagee to a subsequent encumbrancer with an interest in the equity of redemption, as pleaded at paragraphs 27 to 29 of the Particulars of Claim?
- (2) Do the Claimants have a real prospect of establishing that, in accepting Laner's offer to settle the Debt and release the securities, OSF and/or Ortus owed to the Claimants a duty of care and skill as pleaded at paragraph 31 of the Particulars of Claim?
- (3) Do the Claimants have a real prospect of establishing that CPF suffered any loss as pleaded at paragraph 32 of the Particulars of Claim?

28. These issues are addressed in turn below.

Issue 1- The alleged mortgagee duties

29. The Defendants submit that the Claimants' pleaded case as to the existence of equitable and fiduciary duties owed by OSF as mortgagee and by Ortus as OSF's agent is unsustainable on the following grounds. First, the Claimants' case mischaracterises the relationship between the parties. Second, it treats the settlement of the Debt and release of securities as if it were the exercise of a power of sale, contrary to the facts. Third, the Claimants' attempt to invoke the equitable duty owed by a mortgagee to certain third parties when exercising a power of sale is contrary to the well-established limits to that duty.
30. The Claimants' response to these submissions is that the Security Trust Deed was clearly intended to effect a sharing in the security over the Property and that the imposition on OSF and Ortus as its agent of the equitable duties owed by a mortgagee is not inconsistent with authority and is correct as a matter of principle.
31. In my judgment, the Defendants' objections to the Claimants' case as to the mortgagee duties alleged to be owed by OSF and Ortus are well-founded. Contrary to the Claimants' case as set out in the Particulars of Claim, neither CPF nor FFF were "subsequent encumbrancers" and the relationship between the Claimants and the Defendants, was not that of successive mortgagees. In order for either CPF or FFF to be subsequent encumbrancers, there would need to be separate charges, one having priority over the other such that enforcement by the party with the first-ranking charge would have an impact on the extent of the other's security. In fact, there was only one charge, created by the Debenture, the rights to which were vested in the Security Trustee from time to time and in which FFF and OSF each had a beneficial interest as a participant. By the time of the Settlement Agreement, CPF had neither legal nor equitable title to, or interest in, the Debt or the Security.
32. Nor was there any exercise of a power of sale. Contrary to the Claimants' case at paragraph 28 of the Particulars of Claim, OSF was not given a power of sale. The power to sell the Property was vested in the Security Trustee (i.e. CPF and later Ortus). Far from exercising a power of sale, Ortus, by entering into the Settlement Agreement, desisted from exercising that power.
33. The case advanced in the Particulars of Claim as to the duties said to arise on the exercise of a power of sale and the position of CPF and FFF as subsequent

encumbrancers was qualified in the Reply. As set out above, the duties owed by the Defendants were now alleged to be the same as “or equivalent to” those owed on the exercise of a power of sale and the position of a mezzanine or junior participant is alleged to be “akin to” a party with an interest in the equity of redemption. The Reply does not elaborate on or explain the source of these analogous duties beyond the assertion that it would be impossible for lesser duties to arise when agreeing to the redemption of security than on the exercise of a mortgagee’s power of sale. No reliance is placed on any specific provisions of the Security Documents.

34. The Claimants’ case essentially seeks to extend the incidence and scope of the equitable duty owed by a mortgagee when exercising a power of sale so as to fashion a duty owed by a Security Trustee to a junior participant in a syndicated loan agreement when deciding to settle the debt owed by the mortgagor and to release the securities.
35. The equitable duty owed by a mortgagee is, however, a narrow one, subject to well-established limitations both as to the circumstances in which it arises and as to the range of parties to whom it is owed. A mortgagee is generally free to do as it wishes with the security and is not generally subject to any fetters in doing so. As Evershed M.R. put it in *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634: “*it is elementary that a mortgagee seeking to realise his security has no duty of care to see that there is as much possible left over for those who are interested in what is called the ‘equity’.*” It is only if and when a decision to sell is made that equity intervenes to impose a limited duty to obtain the best price reasonably achievable in the circumstances.
36. In *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 the judgement of the Court of Appeal (Aldous, Tuckey LJJ and Lightman J) emphasised the limited extent of the mortgagee’s duty:

“13. A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive. ...

14. A mortgagee “is not a trustee of the power of sale for the mortgagor”. This time-honoured expression can be traced back at least as far as Sir George Jessel MR in *Nash v Eads* (1880) 25 SJ 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, 969G. A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative

restatement of this principle is to be found in *Raja v Austin Gray* [2003] 1 EGLR 91, 96, para 59, per Peter Gibson LJ. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: see *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536. It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, 1355B.

...

18. If the mortgagor requires protection in any of these respects, whether by imposing further duties on the mortgagee or limitations on his rights and powers, he must insist upon them when the bargain is made and upon the inclusion of protective provisions in the mortgage. In the absence of such protective provisions, the mortgagee is entitled to rest on the terms of the mortgage and (save where statute otherwise requires) the court must give effect to them.”

37. The mortgagee's duty is owed to the mortgagor, to any subsequent mortgagee of the property, to a co-mortgagor and to a guarantor of the mortgagor's debt, all of whom have an interest in the equity of redemption: *Alpstream AG v PK Airfinance Sarl* [2015] EWCA Civ 1318 at para 115. Attempts to extend the range of third parties to whom the mortgagee's duty is owed have failed. In *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch 12, a wife held a property on trust for her husband. The property was mortgaged to a bank. The wife defaulted, and the bank exercised its power of sale. The husband sought to set aside the sale contract, alleging that the mortgagee breached a duty to obtain a reasonable price for the property. His claim failed, both at first instance and on appeal. Nourse LJ made it clear, at p.19D, that any duty owed to obtain the best price possible arose:

“out of the particular relationship between [mortgagee and mortgagor, and] it is readily apparent that there is no warrant for extending its scope so as to include a beneficiary or beneficiaries under a trust of which the mortgagor is the trustee.”

38. In *Alpstream AG v PK Airfinance Sarl* the Court of Appeal allowed an appeal against a judgment at first instance that a mortgagee exercising a power of sale owed a duty to an unsecured junior lender as the beneficiary of the proceeds of sale within the same contractual structure. The Court of Appeal held that on established principles no duty was owed to third parties other than the limited range of persons who have been held to

have an interest in the equity of redemption, even if such third parties might foreseeably suffer economic loss were the mortgaged property to be sold too cheaply.

39. In my judgment, it is not sufficient for the Claimants simply to assert that a duty akin to that owed by a mortgagee when exercising a power of sale was owed by OSF and Ortus when accepting Laner's offer to redeem the securities. In the absence of any provision in the Security Trust Deed imposing such a duty, the fact that FFF as Junior Participant might suffer a loss as a result of the acceptance by the Security Trustee of a low settlement offer is not in itself enough to warrant the imposition of the duty.
40. It follows, in my judgment, that the Claimants have no real prospect of establishing the existence of the mortgagee's duties contended for at paragraph 27 to 29 of the Particulars of Claim and that these paragraphs should be struck out.

Issue 2: The alleged duty of care

41. The Defendants challenged the Claimants' case that in accepting Laner's offer to settle the Debt and in releasing the Securities the Defendants were in breach of the duty of care owed under to the Claimants under the Trustee Act 2000 ("the 2000 Act"). This is on the following grounds (i) OSF was not a trustee and did not hold title to any asset over which it could have owed trustees duties to either CPF or FFF (ii) Neither Defendant owed CPF any trustees duties because CPF was not a beneficiary of any trust (iii) Ortus did not owe FFF any duty of care in relation to the acceptance of Laner's offer to redeem because, on the correct construction of the Security Trust Deed, Ortus was entitled and obliged to comply with OSF's instructions.
42. The Claimants had no tenable answer to the first two grounds of challenge. It follows that they have no real prospect of establishing either that OSF owed either Claimant a duty or that any duty of care was owed to CPF.
43. That leaves the issue of whether Ortus owed FFF a duty of care in relation to the settlement of the Debt and the release of the Securities. The Defendants admit in the Defence that any powers exercised by Ortus were subject to a general duty of care under the 2000 Act, requiring Ortus to exercise such care and skill as was reasonably to be expected of a trustee in the circumstances. The Defendants contend, however, that, on the correct construction of the Security Trust Deed, any such duty of care is not relevant to Ortus' acceptance of Laner's offer. This is because, in accepting

Laner's offer to compromise the debt, Ortus was acting pursuant to the duty imposed by Clauses 2.1 and 4.2 to comply with OFS's instructions rather than exercising a power or discretion subject to a duty of care. They contend that Clauses 4.2.3 and 4.6 of the Security Trust Deed make clear that any general power or discretion conferred on Ortus as Security Trustee is subject to an overriding duty to act in accordance with the instructions of OSF.

44. In support of this construction of the Security Trust Deed, the Defendants rely on the decision of Eder J in *Saltri III Limited MD Mezzanine SA Sicar and others* [2012] EWHC 3025, the subject-matter of which has obvious parallels with the present case. In that case, the Security Trustee appointed under an intercreditor agreement ("the ICA") had executed a restructuring agreement which benefitted the senior lenders under a syndicated loan arrangement but which left the mezzanine lenders with no assets to satisfy their subordinated claims. The mezzanine lenders challenged the restructuring on the basis that the security trustee acted in breach of duty. The judge rejected the challenge on the basis that the ICA obliged the Security Trustee to act on the directions of the senior lenders. In particular, Clause 17.4(a) provided as follows:

The Security Trustee shall ... unless a contrary indication appears in [the ICA], act in accordance with any instructions given to it by the Senior Facility Agent ... and shall be entitled to assume that (i) any instructions received by it from the Senior Facility Agent ... are duly given in accordance with the terms of the Finance Documents and (ii) unless it has received actual notice of revocation, that those instructions or directions have not been revoked.

45. Clause 14.3 set out the duties owed by the Security Trustee to the mezzanine lenders in respect of the enforcement of the transaction security including in particular in respect of "*the method, type and timing of that enforcement*" In particular, it was provided that the duty owed by the Security Trustee was "*no different to or greater than the duty to the Obligors that would be owed by the Security Trustee, Receiver or Delegate under general law.*"
46. Eder J held that the effect of these provisions was to exclude a duty on the part of the Security Trustee to act in the interests of the mezzanine lenders, to avoid conflicts or not to favour the interests of other persons over the interests of the mezzanine lenders. The only duties that the Security Trustee could properly be said to owe were the duties

of a mortgagee under general law as expressly provided for in Clause 14.3, that is to say the duty to take reasonable care to obtain the best price reasonably obtainable for the security asset and to exercise the power of sale bona fide and for its proper purpose.

47. The Defendants submitted that the contractual arrangements in the present case are similar to those of *Saltri III* in that in both cases the plain intention of all parties was to ensure that the Security Trustee had no independent discretion and that it would act in accordance with the instructions of OSF as Senior Participant, the only material difference between the contractual arrangements in the two cases being that in *Saltri III* the Security Trustee was under a mortgagee's duty in favour of the mezzanine lenders as expressly provided for in Clause 14.3; no equivalent clause exists for FFF's benefit in the Security Trust Deed.
48. The Claimants submitted in response that the role of the Security Trustee under the Security Trust Deed was essentially an administrative one, that the provisions in the Security Trust Deed providing for compliance with the instructions of the Senior Participant should be construed narrowly and that they were not intended to erode the obligations of the Security Trustee as trustee, which are rendered nugatory on the Defendants' construction.
49. In my judgment, the Defendants' construction of the Security of Deed, in particular Clauses 2.1, 4.1 and 4.2 according to which Ortus was under a duty to comply with OSF's instructions in connection with the Trust Property and that, in complying with that duty, Ortus was not required to take into account FFF's interests and did not owe a duty of care to FFF, is correct. Clauses 2.1 and 4.1 of the Security Trust Deed are drafted in mandatory and unqualified terms. OSF was entitled to instruct Ortus to settle the Debt and release the Securities and Ortus was under a duty to comply with those instructions.
50. The terms of the Security Trust Deed mean that there was a significant imbalance between the rights of FFF and the rights of OSF. This is not in itself unusual. It is standard practice in syndicated lending for the rights of junior or minority participants to be subordinated to the will of the senior or majority participants; see, for example, *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch); *Torre Asset Funding v RBS* [2013] EWHC 2670 and *Saltri III*. The editors of *Paget's Law of Banking* 10th Ed at para [11.21] note that, in the context of tiered lending, the law

does not generally intervene to protect junior creditors since the risk of being unpaid or outvoted is inherent in the junior or minority position of the junior participant and is part of the commercial risk that that particular creditor has assumed. The need to give primacy to the parties' contractual arrangements was emphasised by Eder J in *Saltri III* in the following passage of his judgment:

“[123 f]... where (as in the present case) sophisticated parties have chosen to govern their relationship through arms-length commercial contracts, the scope and nature of the duties owed between the parties are shaped by the terms of, and the language used in, those contracts: see the famous statement in *Hospital Products Ltd v. United States Surgical Corporation* [1984] 156 C.L.R. 41 (at page 97) cited with approval in *Halton v. Guernroy* [2005] EWHC 1968 at § 139 and in *Kelly v. Cooper* [1993] AC [205] at [215]; and also see *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145 at 206. This reflects the general approach of the courts to complicated financial transactional documents, in relation to which there is a particularly strong case for giving effect to the contract the parties have agreed: see e.g. *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 at 421.”

51. Having regard to the terms of the Security Trust Deed, I consider that the Claimants have no real prospect of establishing that Ortus owed FFF the duty of care alleged at paragraph 31 of the Particulars of Claim in relation to its acceptance of Laner's offer to settle the Debt and its release of the securities. Paragraph 31 should be struck out accordingly.

Issue 3: CPF's alleged loss

52. Given my conclusion that the Claimants have no real prospect of establishing the duties on which their claim depends, it is not necessary to determine whether, if such duties could be established, CPF has any real prospect of establishing that it suffered loss. However, as this third issue was the subject of submissions by the parties, I propose to address it.
53. The loss claimed by CPF is a loss of interest on the Debt. The Defendants challenged the claim on the ground that, under the terms of the Assignments, CPF assigned the entire benefit of the Debt, including any entitlement to interest, to OSF and FFF.
54. Clause 2.1 of each of the Assignments reads as follows:

2.1 Subject to the terms of this deed and the Security Trust Deed, the Assignor assigns to the Assignee all the Assignor's beneficial interest in and to the Assignee's Proportion of the Debt with effect from the Assignment Date.

55. The "Assignee's Proportion of the Debt" was defined in Clause 1 of the Assignments as follows:

- a. [£2,414,698, per the Assignment to OSF] [£335,301.84, per the Assignment to FFF] of the principal amount of the Debt;
- b. all interest accrued under the Facility Agreement on the principal amount referred to in paragraph (i)
- c. such pro-rated proportion of the Minimum Interest as the Assignee's Proportion of the Debt bears to the entire principal amount of the Debt; and
- d. any amounts recovered by the Assignor from any Obligor and/or any third party including without limitation valuers and/or other professional advisors) by virtue of the Assignor's entitlement to receive the Assignee's Proportion of the Debt pursuant to the Facility Agreement, less the Assignor's reasonable costs in recovering the same to the extent not reimbursed by an Obligor.

56. Contrary to the Claimants' case, the Assignments included all rights to interest on the Debt. There was no reservation of any entitlement to interest to CPF. I accept that Clause 2.4 of the Deed of Retirement which provides as follows:

For the avoidance of doubt, it is agreed that the New Security Trustee holds such part of the Secured Liabilities received by it from time to time, to which CPF is entitled in its capacity as lender and which was not assigned to the Participants, on trust for CPF, subject to the order of application set out in clauses 8 and 9 of the Security Trust Deed.

suggests that CPF retained some undefined part of the Secured Liabilities but this is not enough to establish any right to interest on CPF's part. The fact that the parties considered it necessary to amend the Assignment to OSF reinforces the conclusion that the unamended Assignment does not allow for the retention of any interest by CPF.

57. The Defendants had a further argument to the effect that, even if executed, the Amendment Agreement would have been ineffective to reserve to CPF a portion of all interest owed on the Debt. This is on the basis that the Amendment Agreement purports to amend the definition of "Assignee's Proportion of the Debt" in the Assignment to OSF with effect from the date of the Amendment Agreement, but the assignment had already taken place. The Defendants argued that it was not possible, by a change to the

definition of the assigned asset, to alter the fact of that assignment under which the entirety of CPF's share of the Debt (and all the interest thereupon) had already been passed to OSF. Given that the Amendment Agreement is not relied on by the Claimants, however, I do not propose to address this argument further.

58. Finally, CPF is claiming a loss of fees but there is no material in the Claimants' Statements of Case or their evidence to support any entitlement to fees. I therefore consider that the claim for fees has no real prospect of success.
59. For these reasons, I conclude that CPF has no real prospect of showing that it has any entitlement to interest or fees and that consequently its claim to loss at paragraph 32.1 of the Particulars of Claim should be struck out.

Conclusion

60. The Defendants are entitled to an order striking out paragraphs 27 to 29, 31 and 32.1 of the Particulars of Claim and to summary judgment against the Claimants on the whole claim.