Case No: BL-2022-000444
Neutral Citation Number: [2023] EWHC 323 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
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Fetter Lane
London EC4A 1NL

Monday, 16 January 2023

BEFORE:

MR JUSTICE RICHARDS

BETWEEN:

BANCA GENERALI S.P.A.

Claimant/Applicant

- and -

(1) CFE (SUISSE) SA
(2) SOVEREIGN CREDIT OPPORTUNITIES SA

Defendants/Respondents

MR A DE MESTRE KC and MR A ROSE (instructed by Mayer Brown International LLP) appeared on behalf of the Claimant/Applicant
MR J GOLDRING KC and MR H PHILLIPS (instructed by Macfarlanes LLP) appeared on behalf of the Defendants/Respondents

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SUBSTANTIVE JUDGMENT

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE RICHARDS: This application arises out of a mandatory injunction made by Falk J (as she then was) (the "Judge") on 15 June 2022 (the "Order"). The Order contained a penal notice. Paragraph 1 of the Order was covered by the penal notice and provided as follows:

> *"As soon as is practicable and in any event by no later than 4pm on 17 June 2022 the Defendants shall provide to the Claimant the following documentation in respect of each of the Receivables specified in Schedule 1 of this Order: a copy of each of the transactional documents which constitute those Receivables including (insofar as may be applicable to each Receivable) loan agreements and any amendments thereof, guarantees including from any Export Credit Agency or insurer, indemnities, promissory notes, any security documents, and letters of credit."*

2. Paragraphs 2 and 3 contained an order in substantially similar terms, also covered by the penal notice, but specifying deadlines of 30 June 2022 and 10 July 2022 in relation to different "Receivables" specified in Schedules 2 and 3 respectively.

3. The question of interpretation is as to the extent of the phrase "transactional documents which constitute those Receivables." The parties' respective positions on the meaning of that phrase can only be understood in light of the background leading up to the making of the Order.

Proceedings leading up to the Order

4. The background and reasoning leading up to the Order is fully set out in the Judge's reserved judgment (the "Judgment"). I will summarise some of the key points with references in this judgment to numbers in square brackets being to paragraphs of the Judgment unless I specify otherwise.

5. The Claimant's clients are holders of the senior notes (the "Notes") in four securitisations known as Trade Finance I, II, III and IV ("TF I" to "TF IV"). The Notes were issued by the Second Defendant ("SCO"). The principal and interest on the Notes is to be paid out of receipts generated by underlying receivables (the "Receivables"). At a high degree of generality and leaving aside points of detail for the time being, SCO acquired rights in respect of Receivables from the First Defendant ("CFE"). The

nature of that acquisition and the precise rights that SCO acquired are complicated and will feature later in this judgment, since they relate to the question of construction I must determine.

6. SCO is incorporated under Luxembourg law and was able to allocate the rights in respect of Receivables that it acquired from CFE to separate compartments which were segregated from each other. Rights associated with the TF I securitisation were allocated to a separate compartment from those associated with TF II and so on.

7. The Claimant has contractual and regulatory obligations to its clients that require it to provide them with periodic valuations of the Notes. It considered that to discharge these obligations it needed to be able to value the securitised assets out of which cash flows on the Notes were to be paid. To do that, it needed to receive information from the Defendants.

8. The Defendants had contractual and regulatory obligations to provide information to the Claimant but the Claimant became concerned that the documents and information the Defendants were providing were insufficient to enable the Claimant to meet its own contractual and regulatory obligations. Ultimately, it made an application to the Court for a mandatory injunction requiring the Defendants to provide it with documents. It based its claim on Clause 12 of the Fiscal and Calculation Agreement for TF II and Clause 12 of the Intercreditor Agreements for TF III and TF IV. Although set out in different documents, these clauses were in substantially similar terms and therefore the Judge referred to them by the generic label "Clause 12" and I will do the same. Ignoring immaterial differences between different versions, Clause 12 provided as follows:

> *"Each Party shall, within ten Business Days of a written request by another Party, supply to that other Party such forms, documentation and other information relating to it, its operations, or the Notes as that other Party reasonably requests for the purposes of that other Party's compliance with Applicable Law…"*

9. The Claimant was therefore seeking an emergency mandatory injunction requiring the delivery of documents pursuant to Clause 12. That was expressed to be by way of interim remedy pending clarification of the Claimant's precise contractual entitlement

on a Part 7 claim issued just before the Claimant's application to the Court. However, the Judge reasoned ([57]to [59]) that granting a mandatory injunction would give the Claimant substantively the whole relief it sought and so performed a more detailed analysis of the merits than might otherwise have been necessary in connection with other types of interim relief.

10. The Judge concluded to a "high degree of assurance" ([73] to [77]) that the Claimant did indeed have regulatory obligations to provide its clients with information on the value of underlying assets (to use a neutral expression). The Judge concluded to a "high degree of assurance" that Clause 12 required the Defendants to provide documents relating to the securitised assets (again using a deliberately neutral term), and that the Claimant's wish to obtain those documents in order to meet its obligations to its own clients would be for the purposes of compliance with Applicable Law ([83] to [88]).

11. At [91], the Judge concluded that documents the Claimant was seeking were "reasonably requested" for the purposes of Clause 12. At paragraphs [94] and [95], the Judge made some comments on the scope of the Claimant's request, to which I will return.

12. It was that process of reasoning that led the Judge to make an order requiring the Defendants to provide documents. She considered at [104] whether it was appropriate for the order to contain a penal notice and concluded that it was. Accordingly she made the Order which contained the paragraphs 1, 2 and 3 that I have mentioned above.

Events subsequent to the Order

13. At a high level of abstraction, the TF I to TF IV securitisations involved SCO acquiring Receivables that were expected to generate the cashflows necessary to enable SCO to pay principal and interest on the Notes. The process of the Defendants providing documents pursuant to the Order resulted in a focus on precisely what rights SCO had in relation to the Receivables and how it acquired them. That focus demonstrated that a reference to SCO "acquiring Receivables", while accurate at a high degree of

generality, risked glossing over some detail. There are competing assertions as to when the Claimant knew about this additional complexity, or should have known about it. I do not need to resolve that disagreement and simply record the actual position which is as follows.

14. In short, the process by which an asset was created and ultimately came to be held by SCO was more complicated than the phrase "acquisition of Receivables" might suggest. Mr Piunti, the managing director of CFE, described the process in his second witness statement as follows:

    a. Interests in Receivables are first acquired by CFE in one of two ways: by direct acquisition or by sub-participation.

    b. In the case of direct acquisition, CFE acquires a direct interest in a Receivable from a third party. How those interests are acquired by and transferred to CFE depends on the nature and the type of the Receivable concerned. It may involve a Loan Market Association ("LMA") trade confirmation, a deed or a contract of assignment, or an endorsement on a promissory note. Other documents may also be generated as part of the transfer process, such as transfer certificates and SWIFT confirmations.

    c. In the case of a sub-participation, an intermediary acquires a direct interest in a Receivable. That intermediary is typically Silverton Invest Limited and so I will use the expression "Silverton" to refer to that intermediary. In such cases, CFE does not itself have any direct interest in the underlying Receivable. However, under a sub-participation agreement Silverton, which holds the actual Receivable, provides CFE with an indirect exposure to the performance of the underlying Receivable. In such a case CFE has contractual rights against Silverton, Silverton has contractual rights against the issuer of the Receivable, but CFE has no direct contractual rights against the issuer of the Receivable.

    d. CFE transfers such rights as, it has (whether those rights were acquired by way of direct acquisition or sub-participation) to SCO under the terms of a Master

Transfer Agreement or Supplemental Transfer Agreement for SCO to hold in one of the four Trade Finance compartments.

15. That means that putting aside differences between the parties as to whether the Claimant did or should have known of this (and if so by when), the process by which SCO acquires its interest in each Receivable can include up to four stages as follows:

    a. **Stage 1** - This is the initial transaction constituting an underlying Receivable (whether a loan, a letter of credit, sovereign debt or otherwise). This stage involves transaction documents which set out the terms of relevant loans or trade finance instruments (including any related security or collateral), the economics of which are ultimately reflected in the Notes;

    b. **Stage 2 -** This stage is relevant only where CFE holds a sub-participated interest. Where relevant, it involves Silverton obtaining an interest in the underlying Receivable that was constituted at Stage 1;

    c. **Stage 3** - This is the transaction by which CFE acquires economic exposure to the Receivable. If there is no Stage 2, then CFE acquires its interest directly, by acquiring the Receivable itself. If there is a Stage 2, then it involves CFE entering into a sub-participation arrangement with Silverton; and

    d. **Stage 4** - This is the transaction by which such interest as CFE had following Stage 3 (whether that be a direct interest in a Receivable, or its rights under a sub-participation arrangement with Silverton) is transferred to SCO and allocated to the relevant compartment.

16. The Claimant's position is that the Order requires the Defendants to provide any documents that were generated by any part of the series of transactions which resulted in SCO having a legal or economic interest in, or right in respect of, Receivables identified in the Schedules to the Order. Thus the Claimant seeks documents relating to all four stages that I have identified above and has asked for a declaration accordingly.

17. The Defendants submit that the Order requires the production only of documents relating to Stage 1.

The proper approach to construction of the Order

18. In determining this question of construction, I will apply the principles that are set out in paragraph 41 of Flaux LJ's judgment in *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd & Ors* [2017] EWCA Civ 1525. Flaux LJ's summary drew on the judgment of Lord Clarke in the Supreme Court's judgment in *JSC BTA Bank v Ablyazov (No. 10)* [2015] UKSC 64 and that is the "judgment" referred to in the following quote:

> *"1. The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment).*
>
> *2. In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment, approving inter alia the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).*
>
> *3. The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]-[26] of the judgment, again citing with approval what Mummery LJ said in Hadkinson)."*

19. Point 1 of Flaux LJ's summary set out a caution against using perceptions as to whether an order should have been granted and if so in what terms as an aid to construction. Lord Clarke, with whom the rest of the Supreme Court agreed, warned in his judgment in *JSC BTA Bank v Ablyazov* against succumbing to any temptation to stretch legal analysis to capture what are seen as the merits or lack of merits of a case. Therefore, the question is simply what the Order means. If it is desirable to give the Order a broader meaning, the solution is to vary it for the future.

20. Point 3 of Flaux LJ's summary highlights the need to consider "context" when construing the Order. Some authorities give guidance on how relevant context is to be ascertained. In *Sans Souci Ltd v VRL Services Ltd (Jamaica)* [2012] UKPC 6, a case involving construction of a court order that did not contain an injunction, Lord Sumption said at [13] of his judgment:

> *"The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order."*

21. The authorities indicate that caution should be exercised in using the parties' submissions in a case as providing context that illuminates the meaning of an order. In *SDI Retail Services Ltd v Rangers Football Club* [2021] EWCA Civ 790, Phillips LJ and Baker LJ, who were in the majority, expressed caution on this matter, with Phillips LJ saying:

> "*Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities*"

22. Underhill LJ had a slightly different perception on this matter but I will follow the approach of Phillips LJ, summarised in the quote above, since he was in the majority and Baker LJ echoed his concern.

Analysis

23. I will group my analysis under various headings. In doing so I am not suggesting that the various headings are watertight components because as Lord Sumption made clear, the process of construction is a single unitary process. However, my use of headings will enable related indications to be considered together.

<u>The language of the Order</u>

24. The Claimant does not go so far as to say that the Order makes no sense if it is restricted to documents at Stage 1. I agree. The Order is perfectly comprehensible whether it embraces documents produced at each of Stages 1 to 4 or is limited to Stage 1 documents.

25. Paragraphs 1 to 3 of the order refers to "Receivables". The use of capitalisation suggests that a defined term is being used but the Order itself contains no definition of the term. Nevertheless, the Claimant argues that the capitalisation remains significant since the TF II Terms and Conditions of the Notes provide that:

> " *'Receivables' means any existing and future monetary rights and receivables and the ancillary rights of the Issuer assigned … pursuant to the Master Transfer Agreement.*"

The focus of this definition, argues the Claimant, is on the rights held by SCO, whatever they may be, and is consistent with an intention that the "transactional documents which constitute those Receivables" (the phrase used in the Order), includes any document produced at any of Stages 1 to 4 that results in SCO having its interest.

26. The Claimant also notes that by the Master Transfer Agreement the "Receivables" that CFE is to transfer to SCO are defined as consisting of:

> *" all of the monetary rights and claims of CFE vis-à-vis the debtors arising under (i) Payment Instruments… (ii) the Financing Instruments granted by the Originators, and … (iii) the Insurance Policies."*

27. I regard the Claimant's reference to this definition as somewhat two-edged. First, the definition operates to define what is transferred from CFE to SCO and therefore does not, in my judgment, obviously embrace instruments that effect that very transfer (i.e. Stage 4 documents which the Claimant argues are covered by the Order). Second, the "rights vis-à-vis the debtor," that are included within the definition are only those that arise under the three categories of instrument identified. It is far from obvious to me that the definition embraces all the Stage 2 and Stage 3 documents that the Claimant asserts are covered by the Order.

28. Be that as it may, the Claimant accepts that the Order does not expressly set out any definition of the term "Receivables". The Order could not import by reference any definition of the term that the parties used in their suite of contractual documents without choosing between the two different definitions that I have set out above, and indeed any other definition set out in those documents. The Order makes no such choice. Therefore, in effect the Claimant's argument is that the meaning of the term "Receivables" used in the Order should be determined against the context of the contractual definitions that the parties used, that emphasise the need to analyse in detail the nature of all rights acquired in respect of receivables and not just those arising at Stage 1.

29. That I consider overstates the significance of the capitalisation of the word "Receivables". The natural reason for using a capital is to explain that the receivables referred to are, specifically, those receivables specified in the Schedules to the Order. The specification in those schedules is made by reference to a numerical scheme and the capitalisation draws attention to the need to identify receivables by reference to the list set out in the schedule. Therefore, in my judgment, the capitalisation of the term "Receivables" sheds little light on the issue raised by the application beyond directing attention to the relevant Schedule.

30. The numerical designations used in the Schedules to the Order do not assist one way or the other. The Order itself contains no definition of what those numerical designations mean. The Defendants used those designations to refer to receivables, or groups of receivables, generically. So, for example, the initial designation "135/150" referred to sovereign debt that was restructured with the agreement of the Paris Club of creditors. The express wording of the Order, when read together with the Judgment, does not suggest that the Judge regarded these numerical designations as setting out individual documents that needed to be disclosed. Instead, the wording of the Order suggests that the numerical references were ways of identifying Receivables, or groups of Receivables. Once those Receivables had been identified, the documents to be disclosed were to be determined by the provisions of paragraphs 1 to 3 of the main body of the Order which I have summarised above and which had, at their heart, the concept of "the transactional documents which constitute those Receivables". That is a conclusion on the express provisions of the Order. In the next section dealing with

"context", I consider possible inferences to be drawn from the parties' conduct in pre-Order correspondence relating to the disclosure of documents relating to Receivables identified in the Order.

31. Next, I consider the "ordinary meaning" of the word "receivable". It is well known in the commercial world that a securitisation involves issuing notes, the principal and interest of which is to be paid out of a pool of underlying "receivables". In my judgment, the meaning of the word "receivable", in connection with a securitisation must take its colour from the context in which the concept is being discussed.

32. It is quite possible to discuss securitisations at a high level of generality. For example, a particular securitisation might be termed a "car loan securitisation" or a "residential mortgage securitisation" in a way that refers, generically, to the nature of the underlying receivables. If in the context of a general discussion about a "car loan securitisation", someone asked what the underlying "receivables" are, in my judgment that person would receive the answer "car loans". If in the same conversation, someone asked what the "documents constituting the receivables" are, they would receive the answer "the loan agreements with the consumer that set out the legal obligations under the car loans and related guarantees", i.e. Stage 1 documents.

33. However, it is also possible to envisage a conversation about the same securitisation that takes place on a much more detailed level. For example, a lawyer might be asked about the precise "receivables" that an issuer might need to enforce in order to secure payments necessary to pay the principal and interest on the notes. In such a case, the lawyer might give a very different answer. For example, if aware that the issuer had acquired, not the underlying car loan, but an assignment of rights under a funded sub-participation agreement in respect of that loan, then the lawyer might well say that the relevant "receivable" is the issuer's rights under the sub-participation agreement. If asked to identify the "documents constituting the receivable", the lawyer might say that the issuer's right to receive payment relies on (i) the car loan originally made with the consumer, (ii) the sub-participation and (iii) the successful assignment of rights under that sub-participation, so that a failure of rights at any stage might mean that the issuer does not receive what it hopes. That might well lead a lawyer engaged in a more

detailed conversation about the car-loan receivable to say that the "documents constituting the receivable" consist of Stage 1 to 4 documents.

34. There is, in my judgment, an inference on the face of the Order that the narrower meaning set out in paragraph 32 above is intended, so that the "documents which constitute the Receivables" are just Stage 1 documents. That comes from the fact that each of paragraphs 1 to 3 of the Order provide examples of documents which constitute the "Receivables", namely:

> *"loan agreements and any amendments thereof, guarantees including from any Export Credit Agency or insurer, indemnities, promissory notes, any security documents, and letters of credit."*

35. The flavour of those references is to Stage 1 documents. That provides an inference pointing in favour of the Defendants' construction of the Order. However, that inference is not determinative since even if the Order gives Stage 1 documents as examples, it is possible, when context is considered that the Order requires the provision of a wider category of documents. I will now, therefore, consider indications provided by context.

Considerations of context

36. It is significant that the Judgment contains no reference to any complexities associated with the way in which SCO acquired its interest in Receivables. The Judgment itself does not mention that SCO might in fact have acquired not trade finance receivables themselves, but rights in respect of funded sub-participations relating to such receivables, with the underlying receivables being held by Silverton rather than CFE. In the introductory section of the Judgment in paragraphs 1 to 8, there is a high level description of the securitisation which does not deal with the manner in which SCO acquired its cash flows. These paragraphs do not suggest that the Judge considered it material to her Order that the process could involve up to the four stages that I have highlighted. That, in my judgment is a pointer in favour of the Order using the terms "Receivables" and "documents which constitute those Receivables" in the sense set out in paragraph 32 above rather than the sense set out in paragraph 33.

37. The Claimant has referred to information that the Defendants provided to it before the Order was made. This information alluded to the possible presence of multiple stages in connection with SCO's acquisition of Receivables. For example, enclosures to a letter of 18 March 2022 from Macfarlanes (the Defendants' solicitors) alluded to the presence of LMA documents, transfer certificates, and such like. The Claimant argues that it was clear to both sides and the Court that the Claimant was seeking at least the documents which the Defendants had referred to in their reporting to the Claimant as part of their dealings prior to the Claimant's application to the Judge. Put another way, the Claimant argues that since the Court itself did not articulate any distinction between Stage 1, Stage 2 or indeed any latter stage documents, the only way to understand what documents were within the scope of the Order is the previous course of dealing between the parties. Moreover, to the extent that the parties' course of dealing resulted in an acknowledgement that the Defendants would disclose documents going beyond Stage 1, the Judge should not be taken as having relieved the Defendants from the consequences of that course of dealing.

38. I do not accept that broad submission for two reasons. First, I am not satisfied that there was any clear "course of dealing" of the kind for which the Claimant argues. I quite accept that before the Order was made, some of the spreadsheets and lists that the Defendants sent to the Claimant contained particular references to documents that can <u>now</u> be understood as relating to stages beyond Stage 1 and that the Defendants were willing to disclose them. However, the present dispute arises because parties are not agreed as to whether the Order extends beyond Stage 1 documents. The prior correspondence between the parties to which I was referred did not deal head-on with that dispute, which is scarcely surprising since the Claimant's position is that it was not then aware of all the complexities associated with Stages 2 to 4. All that correspondence shows is that, confronted with the Claimant's dissatisfaction, the Defendants were prepared to make available a quantity of documents on a voluntary basis. To describe that as a "course of dealing" with a bearing on the present dispute is to approach matters with undue hindsight.

39. In any event, as Lord Sumption makes clear in the extract from his judgment in *Sans Souci Ltd* set out in paragraph 20 above, the Judge's reasons for making the Order are an authoritative and overt statement of the circumstances the court considered relevant.

The Judgment does not suggest that the extent of the Defendants' previous provision of documents was such a relevant circumstance. The problem that the court identified was with the accuracy of the Defendants' reporting on matters relating to what can now be understood as Stage 1 documents. The Judge identified the Claimant's concern at [13] as being:

> *"13. In particular, the Bank is concerned about discrepancies concerning the characteristics of the receivables, and in particular the types of financial instrument involved and whether they are supported by Export Credit Agency ("ECA") guarantees."*

Documents relating to Stages after Stage 1 would be incapable of benefiting from Export Credit Agency guarantees. The Judge's articulation of the concern involves a focus on a problem with the nature of the information the Defendants were providing on (what are now understood to be) Stage 1 matters that could be cured by the provision of underlying Stage 1 documents.

40. I acknowledge that [13] refers to concerns "in particular," suggesting the possible existence of other concerns. However, the Judgment scarcely refers to any complexities associated with the nature of the rights that CFE acquired or by which those rights were transferred to SCO. Moreover, the Judgment contains no analysis of why the Claimant might need sight of documents that have no direct relation to the underlying loans (at what is now known to be Stage 1).

41. That is only reinforced by the fact that at [29] to [38], the Judge analysed the nature of the discrepancies further in terms that referred to problems with the accuracy of the Defendants' descriptions of what can now be understood as Stage 1 documents. For example, at [32], the Judge gave the example of a Sudan receivable that had been described at one point as a "sovereign letter of guarantee" with a principal amount of €10 million and a 95% ECA guarantee. It was later described as having a principal amount of €3.3 million with an ECA guarantee that had already been enforced.

42. At [92], the Judge set out her "key consideration" in reaching her finding that documents were reasonably requested:

"...material changes in the description of the nature of the instruments and the available security, referred to above, in the context of actual or expected failures to redeem Senior Notes in full and what appear to be an increasing pattern of receivables in arrears."

43. Put shortly, the central reason why the Judge made the order she did was that she accepted there were problems with the information the Defendants had provided, that could be cured by the provision of documents relating to the underlying Receivables and the security package connected with them. There is no suggestion that the Judge considered the problems she had identified with the Defendants' reporting could and needed to be cured by the provision of documents that can now be understood as relating Stages 2 to 4.

44. Indeed at [94], the Judge emphasised the narrowness of the Order that she proposed to make. She said:

"The Bank is not seeking to verify all the individual pieces of information that have been provided. The order sought would require the provision of "transactional documents" constituting the receivables such as loan agreements, guarantees and security documents. This is a proportionate response to the specific concerns raised about the nature of the instruments and the security available, being issues which on any basis must be fundamental to valuation."

45. The Claimant has referred to the following oral submission of Mr De Mestre KC (leading counsel for the Claimant both before the Judge and before me):

"The documents themselves will not tell us why they made the error, but the point about the error is we need to understand, for valuation purposes, the, the underlying nature of the receivable and what security is available. Those are fundamental aspects, and where they have been misdescribed. The point is those errors mean we just do not know what receivable we are dealing with. If we get the transaction documents, we can see for ourselves what the, the receivable is, and when, when Dentons reviewed the documents for TF1, one can see by reference to receivables, you know, they describe what the underlying documents are, things like funded participation agreements, trade confirmations. So they are underlying transactional documents from which we will be able to see what, what the receivable is, what the security position is and, for example, if it is, if there, if we know severally there are arrears,

what the enforcement processes are and what the, you know, what, what remedies are available. Those are going to be important things, we say, for valuation, where what has been told historically is not reliable"

46. In this passage, Mr De Mestre did mention the possible existence of funded participation agreements and trade confirmations. However, even putting to one side the caution to be exercised when relying on counsel's submissions as an aid to interpretation of a court order, the fact that Mr De Mestre mentioned these documents does not, in my judgment, demonstrate that the Judge ordered them to be produced, not least since the Judge's analysis of which documents were reasonably requested, proceeded by reference to what we now know as Stage 1 documents. The Judge demonstrated, both in the Judgment and in her exchanges with counsel on both sides during the hearing, a wish to ensure that the ultimate order was proportionate. If she was ordering disclosure of documents going beyond what we now know as Stage 1 documents, there would have been an analysis of why such documents were reasonably requested and whether it was proportionate to direct their disclosure by way of mandatory injunction.

47. The claimant argues that if SCO acquired its rights pursuant to a chain of transactions, it is self-evident that providing a value of the Notes for regulatory purposes will depend on the effect of documents created at all stages of the chain. I understand the logic of that submission, although I am in no position to decide whether it is correct without understanding precisely how the Notes would be valued and the extent of the Claimant's regulatory obligations. However, even if correct, at the very most it establishes that the Claimant might have wanted a wider Order or that the Judge could justifiably have made a wider Order. That does not advance the debate greatly since it is an argument about a different order that the Judge might possibly have made, rather than a proper construction of the Order that she did make.

48. Finally, the Claimant has pointed to perceived inconsistencies in the Defendants' approach to disclosure both before, and after the Order was made. Given the approach to construction that I have outlined, any inconsistency on the part of the Defendants has little, if any, bearing on the issue. What matters is what the Order means.

Disposition

49. The declaration that the Claimant seeks is inconsistent with the ordinary meaning of the Order read in the light of the context in which that Order was made. I will not, therefore, make the declaration in the terms the Claimant seeks.

50. I would have reached the same conclusion even if the Order had not involved a mandatory injunction. My conclusion is only reinforced by the fact that, given it contains a mandatory injunction, it must be restrictively construed.

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