**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**COMMERCIAL COURT (KBD)**

**Claim No. CL-2021-000666**

**7 Rolls Buildings**

**Fetter Ln**

**London**

**EC4A 1NL**

**17 October 2022**

Before

**Simon Salzedo KC sitting as a Deputy Judge of the High Court**

BETWEEN:

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**GLAS SAS (LONDON BRANCH)**

**(in its capacity as Trustee of certain bonds issued under a trust deed dated 21 September 2018)**

Claimant

-v-

**(1) EUROPEAN TOPSOHO S.À.R.L.**

**(2) DYNAMIC TREASURE GROUP LIMITED**

**(3) CHENRAN QIU**

Defendants

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Stephen Midwinter KC and Ben Woolgar** (Instructed by **McDermott Will & Emery**) appeared on behalf of the Claimant

**Francis Tregear KC and Zhen Ye** (Instructed by **Ince Gordon Dadds)** appeared on behalf of the Defendant

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### RULING

(Approved)

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(Official Shorthand Writers to the Court)

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1. **Simon Salzedo KC:** This is my extempore judgment on an application I have heard today for summary judgment on certain issues. The application is brought by the claimant, GLAS SAS (London branch) (“GLAS”), who says that it is the Trustee of certain Bonds, against the first defendant, European Topsoho SARL ("ETS"), which is the Issuer of the Bonds.
2. GLAS states that it takes instructions from an ad hoc group of bondholders (the "AHG"). The issues upon which judgment are sought are, first, GLAS's contention that it is the Trustee, as to which I am asked to make certain declarations and, secondly, the liability of ETS for the outstanding principal under the Bonds of euros 250 million and for interest in the sum of euros 3,287,675 to today's date.
3. There are other issues in the proceedings which are not the subject of today's application.

## Factual background

1. The parties have each emphasised different elements of the factual background, which I will summarise with grateful acknowledgement to the skeletons of them both.
2. ETS, a company incorporated under the laws of Luxembourg, is a member of a group of companies known and referred to as the Ruyi Group, specialising in the clothing and apparel business. Its ultimate holding company is Shandong Ruyi Technology Group Co Limited, a company incorporated under the laws of the People's Republic of China.
3. In 2016, ETS acquired a controlling shareholding of the issued shares in SMCP SA, a company incorporated under the laws of France, which carries on business in the fashion industry and owns a number of highly desirable fashion brands that are sold and distributed globally. Following a listing of shares on Euronext Paris in October 2017, that shareholding was diluted. In 2018, ETS issued €250 million of secured exchangeable Bonds bearing a coupon 4 per cent per annum with a maturity date of 21 September 2021 (the "Bonds").
4. The Bonds were constituted by a Trust Deed dated 21 September 2018 (the "Trust Deed") made between ETS as Issuer, BNP Paribas Trust Corporation UK Limited ("BNP Trust") as Trustee and Forever Winner International Development Limited as guarantor.
5. By clause 2.2 of the Trust Deed, ETS covenanted to pay to, or to the order of, the Trustee in euros the principal amount of the Bonds or any other sum as may be payable in respect of the Bonds on any date when the Bonds, or any of them, became due to be redeemed or repaid. The Trustee undertook to hold the benefit of that covenant on trust for the bondholders.
6. Clause 4 of the Trust Deed set out the security to be provided by ETS (the "Secured Shares") which was to be deposited into an ETS account. ETS assigned its rights in respect of the security to the Trustee for the benefit of itself and the secured parties who included the bondholders.
7. Clause 7 sets out the order of payments to be made by the Trustee in respect of any money received by it which was essentially by paying fees due to itself and the custodian and then making payments to the bondholders towards sums due on the Bonds with any residual balance to be paid to ETS as Issuer.
8. Clause 19 of the Trust Deed provides for the Trustee to take such steps, actions or proceedings against ETS or the guarantor under the Bonds as it may think fit to enforce, among other things, the provisions of the Trust Deed and the Bonds.
9. The Trust Deed was expressly governed by English law pursuant to clause 25.1 and the courts of England had jurisdiction to settle any dispute which may arise out of, or in connection with, the Trust Deed or the Bonds under clause 25.2.
10. Schedule 4 of the Trust Deed contains the terms and conditions of Bond which bind the Issuer, Guarantor and bondholders pursuant to clause 8 of the Trust Deed. Under condition 8 of schedule 4, the Bonds were exchangeable subject to the Issuer's discretion to satisfy an exercised exchange rate wholly or partly by a cash payment into issued and fully paid up ordinary shares of SMCP. Nevertheless, ETS states that it always intended to exercise its discretion under the exchange rights so as to remain a "shareholder of reference" in SMCP in terms of its share capital and voting rights.
11. Prior to the enforcement of the security given under the Trust Deed, after the maturity date, ETS held 53.4 per cent of SMCP's shares with double voting powers, but only 28,028,163 shares were offered as security and those became the Secured Shares, while a further 12,106,939 were outside of that security (the "Unsecured Shares").
12. Since 15 December 2020, CSP IV Acquisitions LP, one of the funds within the Carlyle Group, has held at least 25 per cent of the Bonds. The Carlyle Group have been interested in SMCP since 2013.
13. In December 2020, an issue arose as to whether there had been an Event of Default under the Trust Deed as a result of the guarantor failing to make payment of certain amounts said to be due to lenders Hang Seng Bank Limited and Industrial Bank Co Limited. GLAS says that bondholders wished a notice of default to be issued, but it would appear that BNP Paribas felt unable or unwilling to act.
14. On 24 December 2020, without prior notice, according to ETS, BNP Trust informed ETS by letter that: (i) an Extraordinary Resolution of the bondholders had been passed resolving to appoint the claimant ("GLAS") as co‑trustee and directing BNP Trust to immediately retire (the "Extraordinary Resolution") and, (ii) acting in accordance with that direction, BNP Trust had appointed GLAS as Trustee and would itself retire with immediate effect.
15. Following the Extraordinary Resolution, on 24 December 2020, BNP Paribas purported to appoint GLAS as co‑trustee pursuant to clause 20.3 of the Trust Deed and then to resign as Trustee pursuant to clause 20.2 of the Trust Deed, leaving GLAS as the sole Trustee.
16. On 31 December 2020, GLAS, as purported Trustee, issued a notice of default in respect of certain events of default that were then alleged. ETS and the Guarantor denied the events of default and responded to the notice of default by, among other things, contesting the validity of the appointment of GLAS.
17. While this dispute was ongoing, Carlyle Group expressed an interest in refinancing the Bonds with a new facility, provided that ETS would accept a proposal from AHG. During the period from December 2020 to May 2021, various proposals were exchanged in relation to that proposed refinancing.
18. On 27 May 2021, GLAS sent a letter to ETS stating, among other things, that the AHG had recently notified them of a number of further potential breaches of the Trust Deed that might constitute Events of Default and that it would take enforcement action on the instructions of the AHG if the said potential breaches were not remedied within 15 days. On the same day, GLAS threatened ETS (through their respective solicitors) with legal proceedings for a determination of the validity of their appointment as Trustee as instructed by the AHG. GLAS subsequently issued a Part 8 claim against the defendants on 14 June 2021 seeking declaratory relief confirming the validity of its appointment.
19. The discussions between the ETS and the AHG as well as discussions between ETS and the Carlyle Group continued concurrently while the Carlyle Group had suggested that it would not proceed with their proposed refinancing unless ETS's disputes with the AHG and GLAS were settled. AHG requested a suite of documents to be signed in order to impose an obligation on ETS's part to pay their legal fees and other fees and accept the validity of GLAS's purported appointment.
20. Consequently, allege ETS, ETS entered into a series of transactions on 17 June 2021, including a Deed of Confirmation, a Supplemental Trust Deed, a transaction payment letter, a deferred fee letter and a subordination agreement. As provided for in these documents, the Part 8 Claim was discontinued.
21. The discussions between ETS and the Carlyle Group continued after the execution of the aforementioned documents to August 2021. However, the proposed refinancing did not, in the event, take place. ETS draws attention to the following aspects which it submits are significant.
    1. as reported by Perella Weinberg UK Limited ("PWL"), ETS's then financial advisors to ETS, on 6 August 2021, Mr Schmitz of the Carlyle Group told PWL in a telephone call that he was "facing internal obstacles" to commit resources to the refinancing because of the combination of the pace of previous discussions and the short time period (four to five weeks) before the maturity date of the Bonds.
    2. on 9 August 2021, PWL reported a further telephone call with the Carlyle Group indicating their withdrawal from the transaction on the basis that "institutionally they have no confidence that we will get there ahead of the [maturity date] given all the delays/CO, et cetera".
    3. in September 2021, the Carlyle Group proposed to acquire all of ETS's SMCP shares rather than providing ETS with a refinancing facility. ETS rejected this proposal on the ground that it failed to reflect the premium value which it considered attached to the controlling stake that Ruyi Group held in SMCP.
22. On the maturity date, which was 21 September 2021, ETS did not pay the interest or principal falling due on that date. This gave rise to a number of defaults under the Trust Deed and the terms and conditions of the Bonds. Notice of default was given pursuant to the Trust Deed on 22 September 2021, but the breaches were not cured.
23. On 22 October 2021, GLAS presented a bankruptcy petition against ETS in Luxembourg. The current status of those proceedings, I am told, is that the petition was dismissed on 26 November 2021 on grounds which ETS says include the fact that there had been no realisation of the security held by GLAS.
24. Also, on 22 October 2021, ETS purportedly entered into a Share Sale Agreement with the second defendant ("Dynamic"). By that agreement, Dynamic paid the sum of €1 for all the unsecured shares in SMCP owned by ETS.
25. On 27 October 2021, upon receiving a notice from Wuhu Ruyi Xinbo Investment Partnership Enterprise (Limited Partnership) ("Xinbo") pursuant to a written agreement between ETS, Xinbo and Shandong Ruyi dated 25 July 2018, ETS transferred the Unsecured Shares to Dynamic.
26. On 28 October 2021, GLAS took possession of 21,952,315 shares of the Secured Shares and appointed joint receivers over the remaining 6,075,848 shares constituting the security.
27. When GLAS learned of the sale of the Unsecured Shares to Dynamic from an SMCP press release on 4 November 2021, it sought disclosure in both England and France to identify the transferee, which was subsequently shown to be Dynamic.
28. GLAS urgently applied without notice in England for worldwide freezing relief against ETS and Dynamic and also applied in Singapore for equivalent relief (as well as seeking a worldwide freezing order against Dynamic in the British Virgin Islands where Dynamic is incorporated). His Honour Judge Pelling QC granted a worldwide freezing order on 17 November 2021 and equivalent orders were made in the British Virgin Islands and in Singapore on 18 and 19 November 2021. ETS did not contest the continuation of the English or Singaporean worldwide freezing orders. Mr Justice Jacobs continued the worldwide freezing order in this jurisdiction on 1 December 2021.
29. ETS points out that GLAS has not, as yet, realised the Secured Shares, while GLAS states that it has attempted to organise a sale of the Secured Shares but the process has been frustrated by ETS’s assertion that GLAS is not the validly appointed Trustee. GLAS says that the need for clarification on that issue is one important reason why the present application has been made.
30. There is a dispute between the parties as to whether the Secured Shares were or are likely to be realisable for a sum exceeding the entire debt owing under the Bond. GLAS accepts, for the purpose of its summary judgment application, that ETS has a case with reasonable prospects of success that the Secured Shares are worth at least the amount of the entire judgment debt.

## Approach to summary judgment

1. The application for summary judgment requires me to determine, in relation to each issue raised, whether, in the words of CPR part 24.2(a)(ii), the "defendant has no real prospect of successfully defending the claim or issue" and, if so, whether "there is no other compelling reason why the case or issue should be disposed of at a trial". If both of these are answered in the affirmative, then the court "may give summary judgment". The power to grant judgment is therefore discretionary if the jurisdictional hurdles are surmounted. In this case, some of the relief sought is declaratory which potentially raises a further question of the exercise of the court's discretion.
2. The parties have reminded me of the analysis of Part 24 by Mr Justice Lewison in *Easyair Limited v Opal Telecom* [2009] EWHC 339 (Ch) which has been approved several times by the Court of Appeal and is conveniently set out in the notes to the White Book. Counsel for ETS have especially reminded me of the fifth and sixth points of Mr Justice Lewison's analysis, which require the court to consider whether there is a reasonable basis for concluding that evidence that it has not seen, but that might become available at the trial, could alter the picture relevantly to the determination of the application.
3. Counsel for ETS also referred me to several paragraphs in the judgment of Mr Justice Peter Smith in *Groveholt Limited v Hughes & Anor* [2008] EWHC 1358 (Ch), including, in particular, the citation at paragraph 28 of his judgment of several paragraphs of the judgment of Lord Justice Mummery from the case of *The Bolton Pharmaceutical Company 100 Limited v Doncaster Pharmaceuticals Group Limited* [2006] EWCA Civ 661.
4. I will address the three substantive issues that are raised by the application in turn, but I do not overlook the need to consider them also in the round in the light of the submission on behalf of ETS that the factual and legal complexity of the claim makes summary determination without disclosure and trial inappropriate and may amount to a compelling reason why the case or issue should be disposed of at trial rather than on a summary basis.

## Issue 1. The initial appointment issue

1. The Trust Deed provided at clause 20 as follows:

"20. Appointment, retirement and removal of the trustee

20.1 Appointment: The Issuer has the power of appointing new trustees but no one may be so appointed unless previously approved by an Extraordinary Resolution. A trust corporation will at all times be a trustee and may be the sole trustee. Any appointment of a new trustee will be notified by the Issuer to the Bondholders as soon as practicable. Any new trustee appointed shall be a financial institution for the purposes of Article 1.2 of the Collateral Directive 2002/47/EC.

20.2 Retirement and Removal: Any Trustee may retire at any time on giving at least 60 days’ written notice to the Issuer and the Guarantor without giving any reason or being responsible for any costs occasioned by such retirement and the Bondholders may by Extraordinary Resolution remove any Trustee provided that the retirement or removal of a sole trust corporation will not be effective until a trust corporation is appointed as successor Trustee. If a sole trust corporation gives notice of retirement or an Extraordinary Resolution is passed for its removal, the Issuer or, failing whom, the Guarantor will use all reasonable endeavours to procure that another trust corporation be appointed as Trustee and if they fail to procure the appointment of a new trustee within 30 days of the expiry of the Trustee notice referred to in this Clause 20.2 or within 30 days after the passing of such Extraordinary Resolution, the Trustee shall be entitled to procure forthwith the appointment of a new trustee at the expense of the Issuer (failing whom the Guarantor)

20.3 Co-Trustees: The Trustee may, notwithstanding Clause 20.1, by written notice to the Issuer and the Guarantor appoint anyone to act either as a separate trustee or as a Co-Trustee jointly with the Trustee: 20.3.1 if the Trustee considers the appointment to be in the interests of the Bondholders; 20.3.2 to conform with a legal requirement, restriction or condition in a jurisdiction in which a particular act is to be performed; or 20.3.3 to obtain a judgment or to enforce a judgment or any provision of this Trust Deed in any jurisdiction. Subject to the provisions of this Trust Deed the Trustee may confer on any person so appointed such functions as it thinks fit. The Trustee may by written notice to the Issuer, the Guarantor and that person remove that person so appointed. At the Trustee’s request, each of the Issuer and/or the Guarantor will forthwith do all things as may be required to perfect such appointment or removal and irrevocably appoints the Trustee as its attorney in its name and on its behalf to do so.

20.4 Competence of a Majority of Trustees: If there are more than two Trustees the majority of them will be competent to perform the Trustee’s functions provided the majority includes a trust corporation.”

1. I also refer to clause 13.1.2:

“13.1.2 Resolutions of Bondholders: The Trustee will not be responsible for having acted on any resolution purporting to have been passed at a meeting of Bondholders in respect of which minutes have been made and signed or any direction or request of Bondholders including a Written Resolution or in respect of any approval given by way of Electronic Consent even if it is later found that there was a defect in the constitution of the meeting or the passing of the resolution or any Electronic Consent or, in the case of an Extraordinary Resolution in writing or direction or request of Bondholders it was not A37189623 22 signed by the requisite number of Bondholders or that for any reason it is found that the resolution, direction or request was not valid or binding on the Bondholders.”

1. In the Trust Deed at schedule 3, there is a series of provisions for meetings of bondholders, and they include, at paragraph 17, the following:

"A meeting of bondholders shall, subject to the conditions, in addition to the powers given above, but without prejudice to any powers conferred on other persons by this Trust Deed, have power exercisable by Extraordinary Resolution: ... (vii) to approve a proposed new Trustee and to remove a Trustee"

and the same schedule at paragraph 18 provided as follows:

"An Extraordinary Resolution passed at a meeting of bondholders duly convened and held in accordance with this Trust Deed shall be binding on all the bondholders, whether or not present at the meeting, and each of them shall be bound to give effect to it accordingly. The passing of such a resolution shall be conclusive evidence that the circumstances of such resolution justify the passing of it."

1. Paragraphs 19 and 20 made clear that the term "Extraordinary Resolution" included a written resolution which was a resolution signed by or on behalf of the holders of not less than 75 per cent in principal amount of the Bonds outstanding.
2. The written resolution dated 24 December 2020, to which I have referred, provided as follows:

**“1 EXTRAORDINARY RESOLUTION PASSED BY WAY OF WRITTEN RESOLUTION**

By this Written Resolution, we, the undersigned, being holders of the Bonds (the Bondholders), hereby:

(a) resolve that it is in the interests of all Bondholders that GLAS SAS (London Branch) (GLAS) be appointed as a separate trustee or as a Co-Trustee jointly with the Trustee and in accordance with our powers under paragraph 17(vii) of Schedule 3 (Provisions for Meetings of Bondholders) to the Trust Deed, request, instruct and direct the Trustee to appoint GLAS as a separate trustee or as a Co Trustee jointly with the Trustee in accordance with Clause 20.3 (Co-Trustees) of the Trust Deed, such appointment being hereby approved (the **GLAS Appointment);**

(b) in accordance with our powers under paragraph 17(vii) of Schedule 3 (Provisions for Meetings of Bondholders) of the Trust Deed, desire the removal of the Trustee and request, instruct and direct the Trustee to retire (the **BNPP Retirement**) immediately following the GLAS Appointment such that GLAS becomes the sole trust corporation acting as Trustee, in accordance with Clause 20.2 (Retirement and Removal) of the Trust Deed;

(c) request, instruct and direct the Trustee to waive any and all notice periods and time periods in relation to the BNPP Retirement and the GLAS Appointment, including without limitation the 60 day notice period for the BNPP Retirement and the 30 day period for the GLAS Appointment, in each case as set out in Clause 20.2 (Retirement and Removal) of the Trust Deed to the extent applicable, and further resolve that, in accordance with Condition 15(ii), such waiver, if applicable, is not materially prejudicial to the interests of the Bondholders;

(d) irrevocably and unconditionally represent, warrant and undertake that:

(i) all fees, costs and expenses (including legal fees and, in respect of all amounts, including any applicable value added or similar taxes) of the Trustee notified to us before the date of this Written Resolution are accepted and are in the process of being paid to the Trustee (or as the Trustee may direct) by any one or more of the undersigned, in such proportions as the relevant undersigned may agree, to such account(s) as specified in writing (including on the face of any invoice) to us before the date of this Written Resolution; and

(ii) any proposal by the Issuer or the Guarantor to appoint a replacement Trustee as contemplated under Clause 20.2 (Retirement and Removal) of the Trust Deed would not have been acceptable to us as Bondholders, and that we would have voted against any such proposed replacement Trustee and that, if subsequent to the date of this Written Resolution the Issuer or the Guarantor purport to identify or appoint a replacement Trustee, we will vote against such proposed replacement Trustee;

(a) to (d) above, together, the **Proposals**; …

**2 CONFIRMATIONS IN RELATION TO THE WRITTEN RESOLUTION**

We, the undersigned Bondholders, acknowledge, confirm and agree that:

(a) neither the Proposals nor the Terms of this Written Resolution have been formulated by the Trustee who expresses no view on them, and nothing in this Written Resolution or otherwise should be construed as a recommendation to the Bondholders from the Trustee to either approve or reject this Written Resolution and that, in accordance with normal practice, the Trustee expresses no opinion on the merits (or otherwise) of this Written Resolution;

(b) the Trustee is not responsible for the accuracy, completeness, validity or correctness of the statements made and documents referred to in this Written Resolution or any omissions from this Written Resolution;

(c) we have consulted our own independent legal and/or financial advisers and conducted such due diligence as we consider necessary or appropriate for the purposes of considering this Written Resolution and the transactions contemplated hereby;

(d) we have formed our own view in relation to the actions arising out of this Written Resolution without any reliance on the Trustee or its advisers;

(e) the Trustee has not given (directly or indirectly through any other person) any assurance, guarantee, or representation whatsoever as to the expected or projected success profitability, return, performance result, effect, consequence or benefit (including legal, regulatory, tax, financial, accounting or otherwise), of this Written Resolution and/or the transactions contemplated hereby;

(f) we are sophisticated investors familiar with transactions similar to our investment in the Bonds and are each acting for our own account, and have each made our own independent decisions in respect of passing this Written Resolution and pass this Written Resolution with a full understanding of all the terms, conditions and risks associated with or that exist or may exist now or in the future in connection with this Written Resolution and the transactions contemplated hereby and we confirm that we are each capable of assuming and are willing to assume (financially or otherwise) those risks; and

(g) each of Multi-Strategy Credit Fund-European HY Credit Sleeve, BlackRock Corporate High Yield Fund, Inc., BGF Fixed Income Global Opportunities Fund, BGF Global Conservative Income Fund-European High Yield Portfolio, BlackRock Strategic Income Opportunities Portfolio of BlackRock Funds V, BGF Global High Yield Bond Fund-Euro High Yield Sleeve, BGF US Dollar High Yield Bond Fund, BlackRock High Yield Bond Portfolio of BlackRock Funds V, BlackRock Global Long/Short Credit Fund Of BlackRock Funds IV, BlackRock Absolute Return Bond Fund-ECSF Sleeve, BlackRock Credit Strategies Fund-European High Yield, Global Multi-Asset Income, a sub fund of BlackRock Global Funds, European High Yield Bond Fund, a sub-fund of BlackRock Global Funds, BlackRock Fixed Income Strategies Fund, a sub-fund of BlackRock Strategic Funds, and BlackRock Multi-Asset Income Portfolio of BlackRock Funds II shall not be liable to contribute any amount to (i) the Trustee, as referred to in paragraph 1(d)(i) or (ii) GLAS in connection with any fees or indemnities pursuant to a fee letter and/or a deed of indemnity separately negotiated between some of the other undersigned Bondholders and GLAS and in each case expected to be dated on or about the date of the GLAS Appointment.”

1. By the deed of appointment dated 24 December 2020, between GLAS and BNP Trust, the parties to that deed recited the details of the Bonds, and then, at recitals C and D, as follows:

“(C) The Trustee (acting in accordance with directions given to it in the December 2020 Extraordinary Resolution) has been requested and instructed by certain of the holders of Bonds then outstanding to appoint the Co-Trustee in accordance with the Trustee’s rights under clause 20.3(a) of the Trust Deed. The December 2020 Extraordinary Resolution also contains a resolution, confirmation and direction from the relevant holders of Bonds then outstanding that the appointment of the co-Trustee is in their interests. On the basis of the December 2020 Extraordinary Resolution, the Appointing Party (in its capacity as Trustee immediately before the Effective Date) therefore considers the appointment of the Co-Trustee to be in the interests of the Bondholders. The Co-Trustee accepts such appointment on the terms set out in this deed of appointment (this “Deed”).

(D) Following the Effective Date and the appointment of the Co-Trustee in accordance with and subject to the terms of this Deed, the Appointing Party intends to retire as a Trustee, such that the Co-Trustee will become the sole trustee in relation to the Bonds and the Transaction Documents.”

1. Then the deed of appointment provided at clause 2 as follows:

“2**. Appointment and Acceptance of the Co-Trustee and Retirement of the Appointing Party**

2.1 **Appointment and acceptance**

(a) Pursuant to clause 20.3 of the Trust Deed, the Appointing Party (acting on the basis of the December 2020 Extraordinary Resolution) hereby appoints the Co-Trustee as a Trustee of the Bonds alongside the Appointing Party under the Trust Deed with effect from the Effective Date. The Co-Trustee represents and warrants to the Appointing Party, on which representation and warranty the Co-Trustee shall be entitled to rely absolutely, that the Co-Trustee is a financial institution for the purposes of Article 1.2 of the Collateral Directive 2002/47/EC.

(b) The Co-Trustee is appointed with all the rights, powers, trusts and duties of a Trustee under the Trust Deed and the other Transaction Documents, equivalent to those of the Appointing Party.

(c) With effect from the Effective Date, the Co-Trustee accepts its appointment as a co-Trustee under the Trust Deed alongside the Appointing Party, and agrees that immediately following its appointment it shall have all the rights, powers, trusts and duties of a Trustee under the Trust Deed.

(d) Simultaneous to the appointment of the Co-Trustee in accordance with and subject to the terms of Clauses 2.1(a) to (c) of this Deed, and in accordance with the December 2020 Extraordinary Resolution, the Appointing Party shall, by delivering a Resignation Notice to the Issuer and the Guarantor, retire from its role as Trustee in relation to the Bonds and under the Transaction Documents, effective immediately from such Resignation Notice.

2.2 **Duties and powers of Co-Trustee**

(a) The Appointing Party shall have no responsibility or liability under or related to the Trust Deed or any other Transaction Document that may arise or accrue after the Effective Date or from any actions or omissions of the Co-Trustee.

(b) The Co-Trustee shall have no responsibility or liability under or related to the Trust Deed or any other Transaction Document that may have arisen or accrued before the Effective Date or from any actions or omissions of the Appointing Party

(c) From and after the Effective Date, the Co-Trustee shall be party to the Transaction Documents to which the Appointing Party is party and shall have the rights, benefits and obligations of a Trustee and shall be bound by the provisions thereof.”

1. Also, on 24 December 2020, BNP Trust sent to the Issuer and the Guarantor a notice of retirement which stated at paragraph 2 as follows:

“2. We hereby give you notice that:

a. an Extraordinary Resolution was passed on or about the date of this letter pursuant to which certain Bondholders:

i. resolved that the appointment of GLAS SAS (London Branch) as Co-Trustee was in their interests, and directed us to appoint GLAS SAS (London Branch) as Co-Trustee with immediate effect, in each case in accordance with Clause 20.3 of the Trust Deed (the **GLAS Appointment**); and

ii. thereafter removed us as Trustee, and directed us to retire as Trustee, in accordance with Clause 20.2 of the Trust Deed (the **Retirement**); and

b. acting in accordance with the terms of that Extraordinary Resolution, in respect of which we have no responsibility or liability as set out in Clause 13.1.2 of the Trust Deed, we have made the GLAS Appointment and our Retirement hereby takes immediate effect on and from the date of this letter.”

1. BNP Trust, as the Trustee, had power under clause 20.3 of the Trust Deed to appoint a co‑trustee if it considered the appointment to be in the interests of the bondholders. ETS says that there is no evidence that BNP Trust considered the interests of bondholders as a whole. Counsel for ETS has emphasised that the power of appointment of new trustees is a fiduciary power. In any event, there is no dispute on this application that both BNP Trust and GLAS, as Trustees, were in a fiduciary position as against the bondholders.
2. As to this argument, it is clear that at least 75 per cent of bondholders declared the appointment to be in the interests of bondholders. There is no evidence before the court to suggest that any bondholder has ever suggested otherwise. Counsel for ETS has not suggested any particular basis upon which they might be expected to do so. Moreover, a 75 per cent majority of bondholders were plainly entitled to dismiss the trustee and to veto the appointment of any new trustee. Since such a majority had those powers, other bondholders would have known that any objection to the majority's decisions in these matters would be likely to cause delay and expense, which might well be contrary to their interests. That is speculative, but it might give some support to the more important matter that there is no evidence to suggest that any bondholder has ever suggested or implied that its interests were not served by the decisions taken by the required special majority.
3. In Recital C to the deed of appointment, BNP Trust stated in terms that on the basis of the Extraordinary Resolution, it considered that the appointment was in the interests of bondholders. In these circumstances, it does not seem to me to be a real prospect that at any trial it would be found that BNP Trust did other than conclude in good faith on the basis of the written resolution that bondholders were the best judges of their own interests and, as recited in the deed, that the appointment was indeed in their interests.
4. ETS further submits that it is extraordinary that at one time on 24 December 2020 BNP Trust considered it was in the interests of bondholders for there to be a co‑trustee, and yet, later on the same day, by retiring, BNP Trust showed it no longer thought there should be a co‑trustee.
5. That argument has been developed orally into one that the exercise of a power under clause 20 must be done for a proper purpose and the purpose that can be divined from clause 20 is that there should be co‑trustees or two separate Trustees for separate purposes. It follows, counsel has argued, that the question for BNP Trust when it considered whether to appoint GLAS as co‑trustee was whether it was in the interests of bondholders as a whole for there to be a co‑trustee; and it cannot have determined that it was, given BNP Trust's immediately following action in retiring.
6. This argument is not consistent with the actual words of clause 20.3, which do not require the trustee to be satisfied that it is in the bondholders’ interests for there to be co‑trustees serving together, but only that it is in those interests for the appointment to be made. I see no objection in the wording of clause 20.3 to a conclusion that it is in the bondholders’ interests to make such an appointment with the intention that the new appointee will replace the existing trustee.
7. A further question is then raised as to the effectiveness of the retirement or removal of BNP Trust as Trustee. ETS points out that the procedure for retirement under clause 20.2 is that the Trustee should give 60 days' notice during which time the Issuer may procure the appointment of another Trustee. ETS suggests that it is contrary to the Trust Deed for this process to be circumvented by the procedure that was followed here. I can see the force of that argument in relation to retirement. However, clause 20.2 also provides:

"The bondholders may, by Extraordinary Resolution, remove any Trustee, provided that the retirement or removal of a sole trust corporation will not be effected until a trust corporation is appointed as successor Trustee."

1. As I already set out, paragraph 17(vii) of schedule 3 provides for power "to approve a proposed new trustee and to remove a trustee". I read paragraph (b) of the written resolution as a purported exercise of the power to remove a trustee. That is a question of reading that document in its context and I see no reason to think that evidence at any trial could alter the view that would be taken on that point. Accordingly, I so decide.
2. If that is right, then the Extraordinary Resolution was a valid exercise of the bondholders' power to remove the Trustee. This is consistent with paragraph 2(a)(ii) of the notice of retirement which gives notice that BNP Trust considered that they had been removed as Trustee and directed to retire. It seems to me that, in contractual terms, the direction to retire was nothing more than a request to acknowledge the effectiveness of the removal, which is what BNP did by its notice of retirement.
3. On that basis, it seems to me that both the appointment of GLAS and the removal of BNP Trust were contractual and there is no real prospect of the matter appearing differently at trial. Before making a final decision on that point, I should consider ETS's argument that the Trust Deed could not properly be read as permitting the appointment of a co‑trustee to be used as a device to circumvent ETS's right to appoint a new Trustee if the original Trustee retired on 60 days' notice. ETS further draws attention to evidence which suggests that some bondholders provided an indemnity to GLAS while others did not do so.
4. It seems to me that, in substance, the question is as to the construction of the Trust Deed and that the factual matters to which counsel has referred are not ones which bear upon the construction issue. In my judgment, ETS's argument of construction is incorrect, both for the reasons I have already given about the individual steps and provisions and also because the overall effect of clause 20 is to give ultimate control over the identity of the trustee to the bondholders, who are required under clause 20.1 to approve the appointment of any new trustee and entitled under clause 20.2 summarily to dismiss any existing trustee.
5. The latter consideration explains why what I have held to be the ordinary and literal meaning of the words of clause 20 is also commercially sensible. If I am right about the construction of the provisions, then the submission for ETS that the appointment requires factual investigation falls away. If it was in accordance with the contract, then no factual enquiry into the commercial motivations of the parties for acting as they did will lead to a different result. For these reasons, I find that there is no real prospect of the defendant succeeding on the original appointment issue.

## Issue 2. The Deed of Confirmation issue

1. The Deed of Confirmation dated 17 June 2021 provided as follows:

“2. **Confirmation**

2.1 The Issuer hereby confirms its agreement to appoint GLAS as trustee for the holders of the Bonds in accordance with clause 20.1 of the Trust Deed, such appointment effective from the date of this Deed with all the rights, powers, trusts and duties of a trustee under the Trust Deed and the other Transaction Documents, and GLAS hereby confirms that it accepts such appointment.

2.2 GLAS represents and warrants to the Issuer, on which representation and warranty the Issuer shall be entitled to rely absolutely, that GLAS is a financial institution for the purposes of Article 1.2 of the Collateral Directive 2002/47/EC.

2.3 Without prejudice to the respective positions of the Issuer and GLAS regarding the validity of GLAS' appointment as trustee under the Trust Deed on 24 December 2020 pursuant to the December 2020 Extraordinary Resolution, the Issuer hereby agrees to the appointment of GLAS as trustee for the holders of the Bonds with effect from the date of this Deed and as the sole trust corporation acting as trustee under the Trust Deed and the other Transaction Documents.”

1. On the face of the Deed of Confirmation, there should not be any issue that from its date GLAS was Trustee. However, ETS resists that conclusion on the basis that the Deed of Confirmation is liable to be rescinded on the ground that it (along with other documents that form part of the June 2021 transaction) was induced by misrepresentation on the part of the Carlyle Group which were co‑ordinated with the actions of GLAS and the AHG.
2. It is common ground before me that the relevant law is correctly set out at Snell's Equity (34th edition) at paragraph 15‑009 as follows:

“Where a third party, C, wrongfully causes A to contract with B, the contract will only be liable to be set aside (a) if C was B’s agent acting within the scope of B’s actual or apparent authority; or else (b) if B actually knew of the factual circumstances that are treated by the court as vitiating A’s consent, such as a material misrepresentation or a relationship between A and C sufficient to raise a presumption of undue influence.”

1. GLAS points out that there is no allegation that it knew of any misrepresentations that may have been made by Carlyle and, therefore, it is impossible for the Deed of Confirmation to be set aside as against GLAS. This point was made in the pleaded Reply at paragraph 4.4. In the Defendant's Reply to Defence to Counterclaim at paragraph 3.1, it is pleaded:

"The first defendant does not know, and cannot plead, what knowledge the claimant had at the time that the June 2021 transactions documents were executed of the matters pleaded in section E of the counterclaim. It does not know what knowledge the claimant had of the Carlyle representations pleaded in paragraphs 26, 27 and 30 of the counterclaim.”

1. Counsel for GLAS emphasises that ETS's case amounts to an allegation of fraud against GLAS which has to be distinctly alleged to be an issue at all and has not, in fact, been alleged at all. GLAS has also stated in evidence that it did not know of any of the alleged representations on the part of Carlyle.
2. In oral submissions, leading counsel for ETS submitted that if ETS is correct that the circumstances of the appointment were surprising and must have involved a degree of co‑operation between GLAS and/or BNP Trust and the bondholders, then the ground is laid to cause the court some unease as to what might emerge as to issues relating to the appointment and the confirmation. I also have in mind what counsel for ETS submitted in a little more detail in their skeleton argument at paragraphs 44 to 48. ETS says that it is the nature of their case that they could not be expected to advance a case on GLAS's knowledge of Carlyle's alleged misrepresentations prior to disclosure.
3. The question for me is whether those submissions give rise to a real prospect that ETS will be in a position at trial to allege and ultimately prove that GLAS knew of the misrepresentations alleged against Carlyle. In my judgment, those submissions amount to no more than a hope that something may turn up and do not give rise to a reasoned basis for thinking that GLAS might have had the relevant knowledge. I therefore conclude that there is no real prospect of the defendant succeeding on the deed of confirmation issues.

## Issue 3. Application of security issue

1. In the written materials, there was a third issue as to whether GLAS was entitled to pursue judgment for the alleged debt, notwithstanding that it held the Secured Shares as security. In oral argument, counsel for GLAS expressly did not pursue that point.

## Discretionary considerations

1. No particular discretionary considerations have been advanced before me. It seems to me that the right approach is to grant summary judgment including the declarations which GLAS has sought in order to decide issues in the most just and effective way and to assist and encourage the parties to comply with what I have held to be their contractual rights and obligations. I have weighed up in the round whether the matters which ETS have urged upon the court as being such as to give rise to "unease" amount to a compelling reason why the issues in this application should be disposed of at trial, and I have concluded that they do not.
2. I will hear counsel on any consequential matters that arise from this judgment.**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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