Neutral Citation Number: [2022] EWHC 1450 (Ch)

Case No: BL-2022-000444

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

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

Date: 15/06/2022

Before:

MRS JUSTICE FALK

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Between:

BANCA GENERALI S.P.A — **Claimant/ Applicant**

- and –

(1) CFE (SUISSE) SA

(2) SOVEREIGN CREDIT OPPORTUNITIES SA — **Defendants/ Respondents**

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Andrew de Mestre QC and Andrew Rose (instructed by **Mayer Brown International LLP**) for the **Claimant/Applicant**
Jeremy Goldring QC and Henry Phillips (instructed by **Macfarlanes LLP**) for the **Defendants/Respondents**

Hearing date: 24 May 2022

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2 pm on 15 June 2022.

Mrs Justice Falk:

Introduction and background

1. This is an application by the Claimant, Banca Generali S.p.A. (the "Bank"), for an order that the Defendants provide copies of transactional documents relating to receivables held within three securitisation structures in respect of which the Bank has clients who are Senior Noteholders.

2. The Second Defendant, Sovereign Credit Opportunities SA ("SCO"), is a Luxembourg incorporated special purpose vehicle. It acted as note issuer and it holds the receivables. The First Defendant, CFE (Suisse) SA ("CFE"), a company in the same corporate group as SCO, was responsible for acquiring and selling the receivables to SCO under a Master Transfer Agreement ("MTA"). It also acts as collection agent in respect of the receivables. CFE holds Junior Notes accounting for 5% of the total value of the notes in issue.

3. The proceedings were issued on 15 March 2022. This application was issued on 16 March. An application for expedition was granted by Fancourt J, who also granted permission for expert evidence on Italian law.

4. In essence, the Bank says that it requires the documents to comply with its regulatory obligations to its clients. The Defendants dispute this.

5. The three securitisation structures are known as Trade Finance II ("TF II"), Trade Finance III ("TF III") and Trade Finance IV ("TF IV"). As the names suggest there was also a Trade Finance I ("TF I"). SCO acted as the note issuer in respect of all four Trade Finance transactions, acting through a separate "compartment" in accordance with Luxembourg law. The effect of that law is that receivables allocated to a particular compartment are segregated from other assets and liabilities, and are available only to satisfy obligations associated with that compartment.

6. The Bank acted as Senior Notes Initial Subscriber in respect of TF I and TF II, and as Placing Agent for TF III and TF IV. Essentially, the Bank's clients bought the Senior Notes either from the Bank or via a placing undertaken by the Bank. One of the Bank's significant ongoing roles is that it is a party to transaction documents in respect of each securitisation and, under their terms, is able to exercise rights on behalf of Senior Noteholders.

7. The notes issued pursuant to the Trade Finance securitisations are not publicly traded. The vast majority of the outstanding Senior Notes are held for clients of the Bank.

8. The securitised receivables are trade finance receivables in respect of exports from Europe to emerging markets. The concept of trade finance receivable is broad, and is not typically simply an unpaid invoice. It would, for example, cover amounts owed to European exporters or banks arising from letters of credit, promissory notes and similar instruments issued by governmental as well as private entities in emerging markets.

9. The trade finance transactions are not the first securitisations that the parties have worked on together. There was a set of previous transactions in 2016 under which healthcare receivables were securitised, and notes were similarly sold to or placed with

clients of the Bank. The Bank's position is that it has transpired that there were repeated issues with the value of the receivables securitised in those transactions, as a result of which it made an offer in July 2021 to purchase the notes from its clients so as to protect them from potential losses. This has led the Bank to make a provision of €80 million in respect of its exposure. There is also an ongoing criminal investigation in Italy in respect of those transactions, together with investigations by the Bank of Italy and the Italian financial regulator, CONSOB.

10. The issues with the healthcare receivables transactions provide relevant background and context. It is clear from the Bank's evidence that what occurred with those transactions has led to intensified monitoring by the Bank of other transactions involving complex or illiquid products. Whilst there is a hint in the Bank's evidence that the issues in respect of the healthcare transactions created specific concerns on the part of the Bank in respect of the CFE group, I should make clear that there has in fact been no investigation into the CFE group's conduct or allegation of impropriety against it. The Defendants' position is that they are just as much the victim of what they say is the limited wrongful activity that has been uncovered in relation to those transactions as the Bank.

11. The TF I notes were due to be fully redeemed on 18 October 2021 but were not. The Bank's position is that it became clear in late 2021, based on information which included a report commissioned from the law firm Dentons, that inaccurate information had been provided to the Bank in respect of the underlying exposures in that securitisation. It says that this is part of the background to the problems that then began to emerge in relation to TF II, TF III and TF IV, not least because some of the receivables are common to more than one portfolio. The Defendants' position is that they sought to engage constructively throughout (including through the appointment of Dentons), but because of time and manpower constraints they could not comply with every request within the period demanded.

12. Up to the quarter ended 31 August 2021, the Bank received both monthly information and quarterly reports in respect of TF II, TF III and TF IV, which it believed satisfied its requirements. However, the position changed for quarterly reports for the period to 30 November 2021. The reports for that period were provided on 10 January 2022. In particular, no amortisation schedules were produced in respect of the individual receivables, and a number of the data fields were marked with a "ND" (no data) code. The changes, together with what the Bank considered to be material discrepancies with previous reports, led to complaints from the Bank that it was unable to calculate a fair value for the Senior Notes, and ultimately to the issue of these proceedings.

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. The effect, the Bank says, is that the receivables as now described present a different type of risk. Its position is that the discrepancies and errors have resulted in such a loss of confidence that it has concluded, with advice from PwC, that it is not in a position properly to value the notes and report on them to its clients in accordance with what it considers to be its regulatory obligations. As at 31 December 2021 and 31 March 2022 it has therefore reported only the nominal value of the Senior Notes, and has included a note to the effect that it did not have sufficient information to calculate their fair value.

14. The Bank also relies on the emergence of concerns over certain specific receivables and transactions in them.

15. The final maturity date for TF II was 14 April 2022. The Senior Notes were not fully redeemed on that date. This has resulted in the service of a formal notice, the effect of which is that the notes are immediately due and payable and that the issuer is bound to comply with directions of Senior Noteholders in relation to management and administration of the receivables. An instruction has been given to sell the receivables, but that will first involve the appointment of an independent third party to value the receivables. That appointment has not yet been made.

16. TF III is due to redeem on 14 July 2022. The Bank has been informed that the Senior Notes are not likely to redeem in full on that date. The final maturity date for TF IV is 15 December 2023, although this is subject to a possible extension to 15 December 2024.

17. The amounts of Senior Notes outstanding are around €49 million for TF II, around €98 million for TF III, and €150 million for TF IV.

18. A final point to make by way of background is that TF IV differs from the earlier securitisations in that there is an additional contractual document, an Asset Management Agreement, appointing a UK entity in the same group as the Defendants, CFE UK Ltd, as asset manager. The obligations imposed on the asset manager include a requirement that no more than 10% of the receivables by value have a maturity which is after the final maturity date. It is common ground that this obligation has been breached (at least as at 30 November 2021), although the asset manager's position is that this has since been remedied.

19. This judgment was circulated in draft on 26 May 2022 on the usual confidential basis, with a timetable for hand down that allowed for written submissions to be provided on one aspect of the order sought, and for those submissions to be addressed in the final form of the judgment if or to the extent that agreement was not reached. The final form of this judgment reflects submissions received on 10 June 2022.

The parties' cases

The Bank's case

20. The Bank's case is that it has a contractual right to the documents which it seeks because it has reasonably requested them for the purpose of complying with its regulatory obligations to report the value of the Senior Notes to its clients.

21. At the time the proceedings were issued the Bank sought both information and documents. The Bank accepts that the information that it was seeking has now been provided, or at least largely provided, through a combination of quarterly reporting for the period to 28 February 2022 and correspondence. However, the Bank also says that the information that has been provided was frequently different from or inconsistent with information provided previously, such as to give rise to concerns. An earlier proposal it made for a sampling exercise to be carried out in relation to the documents was rejected. It says that it has been left with no option but to pursue the application to

obtain access to all underlying transactional documentation, because it has lost confidence in the accuracy of the information.

22. In summary, the Bank's argument that it is entitled to the underlying documents is as follows:

    a) The Bank has reporting obligations to its clients, the Senior Noteholders, arising under Articles 60 and 63 of Regulation (EU) 2017/565 (see below).

    b) Article 60, which applies where the Bank provides portfolio management services in relation to the Senior Notes, requires the Bank to report quarterly on the "fair value" of the Senior Notes.

    c) Article 63, which applies where the Bank holds the Senior Notes on behalf of clients, requires the Bank to report at least quarterly on the "estimated value" of the Senior Notes.

    d) The valuation exercise required of the Bank under either or both of Articles 60 and 63 involves the Bank valuing the assets in the securitisations, namely the receivables.

    e) In conducting that valuation exercise, the Bank must comply with conduct of business rules, which include (under Article 24(1) of MiFID II – see below) acting honestly, fairly and professionally in accordance with the best interests of clients.

    f) For the purposes of valuing the Senior Notes, the Bank depends on information which is provided to it by the Defendants under contract and under the Securitisation Regulation (see below). However, the Bank has lost confidence in the ability or willingness of the Defendants to provide it with accurate information.

    g) As a result, on the last two occasions when the Bank was required to provide valuations to its clients – as at 31 December 2021 and 31 March 2022 – it was unable to do so.

    h) In circumstances where the Bank has lost confidence in the Defendants' ability or willingness to report accurately, it says it must exercise its contractual right under clause 12 of the relevant Fiscal And Calculation Agreement or Intercreditor Agreement to request the documents available to the Defendants in order to satisfy itself that the information which the Defendants now say is accurate is indeed so. This will enable the Bank properly to calculate the value of the Senior Notes and then report to its clients.

    i) The Defendants are bound to supply documents pursuant to clause 12. The request is made for the purposes of compliance with Applicable Law, as defined in that clause, and is reasonable.

The Defendants' case

23. The Defendants say that the changes in the format and content of reports were made in order to report in accordance with the forms mandated by the European Securities and

Markets Association ("ESMA"). This first applied to the reports for the period to 30 November 2021. The absence of information such as an amortisation schedule was explained by the fact that the regulatory standards did not require it (although in fact I note that it now appears to have been accepted in *inter partes* correspondence that amortisation information should have been provided). However, certain other information was required and provided which had not previously been reported. The fact that ESMA was in the process of developing technical standards and templates which could impact on transparency undertakings was highlighted as a risk factor in the prospectus.

24. The Defendants say that initial teething problems with the transition to the ESMA format have been fixed, that the problems were historic and that there is no requirement to provide underlying documents.

25. Further, complying with the Bank's request would be unreasonably burdensome for CFE (bearing in mind that the relevant team comprises only four individuals), undermine its business and place it in potential breach of confidentiality clauses. The Defendants have in good faith voluntarily provided all the information requested and needed to calculate value. The initial timetable set in correspondence was unrealistic, given the need for the team also to work on the normal quarterly reporting cycle (the deadline for the February 2022 reports being missed as a result). The request shifted from asking for information to asking for documents before the former request could be complied with, and proceedings were also issued at a time when the Bank knew that a substantive response was imminent.

26. That response was provided on 18 March 2022, in the form of a letter from Macfarlanes, and provided the vast majority of the information requested. Macfarlanes also invited the Bank to give details of any further information that the Bank required, and significant care was taken to respond to further requests. The Defendants understood that all these had been addressed by 29 April. However, reply evidence filed on behalf of the Bank on 11 May 2022 referred to a letter of the same date from its solicitors Mayer Brown concerning information provided on 18 March. There was no explanation as to why the Bank had waited nearly eight weeks to raise those points, other than deliberately to make the point that there were unresolved issues and to create a moving target.

27. The Defendants are prepared to co-operate if any further information is needed. But the reality is that the Bank placed high-risk notes with its clients, some of which have not performed as might have been hoped due to circumstances that include Covid-19 and the war in Ukraine. The Senior Notes were high risk, high reward investments that were unlisted and unhedged, underpinned by receivables from high-risk counterparties in developing countries. The significant degree of risk that existed, including the risk that amounts invested would not be recovered, was clearly disclosed in the prospectuses. The Bank was attempting to blame the Defendants by making unwarranted insinuations as to their integrity, and making overblown and self-serving assertions. Its claimed total loss of confidence was a disproportionate response.

28. The Defendants had also addressed in detail the specific concerns raised about certain receivables and transactions in them. They also pointed to CFE's economic interest as junior noteholder, such that it takes the first "hit" on any loss suffered.

The changes in descriptions and other concerns

29. Mr de Mestre's skeleton argument for the Bank included summaries in tabular form of (a) changes in the description of receivables; (b) changes in the description of the security available in respect of the receivables; and (c) the position as regards any arrears. I did not understand these tables to be disputed. The first two tables, which are most relevant to the issue that I must decide, are reproduced below. The numbers refer to the number of receivables in each category held at 31 August 2021 and still held as at 28 February 2022 (for example, there were a total of 18 receivables in that category in the TF II portfolio as at 31 August 2021).

Description of receivables:

Transaction	Report to 31/08/21	Report to 30/11/21	Report to 28/02/22
TF II	15 x "Sovereign Letter of Guarantee" 3 x "Letter of Credit"	10 x "Sovereign Debt" 5 x "Loan/lease" (ESMA code LOLE) 2 x "Letter of credit" 1 x Promissory Note	10 x "Sovereign Debt under restructuring" 2 x "Term loan" 3 x "Syndicated term loan" 2 x "Letter of Credit" 1 x "Promissory Note"
TF III	9 x "Sovereign Letter of Guarantee" 5 x "Letter of Credit" 1 x "Commercial Facility"	11 x "Loan/Lease" (ESMA code LOLE) 1 x "Letter of credit" 2 x "Sovereign debt" 1 x "Promissory notes"	5 x "Syndicated term loan" 2 x "Sovereign debt under restructuring" 3 x "Term loan" 1 x "Letter of credit" 1 x "Promissory Notes"
TF IV	10 x "Sovereign Letter of Guarantee" 1 x "Letter of Credit"	9 x "Loan /lease" 1 x "Letter of Credit" 1 x "Discount of receivables"	3 x "Term loan" 6 x "Syndicated term loan" 1 x "Letter of credit" 1 x "Discount of Receivables"

Description of security:

Transaction	Report to 31/08/21	Report to 30/11/21	Report to 28/02/22
TF II	All 18 exposures had an ECA guarantee from an identified Agency	11 of the 18 exposures were identified as having a "Guarantee not	11 of the 18 exposures were described as follows "*Original exposure*

	for 95% (16 exposures) or 100% (2 exposures).	backed by further collateral" (ESMA code GNCO) but with no indication of the identity of the guarantor.	*collateralized by ECA, the ECA has already been enforced.*"
TF III	All 14 exposures had an ECA guarantee from an identified agency for between 85% and 100%	4 of the 14 exposures were identified as having "Guarantee not backed by further collateral" (ESMA code GNCO) but with no indication of the identity of the guarantor.	2 of the exposures were described as follows "*Original exposure collateralized by ECA, the ECA has already been enforced.*" 3 of the exposures had some political and/or economic risk cover.
TF IV	All 11 exposures had an ECA guarantee from an identified agency for 95% or 100%	3 of the 11 exposures were identified as having "Guarantee not backed by further collateral" (ESMA code GNCO) but with no indication of the identity of the guarantor.	4 of the 11 exposures were identified as having "Guarantee not backed by further collateral" (ESMA code GNCO) but with no indication of the identity of the guarantor. Of these, one was identified as having political and commercial risk cover.

30. As can be seen, there are material differences. For example, apart from one "commercial facility" there was no mention of loans as at 31 August 2021. Further, the impression given at that time as regards security was that all exposures substantially benefited from ECA guarantees, whereas it now appears that with a number of them any guarantee is entirely historic.

31. Additional specific concerns have arisen with the largest single receivable in TF II (the "Sudan receivable") and with a series of nine receivables related to entities in Cuba held in TF II, TF III and TF IV (the "Cuban receivables"). The Bank relies on these to illustrate what it describes as a total loss of confidence in the Defendants' ability to provide accurate information.

32. As at 31 August 2021 the Sudan receivable was described as a "Sovereign letter of guarantee", with a principal amount of €10 million and an ECA guarantee of 95%. By 28 February 2022 it was described as "Sovereign debt under restructuring" and was said to be "distressed", with a principal amount of €3.3 million, said to have followed a write off of debt owed by Sudan. The Bank was also informed by correspondence on 31 March 2022 that an ECA guarantee had been enforced before the Defendants acquired the receivable, such that there had been no security at any relevant time. It was also subsequently clarified that the debt was written off in July 2021, that is before the report as at 31 August and well before the report as at 30 November, which had described the debt as sovereign debt with a guarantee, without reference to a write off.

33. Further, the Bank has concerns that the price paid for the Sudan receivable was excessive because Sudanese debt not supported by a guarantee has traded in recent years at between 5% and 15% of nominal value, whereas the purchase price was 75.68% of nominal value.

34. The Cuban receivables had a combined nominal value of more than €40 million, with four different originators. The reported purchase price was in each case over 90%. They were all still held at the time the Bank issued its claim and at the date of the first hearing on 6 April 2022. However, two days later the CFE group published a notice stating that Cuban receivables held in relation to TF II had been sold on 7 April (a week before the final maturity date) for a price which was about 20% of their nominal value, which was said to be the "best offer at the time". Cuban receivables held in the TF III and TF IV compartments were also sold at 21.6% and 22.6% of their respective nominal values.

35. The explanation provided to the Bank was that Cuba's support for the Russian invasion of Ukraine had caused a fall in value. The Bank does not accept that this is credible given that some of the receivables were sold into the securitisations between October 2021 and January 2022 at between 94 and 96% of their nominal value. It says that the fall in value cannot realistically be attributed solely to events in Ukraine (for example, Cuba had been heavily sanctioned by the US well before 2022), and it points out that some of the receivables had been purchased from October 2021 onwards despite a default in respect of other receivables with the same originator.

36. CFE has provided a relatively detailed response in correspondence to the concerns raised in respect of the Cuban receivables. In particular, it says that the sale was at market value and to an unconnected party, that the sale was not linked to the proceedings, and that the war in Ukraine has indeed had a very material impact.

37. It is not necessary to determine any factual dispute about the Sudan or Cuban receivables for the purposes of this application, but the issues that have arisen in respect of the former, plus the fact that a substantial loss has been realised on the latter in circumstances where some of the Cuban receivables were bought relatively recently, have undoubtedly enhanced the Bank's concerns.

38. The witness statements produced on behalf of the Bank evidence its concern about what it says is its inability to report on the value of the Senior Notes, both in terms of tensions with clients and the risk of sanction from regulatory authorities. The evidence also contrasts a perceived lack of cooperation by CFE with the support and cooperation the Bank says it has had from other asset managers in connection with the intensified

monitoring of certain products that it has started carrying out following the issues that arose with the healthcare receivable securitisations.

The relevant regulatory regimes

The Securitisation Regulation and Disclosure Regulation

39. Each of the Trade Finance transactions is subject to EU Regulation 2017/2402 (the "Securitisation Regulation") and Commission Delegated Regulation (EU) 2020/1224 (the "Disclosure Regulation"). Article 7 of the Securitisation Regulation requires a designated party to make available certain categories of information to holders of a "securitisation position" (defined as exposure to a securitisation). As discussed below, the Defendants are the relevant designated parties.

40. Article 7(1) of the Securitisation Regulation relevantly provides:

> "The originator, sponsor and SSPE[1] of a securitisation shall, in accordance with paragraph 2 of this Article, make at least the following information available to holders of a securitisation position, to the competent authorities referred to in Article 29 and, upon request, to potential investors:
> (a) information on the underlying exposures on a quarterly basis … ;
> (b) all underlying documentation that is essential for the understanding of the transaction, including but not limited to, where applicable, the following documents:
> (i) the final offering document or the prospectus together with the closing transaction documents, excluding legal opinions;
> (ii) for traditional securitisation the asset sale agreement, assignment, novation or transfer agreement and any relevant declaration of trust;
> (iii) the derivatives and guarantee agreements, as well as any relevant documents on collateralisation arrangements where the exposures being securitised remain exposures of the originator;
> (iv) the servicing, back-up servicing, administration and cash management agreements;
> (v) the trust deed, security deed, agency agreement, account bank agreement, guaranteed investment contract, incorporated terms or master trust framework or master definitions agreement or such legal documentation with equivalent legal value;
> (vi) any relevant inter-creditor agreements, derivatives documentation, subordinated loan agreements, start-up loan agreements and liquidity facility agreements;
> That underlying documentation shall include a detailed description of the priority of payments of the securitisation;
> …
> (e) quarterly investor reports … containing the following:
> (i) all materially relevant data on the credit quality and performance of underlying exposures;
> …"

41. Under Article 7(3) of the Securitisation Regulation, ESMA was required to develop draft regulatory standards to "specify the information" to be provided in order to

[1] Securitisation special purpose entity.

comply with the reporting obligations under Articles 7(1)(a) and (e). Those regulatory standards are now reflected in templates annexed to the Disclosure Regulation.

42. The Defendants rely on there being no provision requiring a designated party to provide underlying documents in respect of the assets held in a securitisation, as opposed to documents related to the securitisation itself. They point out the distinction between the information required under Article 7(1)(a) and Article 7(1)(b), which as the list in that paragraph makes clear includes documents related to the securitisation but not the underlying exposures.

MiFID II

43. Section 2 of Chapter 2 of Directive 2014/65/EU ("MiFID II") deals with investor protection. Article 24(1) provides:

> "Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25."

44. Article 25 deals among other things with reporting to clients. Article 25(6) provides:

> "The investment firm shall provide the client with adequate reports on the service provided in a durable medium. Those reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client."

The Bank's regulatory reporting requirements

45. As already indicated, the Bank relies on its regulatory reporting obligations, in particular those arising under Articles 60 and 63 of Commission Delegated Regulation (EU) 2017/565 ("Regulation 565"), as understood in the light of Article 24(1) of MiFID II.

46. Article 60 applies in situations where the Bank provides portfolio management services. Article 63 applies where the Bank provides a more limited service of holding securities on behalf of its client (custody services). It is clear from the Bank's evidence that it provides each type of service to a number of clients in respect of the Senior Notes issued by each of TF II, TF III and TF IV. In practice the Bank does not distinguish between the different categories of client when reporting on value.

47. Article 60 relevantly provides as follows:

> **"Reporting obligations in respect of portfolio management**
>
> **(Article 25(6) of Directive 2014/65/EU)**
>
> 1. Investments firms which provide the service of portfolio management to clients shall provide each such client with a periodic statement in a durable

medium of the portfolio management activities carried out on behalf of that client unless such a statement is provided by another person.

2. The periodic statement required under paragraph 1 shall provide a fair and balanced review of the activities undertaken and of the performance of the portfolio during the reporting period and shall include, where relevant, the following information:

(a) the name of the investment firm;

(b) the name or other designation of the client's account;

(c) a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the end of the reporting period, and the performance of the portfolio during the reporting period;

(d) the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;

(e) a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;

(f) the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;

(g) information about other corporate actions giving rights in relation to financial instruments held in the portfolio;

(h) for each transaction executed during the period, the information referred to in Article 59(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

3. The periodic statement referred to in paragraph 1 shall be provided once every three months…

…"

48. Article 63 relevantly provides:

"Statements of client financial instruments or client funds

(Article 25(6) of Directive 2014/65/EU)

1. Investment firms that hold client financial instruments or client funds shall send at least on a quarterly basis, to each client for whom they hold financial instruments or funds, a statement in a durable medium of those financial instruments or funds unless such a statement has been provided in any other periodic statement…

2. The statement of client assets referred to in paragraph 1 shall include the following information:

(a) details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;

(b) the extent to which any client financial instruments or client funds have been the subject of securities financing transactions

> (c) the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued;
> (d) a clear indication of the assets or funds which are subject to the rules of Directive 2014/65/EU and its implementing measures and those that are not, such as those that are subject to Title Transfer Collateral Agreement;
> (e) a clear indication of which assets are affected by some peculiarities in their ownership status, for instance due to a security interest;
> (f) the market or estimated value, when the market value is not available, of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity. The evaluation of the estimated value shall be performed by the firm on a best effort basis.
> …"

Contractual provisions

49. The key contractual provision is clause 12 of the Fiscal and Calculation Agreement for TF II, and clause 12 of the Intercreditor Agreements for TF III and TF IV ("clause 12"). These are English law governed agreements, the parties to which include the Bank and the Defendants. Ignoring any immaterial difference, clause 12 provides:

> "**Mutual undertaking regarding information reporting and collection obligations**
> 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 and shall notify the relevant other Party reasonably promptly in the event that it becomes aware that any of the forms, documentation or other information provided by such Party is (or becomes) inaccurate in any material respect; provided, however, that no Party shall be required to provide any forms, documentation or other information pursuant to this Clause 12 to the extent that: (i) any such form, documentation or other information (or the information required to be provided on such form or documentation) is not reasonably available to such Party and cannot be obtained by such Party using reasonable efforts; or (ii) doing so would or might in the reasonable opinion of such Party constitute a breach of any: (a) Applicable Law; (b) fiduciary duty; or (c) duty of confidentiality. For purposes of this Clause 11 [sic], "Applicable Law" shall be deemed to include (i) any rule or practice of any authority by which any Party is bound or with which it is accustomed to comply; (ii) any agreement between any authorities; and (iii) any agreement between any authority and any Party that is customarily entered into by institutions of a similar nature."

50. Also relevant is the provision for quarterly reporting, because it is dissatisfaction with that that has led to the present dispute. For TF II and TF III these obligations are placed on CFE under clause 19.2 of, respectively, the Fiscal and Calculation Agreement and Intercreditor Agreement. For TF IV the obligations are placed on SCO under clause 19.2 of the Intercreditor Agreement. Those provisions appoint the relevant defendant

entity as the designated reporting party under Article 7 of the Securitisation Regulation (referred to in the agreement as the "EU Transparency Requirements"), and require it to:

> "make available the information required by the EU Transparency Requirements to the persons and by the means specified therein…" (clause 19.2.1)

51. Clause 19.2.2 provides more detail, including specifying at paragraph (a) the places in the prospectus that the information required to be provided pursuant to Article 7 of the Securitisation Regulation will be included at the point of issue, and at paragraph (b) the information to be provided thereafter. Paragraph (b) separately specifies information to be provided on each monthly payment date and other categories of information. Clause 19.2.2 relevantly provides as follows (taking the text from the TF II documentation):

> "19.2.2 In particular, the Seller hereby undertakes that any of the information required to be given to prospective investors and the Noteholders pursuant to Article 7 of the Securitisation Regulation:
> (a) …;
> (b) following the Issue Date, will:
> (i) in respect of each Payment Date, be included in the Payments Report, which will contain, inter alia, information relating to the Notes (including, without limitation, details with respect to the applicable interest rate, the amount of interest and Premium (if any) payable to the Noteholders, the Principal Amount Outstanding of the Notes, principal payments on the Notes, other payments made by the Issuer, all materially relevant data on the credit quality and performance of underlying exposures, information on events which trigger changes in the priority of payments or the replacement of any counterparties, data on the cash flows generated by the underlying exposures and by the liabilities of the securitisation, and information on the material net economic interest (of at least 5 (five) per cent) in the Securitisation maintained by the Seller in accordance with paragraph 3(d) of Article 6 of the Securitisation Regulation or any alternative permitted method) and will be generally made available to the Noteholders on the following website: http://www.cfefinance.com;
>
> (ii) with reference to the information regarding the Receivables, be made available, on a quarterly basis, on the following website: http://www.cfe-finance.com;
>
> …
>
> (iv) with reference to the further information which from time to time may be deemed necessary under Article 7 of the Securitisation Regulation in accordance with the market practice or any future implementing rules and not covered under points (i) and (ii) above, be provided, by the Seller on the following website: http://www.cfefinance.com."

52. The Particulars of Claim sought declarations that the Defendants were in breach of both clauses 12 and 19, and injunctive relief to secure performance. The claim is now maintained only under clause 12.

Legal principles

Injunctive relief

53. The starting point is of course the well-known test set out in *American Cyanamid v Ethicon Ltd* [1975] AC 396, namely whether there is a serious question to be tried, whether damages would be an adequate remedy, and where the balance of convenience lies.

54. However, the remedy that the Bank seeks is a mandatory injunction. Further, while in form it is an interim injunction, in practice it comprises substantially all the relief that the Bank seeks. These points affect the approach that the court will adopt.

55. The relevant principles in respect of mandatory injunctions were set out by Phillips LJ in *Zockoll Group Ltd v Mercury Communications Ltd (No.1*) [1998] FSR 354 at 366, where he said that the following passage from the judgment of Chadwick J in *Nottingham Building Society v Eurodynamics Systems* [1993] FSR 468 at 474 was one he "would commend as being all the citation that should in future be necessary":

> "… First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffmann J.
> Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.
> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
> But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

56. The reference to Hoffmann J's description of "wrong" is to his decision in *Films Rover International and others v Cannon Film Cells Ltd* [1987] 1 WLR 670, where he referred at p.680 to a wrong decision "in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial".

57. It follows that while the court will consider whether there is a "high degree of assurance", that is not the only test. The court will consider the balance of justice, the underlying principle being to adopt whichever course seems likely to cause the least irremediable prejudice.

58. Additional caution is needed if the practical result of granting an injunction is to give the claimant all the relief it is seeking. As explained by Mustill LJ in *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657 at 664:

> "The matter before the court is not only an application for a mandatory injunction, but it is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case."

59. It is uncontroversial than in such a case the degree of likelihood of the claimant succeeding if the case proceeded to trial is a relevant factor: see for example *Global Gaming Ventures (Group) Ltd v Global Gaming Ventures (Holdings) Ltd* [2018] EWCA Civ 68 at [45].

60. As to adequacy of damages, the Bank relied on difficulty of quantification as being an acknowledged basis for treating damages as an inadequate remedy: *Bath and North East Somerset DC v Mowlem Plc* [2015] 1 WLR 785, per Mance LJ at [16], and also pointed out that it was no bar to interim relief that what was sought amounted to specific performance of the contract: *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576.

Contractual construction

61. Since the dispute concerns the construction of clause 12, it is worth briefly summarising the principles to apply. I was referred to the summary by Popplewell J in *Lukoil Asia Pacific Pte v Ocean Tankers (Pte) Ltd* [2018] 2 All ER (Comm) 108 at [8], which I gratefully adopt:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the

> court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

Discussion

The parties' cases on clause 12

62. The Bank's position is that each of the requirements of clause 12 are met. It was not suggested in the Defendants' evidence that the documents are not available, and indeed if they were not then CFE would have been in breach of the MTAs under which the receivables were transferred to SCO. The information must have been considered in responding to the information requests that the Bank has made. Further, as far as TF II is concerned the information must in any event be collated for the purposes of the independent valuation that must now be carried out. The need to review confidentiality provisions in the documents did not make the request unreasonable, and in any event confidentiality should not be a serious concern given that the receivables have been transferred into a securitisation structure and material information is reported about them already. The main burden of reviewing the clauses would fall on lawyers, and not CFE group personnel. Mr de Mestre also clarified at the hearing that the Bank would not seek an order that overrode contractual confidentiality provisions, where those applied and were engaged. However, even where such provisions exist they may well not apply on the facts.

63. The Defendants dispute that any of the requirements of clause 12 are met. Clause 12 conferred only a limited right a) to supply documents and information relating to "it, its operations or the Notes"; b) for the purpose of compliance with "Applicable Law"; and c) only where the documents or information were or was reasonably requested. None of these requirements were met. Further, there were material exclusions on which the Defendants were entitled to rely.

Whether the documents fall within the scope of clause 12

64. Mr Goldring, for the Defendants, submitted that the documents sought were not documents or information "relating to … the Notes". The factual matrix included a fundamental distinction between the securities issued to investors in a securitisation and the underlying pool of assets that are securitised, and the documentation reflected this by drawing a clear distinction between the "Notes" and the "Receivables". The distinction was also reflected in Article 7(1) of the Securitisation Regulation, which deals separately with information on underlying exposures at paragraph (a) and documents relating to the securitisation itself at paragraph (b) (see [40.] above).

65. I am unpersuaded by this submission. It is true that, where relevant to do so, the draftsperson has specifically referred to information relating to the Receivables. Examples of this can be seen in the provisions of the MTA referred to at [96.] to [98.]

below. But he or she has not generally done so in contradistinction to information "relating to the Notes". The references in the MTA make sense in the context of that agreement, the purpose of which is specific to the Receivables and their transfer to SCO.

66. The high watermark of Mr Goldring's submission on this point relates to clause 6.3.2 of the Intercreditor Agreement for TF IV, which deals with the contents of the monthly "Payments Reports" to be prepared by the Calculation Agent (another CFE entity), which provides as follows:

> "The Payments Report shall include, *inter alia*:
>
> (a) information relating to the Notes, including, without limitation, details with respect to the applicable interest rate, the amount of interest and Premium (if any) payable to the Noteholders, the Principal Amount Outstanding of the Notes, principal payments on the Notes, other payments made by the Issuer;
> …
> (c) the data on the cash flows generated by the Receivables, the Expenses and other liabilities of the Securitisation…"

67. This provision is not replicated in the documentation for the earlier securitisations. In contrast, what does appear in each of the agreements of which clause 12 forms part is clause 19.2.2, set out at [51.] above. Clause 19.2.2(b)(i) sets out a non-exhaustive list of "information relating to the Notes" which includes among other things:

> "… all materially relevant data on the credit quality and performance of underlying exposures, information on events which trigger changes in the priority of payments or the replacement of any counterparties, data on the cash flows generated by the underlying exposures…"

68. In my view that clearly demonstrates that the concept of "relating to the Notes" was not necessarily intended to be interpreted in a way that ignored the underlying exposures. That interpretation also clearly accords with business common sense. Clause 6.3.2 of the Intercreditor Agreement for TF IV does not persuade me that the interpretation I have adopted is wrong. It would be very strange if the parties had agreed to a clause that permitted information or documents to be requested for the purpose of complying with some part of the Bank's obligations in respect of the Notes, but not other aspects, including questions relevant to valuation.

69. Article 7(1) of the Securitisation Regulation specifies the minimum information that must be made available (see the reference to "at least" in the opening paragraph). The fact that it requires transactional documentation relating to the securitisation to be made available does not preclude the parties from agreeing by contract that additional information or documentation can be required to be provided. Indeed, clause 12 would have limited utility if the information or documents in question had to be made available in any event under Article 7(1), the requirements of which are independently addressed by clause 19.

70. Further, Mr Goldring's submission does not address the fact that, by referring to documentation and information "relating to it, its operations, or the Notes", clause 12

extends to documentation and information relating to the party the subject of the request and to its activities. SCO is a special purpose vehicle whose sole role is to hold the receivables and act as note issuer. CFE acts as collection agent, and so has an active role in managing and administering the receivables. Even if I was wrong about my interpretation of "relating to the Notes", there would be a strong argument that documentation and information in respect of the receivables would be caught in any event as being material relating to SCO or CFE or their respective operations.

71. I disagree with Mr Goldring's argument that, by not accepting the Defendants' interpretation, clause 12 is being construed as a broad investigatory right of imprecise scope, and in a way that is inconsistent with the relatively tight time limit it imposes for material to be provided. The right is restricted by reference to the purpose for which the documents or information is sought, by reference to the requirement that the requesting party must act reasonably (as to which see further below), and by the restriction to documents and information that are reasonably available or can be obtained using reasonable efforts.

72. For these reasons I have no hesitation in concluding, at least to the standard of high degree of assurance, that the Bank's interpretation would be likely to be preferred at trial, such that (subject to the other requirements) the documents sought are capable of falling within the scope of clause 12.

"Applicable Law"

73. It is not in dispute that where Article 63 of Regulation 565 applies (that is, custody cases) the Bank must provide "estimated value" on a "best effort" basis where market value is not available. As regards Article 60 there was a dispute between the experts as to whether the Bank was required to report "fair value". The Defendants' expert, Professor Gentili, maintains that the words "where relevant" in the opening words of Article 60(2) entitle the Bank to decline to do so on the basis that it is not required by law and not necessary to provide fair and balanced review of the activities. Rather, performance of the portfolio should be derived from a comparison between the purchase price of the Senior Notes and the current value of similar instruments.

74. Mr Goldring submitted that I should not prefer the evidence of one expert to the other without cross-examination. I have doubts about that when the parties have both accepted that they should each have permission to rely on expert evidence for the purposes of this application, without cross-examination being envisaged. But in any event I can deal with the point on the simple basis that Professor Gentili's view begs the question as to whether there are similar instruments that could be used to assess performance. The Bank's unchallenged evidence is that there are not, it not being feasible to attempt to recreate a portfolio of underlying receivables with a similar risk profile that would be an appropriate comparator, or that such receivables would have a market value that could be used.

75. In any event I have to say that, based on the evidence available (and bearing in mind that what is being interpreted are in any event provisions of EU law, rather than purely domestic legislation), I would have little hesitation in concluding, again to the standard of high degree of assurance, that the Bank would be likely to establish at trial that information about value is in any event "relevant". Providing a "fair and balanced review" of the performance of a portfolio, as referred to in the opening words of Article

60(2), must sensibly involve comparing the value of the portfolio in different reporting periods. The inclusive list that follows this explicitly refers, at paragraph (c), to the "valuation of the portfolio". Details of each financial instrument held are required, and its "market value, or fair value if market value is unavailable".

76. The evidence of the Bank's expert Professor Enriques on this point is that the only limitation provided by "where relevant" is that information that is not applicable, because facts have not materialised, need not be provided. So, for example, if no fees were charged during the relevant period then disclosure of fees is not required. It is not necessary for me to decide whether that view is correct, but it has considerable force. The basic requirement in Article 60(2) is that the statement must provide a "fair and balanced review of the activities undertaken and of the performance of the portfolio" during the reporting period. This is followed by a non-exhaustive list of information that must be provided (see the reference to "shall include"). Construing "where relevant" in the way proposed by Professor Enriques is consistent with the significance that has obviously been accorded to the items specified by choosing to spell them out expressly, rather than leaving scope for debate, and in particular leaving potential scope for an investment manager to seek to decide for itself whether particular information is or is not required for a fair and balanced review. It seems unlikely that it was intended that the "where relevant" qualifier was intended to allow material uncertainty to be introduced as to whether items on the list are relevant to provide a fair and balanced review, if the information in fact exists.

77. At a more general level, it is also at least strongly arguable that if market value is not available then some alternative form of valuation is relevant, and material, information for investors. What is specified is "fair value". As Mr de Mestre submitted, it can hardly be the case that there is a requirement to provide estimated values in custody cases, but no requirement to provide any indication of value in portfolio management cases, where investment firms might be expected to be held to a more exacting standard.

78. The Bank's evidence is that the concerns it has, and which it says have not been dispelled, have prevented it from reporting values to clients with confidence. Professor Enriques' evidence is that to require it to do so on a basis that ignores reasonably held doubts would not be consistent with the investment protection principles that underlie MiFID II, and specifically Article 24(1). I find that evidence to be compelling.

79. Professor Gentili's evidence refers to Article 21(1) of the Italian Legislative Decree no. 58 of 24 February 1998 (as subsequently amended and supplemented from time to time), which requires that authorised entities must:

> "a) behave with diligence, fairness, and transparency, to best serve the interest of customer and for the integrity of the markets; b) acquire the necessary information from clients and operate in such a way that they are always adequately informed".

80. Like Article 24(1) of MiFID II, it can be seen that the need to act in the best interests of the customer is emphasised, and indeed there is an express obligation to ensure that clients are "always adequately informed".

81. Professor Gentili also makes the point that Italian law directly regulates information provided by investment firms to CONSOB and clients, and that in contrast the provision of information to investment firms (other than information required to be made public) is governed by contract. The issue before me is the scope of the relevant contract, specifically clause 12. Although Professor Gentili also suggests that if underlying documents were required to ensure that clients are adequately informed that would be made explicit, I do not think that follows. As he says, the information which can be obtained is determined by contract. The Securitisation Regulation and Disclosure Regulation contain some requirements, but do not comprise a complete code.

82. I note Professor Gentili's agreement that Articles 60 and 63 must be interpreted taking into account the regime's purpose of protecting clients. It seems to me that information about value is fundamental. Without it clients cannot properly assess their own positions and, for example, question the portfolio manager about performance.

Whether for the purpose of compliance with Applicable Law: objective test?

83. Mr Goldring submitted that it was not sufficient for a request simply to be motivated by the purpose of complying with Applicable Law, or that the requesting party is of the opinion that the information or documentation is required for that purpose. Rather, a request could only properly be made where the material sought was objectively required for the purpose of complying with Applicable Law. If the requesting party could comply without the information or documents then clause 12 was not engaged. The fact that the test was objective was supported by the fact that the second part of clause 12 permitted a party to refuse to comply with an otherwise valid request by reference to its "reasonable opinion".

84. Mr Goldring's submission was attractively put but, in reality, amounts to rewording the test as one of necessity. It amounts to saying that clause 12 would only apply if the documents or information were objectively *required* for the purpose of complying with Applicable Law. I am satisfied, at least to the standard of a high degree of assurance, that the Bank would be likely to establish at trial that that is not what clause 12 provides.

85. A natural interpretation of the language used requires consideration of the requesting party's actual purpose in making the request. If that purpose is something other than compliance with Applicable Law then the clause will not be engaged. Further, as discussed below it will only apply to reasonable requests. That qualification introduces an important objective element. I would add that that element is entirely objective. In contrast, the reference to "reasonable opinion" later in the clause might well be read in a manner which encompasses a range of potential reasonable opinions held by the relevant party.

Whether for the purpose of compliance with Applicable Law: verification required?

86. Mr Goldring submitted that, in any event, the Bank now had all the information it had requested to report on fair value, and indeed had received much more information than it had had access to for the purpose of previous reports on value. Professor Gentili had opined that the Bank could rely on the information that had been provided and was not obliged to seek to verify it. Professor Enriques had agreed that there was no general

duty to verify information, and that the Italian regulations did not grant the Bank the right to receive the underlying documents.

87. I have already addressed these points in part. The fact that there is no general duty of verification, or automatic right under the regulatory regime to receive underlying documents, is not determinative of the contractual position. I have also found Professor Enriques' evidence that to determine fair value on a basis that ignores reasonably held doubts would not be consistent with the investment protection principles that underlie MiFID II to be compelling. However, in any event, I have rejected the submission that clause 12 only applies to requests for information or documents that are necessary to comply with Applicable Law.

88. The more significant point is whether, given that the Bank now has the requisite information, a request for the underlying documents is "reasonably" made. I turn to that now.

"Reasonably requests"

89. Mr Goldring submitted that the request was far from reasonable, for the following reasons:

    a) There were no reasonable grounds to doubt the accuracy of the information now in the Bank's possession, which had been thoroughly checked. The discrepancies had been addressed and the Defendants were willing to answer further information requests.

    b) The documents would be difficult to gather and disclose. The process would be detrimental to CFE's business by diverting a small cohort of employees from their day-to-day work. It was estimated that two to three months would be required to collate and provide the documents, initially estimated at approximately 580 in number.

    c) A significant number of the documents are likely to be subject to confidentiality clauses, and are also likely to be governed by foreign law, such that local counsel would need to be engaged, which would be time-consuming and expensive.

90. Mr Goldring also submitted that, for the same reasons, the documents were not "reasonably available" and could not be obtained by "reasonable efforts".

91. I have concluded to a high degree of assurance that, in the particular circumstances of this case, the Bank would be likely to establish at trial that the documents it seeks are ones that are reasonably requested by it.

92. It is important to emphasise that this conclusion carries no implication that such documents are routinely obtainable, or that there has been any wrongdoing on the part of CFE. The key consideration relates to the 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. It is also relevant that the substantive response provided on 18 March (see [26.] above) has itself led to what Mr Goldring described as an iterative process, in which further corrections have been made. Given

the extent of the changes over time, and the lack of clear explanations about why material errors occurred, the Bank's lack of confidence in what it is now being told is understandable. As Mr de Mestre fairly said, the Bank does not have a clear basis to determine that what is being said now is accurate, when previous statements have proved not to be accurate in important respects.

93. As to the Defendants' complaint of a moving target, whilst I understand their point about queries being raised late, overall I prefer Mr de Mestre's submission that the major movements have been the material changes in information provided by the Defendants over the last few months, including during the iterative process to which Mr Goldring referred. It is that that has prompted a series of questions from the Bank as new information has emerged over time.

94. 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, particularly for receivables that are in arrears or risk being non-performing. The Defendants point out that it was always clear that the Senior Notes were high-risk, but that simply enhances the need for clarity.

95. It became apparent at the hearing that the estimate of 580 documents may well have been prepared on an incorrect basis, on the assumption that a much wider category of documents was caught. That is not the case.

96. I am also concerned about potential issues raised at the hearing as to the availability of documents. Using the MTA for TF II as an example (a document written in English, although governed by Luxembourg law), clause 4.4 required copies of "all relevant documents related to the Receivables" to be delivered by CFE to SCO. There was a provision permitting SCO to waive this requirement, but there was no evidence that it had done so. In any event CFE must be expected to have contracted to receive, or at least to obtain access to, those documents when it made its own purchases of the receivables.

97. Further, clause 10.1 of the MTA contains undertakings on the part of CFE, including that it will:

> "… keep all its books, records and documents evidencing or relating to the Receivables and shall (a) prior to the occurrence of a Trigger Event, on receipt of not less than two Business Days' notice, at any reasonable time during normal business hours and (b) after the occurrence of a Trigger Event, forthwith permit the Purchaser or any of its agents or representatives to examine the records, books of account and documents (including computer tapes and disks) of each of the Seller relating to the Receivables".

("Trigger Events" would include payment defaults, including a failure to redeem.)

98. Clause 11.3 also includes a specific obligation to:

> "maintain and update all the documentation related to the Receivables and verify if the evidentiary documents of the Receivables are suitable to constitute proof of the existence and the ownership of the Receivables and inform [SCO] accordingly".

99. Given the requirements of clauses 10.1 and 11.3, including that documents are to be made available within two business days (or forthwith in certain circumstances), the suggestions made at the hearing that it may not be straightforward to access the documents give rise to concern. An argument that it would be unduly burdensome to collate the documents would appear to suggest that the provisions of the MTA may not have been, or could not be, complied with. Moreover, those comments rather reinforce the Bank's concerns about the accuracy of the information provided to date, because they rather suggest that it may not have been cross-checked, or adequately cross-checked, against the underlying documents.

Damages an adequate remedy?

100. The Defendants did not dispute that damages would not be an adequate remedy for the Bank if an injunction was refused. I accept that the Bank faces concerns from regulators as well as its clients as a result of what would be a persistent failure to report on value. A remedy in damages against SCO, a special purpose vehicle, would also reduce sums available to Senior Noteholders.

101. In contrast, damages ought to be an adequate remedy for the Defendants, because the cost of providing documents should be quantifiable. I note that the Bank is offering the normal cross-undertaking in damages, and there is no suggestion that it might fail to pay any compensation that might be ordered.

Balance of justice

102. I have concluded that, for the reasons already given, the balance of justice favours granting the injunction sought. I am satisfied that doing so appears likely to cause the least irremediable prejudice, and overall carries a lower risk of injustice than refusing relief.

103. I do, however, consider that the time limit the court sets for the provision of the documents requires account to be taken of the circumstances, and in particular any material impact that it may have on the Defendants' regular reporting obligations. Following encouragement from me at the hearing and after circulation of this judgment in draft, I am pleased to say that the parties have now agreed a sensible timetable for documents to be provided, which will be reflected in my order. They have also agreed the terms of a confidentiality agreement which, among other things, will ameliorate concerns raised in respect of confidentiality clauses (the "Confidentiality Agreement").

Form of order

104. I am grateful that the parties were able to agree material parts of the form of the order, including as just indicated the timetable for documents to be provided. There were two outstanding points on which I received written submissions following circulation of the judgment in draft, which I should deal with briefly.

Penal notice

105. The Defendants objected to the Bank's proposal to include a penal notice on the face of the order as sealed by the court. The obvious context for this is CPR 81.4, which provides that one of the requirements of a contempt application is confirmation that the order allegedly breached included a penal notice (see CPR 81.4(2)(e)).

106. As the Chancery Guide makes clear, it is not necessary to obtain the court's consent to the inclusion of a penal notice. Such a notice could simply be added before service. I cannot see a good justification in this case for the court to refuse to include such a notice on the form of the order as sealed.

107. It is worth pointing out that the absence of a penal notice will not necessarily preclude contempt proceedings, because the court may in certain circumstances waive the requirement. If the Defendants may be unable to comply on a timely basis with any of the provisions of the order then the proper course is to apply to the court (but they should of course first seek agreement to a revised timetable).

Collateral use

108. The Defendants sought to include in the order a provision which would generally prevent the use of the documents disclosed for purposes other than those specified in the proposed Confidentiality Agreement. The intended effect of the wording was that the Bank would only be able to use the documents, and presumably the information contained in them, for the purposes specified in clause 12, namely compliance with Applicable Law, or in other circumstances where it was required to do so in order to comply with legal or regulatory requirements.

109. The Bank's position is that this fails to reflect the terms of the Confidentiality Agreement, the relevant provisions of which will provide as follows:

> Clause 1.2:
> "In this Agreement the following words and expressions shall have the following meanings:
> **Confidential Information**: the documents to be provided to the Claimant pursuant to paragraphs 1, 2 and 3 of the Order and all information and data contained in those documents, including all confidential and proprietary information contained in them, save that it shall not include (a) information and data reported or reportable to the Claimant and/or the holders of Senior Notes pursuant to the Securitisation Regulation or otherwise provided under the Transaction Documents and/or (b) documents (and information and data contained therein), which are not themselves subject to any confidentiality provisions that would otherwise prevent provision of those documents (or information and data contained therein);
> …"
>
> Clause 2.1:
> "The Claimant undertakes that:
> 2.1.1 without the prior written consent of the Defendants (such consent not to be unreasonably withheld) or further order of the Court, no Confidential Information shall be used by it for any purpose other than the Claimant's

> compliance with Applicable Law as defined in clause 12 of the Fiscal and Calculation Agreement and the Intercreditor Agreements ("the Purpose");
> .."
>
> Clause 3.1:
> "The undertakings of the Claimant in paragraph 2.1 shall not apply to any Confidential Information:
> …
> 3.1.4 to the extent disclosure or use is necessary for the Claimant to comply with any applicable legal or regulatory obligation, or pursuant to an order of a court of competent jurisdiction or demand made by any competent authority or body."
>
> (Clause 3.1 also excludes information in the public domain.)

110. The Bank is concerned that the wording proposed by the Defendants for inclusion in the order could prevent the use of information that it already has, as well as new information obtained on receipt of the documents. It further submits that clause 12 imposes no restriction on the *use* it makes of material provided under clause 12, as opposed to the purpose for which it is sought. The alternative wording that the Bank proposed would simply provide that Confidential Information (as defined) may only be used in accordance with the Confidentiality Agreement.

111. In principle, the Bank's submissions have force. Clause 12 focuses on the purpose for which documents are sought. Subject to that important point, it places no express contractual restriction on the use of those documents or the information contained in them. Other than in respect of documents which could have been withheld on confidentiality grounds, the effect of the court's decision is to enforce the contractual terms, rather than to make an order for specific disclosure of documents not otherwise required to be provided. To the extent that what is provided pursuant to the terms of the order could have been withheld under clause 12 on confidentiality grounds (such that the order as agreed may go beyond the terms of clause 12) then clause 2.1.1 of the Confidentiality Agreement will prevent collateral use.

112. However, what is sought is in terms an interim mandatory injunction, and the documents were sought specifically for the purpose of complying with the Bank's own reporting obligations to its clients. The court's assessment was based on the normal balancing exercise conducted when any such injunction is sought, having regard to the specific purpose for which the documents were sought. The Defendants have expressed concern that the Bank may use documents in a way which would reveal sensitive information to third parties with whom it holds important commercial relationships.

113. In the light of these points I have concluded that the appropriate order at this interim stage is to restrict the use of documents provided along the lines proposed by the Defendants, but to address the specific concern raised by the Bank by making it clear that the restriction does not apply to any information held or provided independently of the provision of those documents. The order will provide for liberty to apply, which would permit the Bank to return to court if it determines that it should be able to use any of the documents for a different purpose, and agreement cannot be reached with the Defendants.

Conclusion

114. In conclusion, it is appropriate in the circumstances to grant the relief sought by the Bank, with documents to be provided in accordance with the timetable that the parties have now agreed, and subject to the restriction on use outlined in the preceding paragraph.