Neutral Citation Number: [2016] EWHC 100 (Comm)

Case No: CL-2014-000777

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 28 January 2016

Before :

MR JUSTICE PHILLIPS

- -

Between :

CANARY WHARF FINANCE II PLC

Claimant

- and -

(1) DEUTSCHE TRUSTEE COMPANY LIMITED
(2) AVIVA LIFE & PENSIONS UK LIMITED
(3) AVIVA ANNUITY UK LIMITED
(4) FRIENDS LIFE LIMITED
(5) LEGAL & GENERAL ASSURANCE (PENSIONS MANAGEMENT) LIMITED
(6) THE PRUDENTIAL ASSURANCE COMPANY LIMITED
(7) PRUDENTIAL RETIREMENT INCOME LIMITED
(8) SCOTTISH WIDOWS INVESTMENT PARTNERSHIP PROPERTY TRUST
(9) SCOTTISH WIDOWS INVESTMENT PARTNERSHIP INVESTMENT FUNDS UK ICVC – CORPORATE BOND PLUS FUND
(10) SCOTTISH WIDOWS INVESTMENT PARTNERSHIP INVESTMENT FUND UK ICVC – STERLING BOND PLUS FUND

Defendants

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John McGhee QC and David Mumford (instructed by **Clifford Chance LLP**) for the **Claimant**
Georgina Peters (instructed by **Allen & Overy LLP**) for the **First Defendant**
David Wolfson QC and **Nehali Shah** (instructed by **Boies, Schiller & Flexner (UK) LLP**) for the **Second to Tenth Defendants**

Hearing dates: 27 & 28 July 2015

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Approved Judgment

Mr Justice Phillips :

1. These Part 8 proceedings turn on a point of construction of the terms and conditions ('the Conditions') of mortgage-backed debentures ('Notes') issued by the claimant ('the Issuer'), a special purpose company in the Canary Wharf Group ('the CW Group'), pursuant to a securitisation of the CW Group's real estate portfolio. The first issue of Notes was constituted by a Trust Deed between the Issuer and the first defendant as Trustee for the Noteholders ('the Trustee') dated 6 June 2000. The Conditions were set out in the Trust Deed, which has been amended and restated as further Notes have been issued, the latest version being dated 23 April 2007.

2. The securitisation is structured, in broad outline, as follows. The Issuer has lent the sums raised by issuing Notes to another special purpose company in the CW Group, CW Lending II Limited ('the Borrower') pursuant to an Intercompany Loan Agreement ('the ICLA'), also originally dated 6 June 2000. The Borrower has on-lent those sums (via an intermediate special purpose company) to companies in the CW Group, including those with interests in the CW Group's properties ('the Charging Subsidiaries'). The Borrower's liabilities under the ICLA are secured by charges over the CW Group's properties (within a Composite Debenture) granted by the Charging Subsidiaries to the Issuer and sub-charged to the Trustee. The ICLA has been revised on numerous occasions, the latest version being dated 17 June 2014.

3. In the period leading up to June 2014 the CW Group decided that it would be commercially desirable to sell the freehold interest in 10 Upper Bank Street (referred to as 'HQ5'), one of the properties in the securitised portfolio. The terms of the ICLA (clause 17.20(a)) require the Issuer and Trustee to release a Mortgaged Property from their Security Interests in certain specified circumstances. Those circumstances include where the Borrower prepays a specified amount of the loans in circumstances where the net indebtedness of the Borrower, as a percentage of the value of the security held, does not increase as a result of the repayment and consequent release of security (clause 17.20(a)(ii)).

4. On 20 June 2014 HQ5 was sold for £795,000,000, the Borrower paying £577,900,000 of that sum to the Issuer by way of prepayment of sums due under the ICLA (the relevant Release Prepayment Amount) in exchange for the release of HQ5 from the Composite Debenture. On 22 July 2014, after giving notice as required, the Issuer utilised that sum to effect early redemption of Class A1 Notes, due in October 2033 and carrying fixed interest at 6.455% per annum.

5. The question which has arisen is whether the Issuer, in redeeming Notes with the proceeds of a prepayment of sums due under the ICLA following a release of Mortgaged Property, is to be taken to have effected the redemption under condition 5(b)(iv) of the Conditions (applying where the proceeds are of a 'mandatory repayment' arising from or as a result of a release of a Mortgaged Property) or under condition 5(c) (applying to an 'optional redemption').

6. The distinction has significant consequences. Whilst condition 5(b)(iv) provides for Notes to be redeemed (with the proceeds of a 'mandatory prepayment') by payment of the Principal Amount Outstanding in respect of the Notes (plus accrued interest), condition 5(c) provides for the Issuer, on effecting an optional redemption of Fixed Rate Notes, to pay the higher of (i) the Principal Amount Outstanding and (ii) a sum equivalent to the price of Treasury Stock which would produce the same yield as the Fixed Rate Notes would have produced for their duration (in either case, plus accrued interest). It is common ground that, as Treasury Stock will generally be more secure than the Notes, the price of stock that would produce the same rate of return will be significantly higher than the Principal Amount Outstanding in respect of the Notes. The difference may be regarded as a premium (and is so described in certain clauses of the ICLA), sometimes referred to as a 'Spens' payment. If a premium is payable on redemption of Fixed Rate Notes with proceeds from a sale under clause 17.20(a)(ii), it is clear that the sum the Borrower must pay to obtain the release of the Mortgage Property also includes that premium.

7. The parties are agreed that, if a premium is payable to the Class A1 Noteholders in relation to the redemption in question (and was correspondingly payable by the Borrower in order to obtain the release of HQ5), the amount of that premium is £168,746,800. In order to preserve the position pending determination of the issue (and as a condition of the Trustee's agreement to the release of HQ5 from the Security Interests), that sum was deducted from the balance of the proceeds of sale of HQ5 and was placed, by the Issuer, in an account with Deutsche Bank AG, charged in favour of the Trustee.

8. The Issuer accordingly seeks a declaration that the redemption in issue took place under condition 5(b)(iv) and that the amount payable by the Issuer is limited to the Principal Amount Outstanding in respect of the Notes redeemed, plus accrued interest. The Issuer seeks a further declaration that, whenever the Borrower obtains a release under clause 17.20(a)(ii) of the ICLA, the amounts payable to the holders of Fixed Rate Notes by way of redemption are to be calculated in accordance with condition 5(b)(iv).

9. The second to tenth defendants have been joined in the proceedings as representatives of the holders of the Class A1 Notes ('the Representative Noteholders'). They oppose the relief sought by the Issuer and seek declarations to the opposite effect. The Trustee supports their stance and also seeks declarations to the opposite effect".

The key provisions

10. Clause 17.20 of the ICLA is headed "*Substitution, release and addition of new Mortgaged Property*". The clause provides for the release of a Mortgage Property, without the need for the Borrower to make a prepayment, where the LMC (aggregate Loans outstanding, minus cash held to the Borrower's credit) will not exceed 80% of the open market value of the remaining Mortgaged Properties (clause 17.20(a)(i)) or where substitute security is provided, whether in the form of cash or an alternative property (clause 17.20(a)(iii)).

11. Clause 17.20(a)(ii) provides the Borrower with the further option of obtaining the release of a Mortgaged Property upon making a specified prepayment, provided the overall security for the remaining indebtedness is not reduced in percentage terms:

> "*(a) Each of the Issuer and the Trustee shall, upon the request of the Borrower, release the Security Interests it holds over a Mortgaged Property (and over any proceeds of sale thereof)…. if:*
>
> *(i) …..*
>
> *(ii) in connection with the release of any Mortgaged Property … the Borrower makes a prepayment of the Loans in an amount sufficient to enable the Issuer to redeem Notes in a principal amount equal to the Release Prepayment Amount for such Mortgaged Property, together with all accrued interest thereon and any other amounts payable by the Issuer in connection with the redemption of the Notes (including, without limitation, pursuant to condition 5 of the Conditions),* ***provided that*** *the result of the LMCTV Test [defined as the percentage which LMC is to the aggregate value of the Mortgaged Properties] after the making of such prepayment is equal to or less than the result of the LMCTV Test immediately prior to such prepayment and the release of the Mortgaged Property taking place….*"

12. It is common ground that the release of security in the present case was under clause 17.20(a)(ii). The Borrower paid the Release Prepayment Amount for HQ5, being the £577,900,000 referred to above. The question is whether "*any other amounts payable by the Issuer in connection with the redemption of the Notes … pursuant to condition 5*" includes a premium of £168,746,800.

13. Condition 5(a) of the Notes provides that the Issuer shall redeem the Notes on their due date (October 2033 in the case of the Class A1 Notes) at their Principal Amount Outstanding plus accrued interest, and further provides that the Issuer may not redeem them prior to that date save as provided in condition 5 (without prejudice to the Event of Default provision).

14. Condition 5(b) is headed "***Mandatory redemption from Scheduled Principal Payments and Mandatory Prepayment of the Intercompany Loan***". Condition 5(b)(iv) provides as follows:

> *(iv) To the extent that the proceeds of a mandatory prepayment of part of the Intercompany Loan to the Issuer arise from or as a result of the release of a Mortgaged Property from the security created by the Composite Debenture, the Issuer shall be obliged to apply the proceeds thereof to redeem all or part of a class or classes of Notes ….. The provisions of*

> *Condition 5(c) shall apply to any such mandatory redemption save that the amount payable to Fixed Rate Noteholders shall be the amount set out in Condition 5(c)(ii)(A) below, together with accrued interest up to and including the date of payment.*

15. Condition 5(c) is headed "***Optional redemption***" and provides as follows:

> *On giving not more than 60 nor less than 30 days' notice to the Trustee and to the Noteholders in accordance with Condition 14 and provided that, on the Interest Payment Date on which such notice expires, no Note Enforcement Notice in relation to the relevant class of Notes has been served following an Event of Default, and further provided that it has, prior to giving such notice, certified to the Trustee and provided evidence acceptable to the Trustee (as specified in the Trust Deed) to the effect that it will have the necessary funds to discharge any amounts required under the Issuer Deed of Charge or, as the case may be, the Cash Management Agreement to be paid on such Interest Payment Date and to pay all such amounts which shall be required to be paid on the next following Interest Payment Date and further provided that the Rating Agencies then rating the Notes confirm in writing to the Trustee that the then current ratings assigned by such Rating Agencies in respect of the Notes then outstanding will not be adversely affected thereby, the Issuer may redeem on any Interest Payment Date:*
>
> *(i) …*
>
> *(ii) some (but not less than an aggregate Principal Amount Outstanding of £1,000,000 of a class of Fixed Rate Notes and thereafter in multiples of £100,000) or all of the Principal Amount Outstanding of a class of the Fixed Rate Notes at a price equal to …. whichever is the higher of paragraphs (A) and (B) below:*
>
> *(A) the Principal Amount Outstanding of the relevant class of Fixed Rate Notes to be redeemed on the relevant Interest Payment Date; and*
>
> *(B) that price … expressed as a percentage .. at which the Gross Redemption Yield (as defined below) on the Class A1 Notes … on the Relevant Date … is equal to the Gross Redemption Yield at 3.00pm (London Time) on such Relevant Date of the Class A1 Relevant Treasury Stock …*

> *together with (in the case of each of (A) and (B) above) accrued interest to the date of redemption.*"

The relevant legal principles

16. The law governing the construction of commercial contracts was common ground, both parties accepting that the relevant principles are those summarised by Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 as follows:

    (1) The "*ultimate aim of interpreting a provision in the contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant*" [14]

    (2) The "*relevant reasonable person is the one 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*" [14]

    (3) "*The language used by the parties will often have more than one potential meaning… 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*"[21]

    (4) However, "*[w]here the parties have used unambiguous language, the court must apply it*" [23]

    (5) The resolution of an issue of interpretation is "*an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences*" [28], citing Lord Mance in *In re Sigma Finance Corpn* [2010] 1 All ER 571.

17. The Issuer in particular, however, emphasised that the Court should not lose sight of the primary importance of the language used in the relevant provisions, referring to recent warnings to that effect in the decision of the Supreme Court in *Arnold v Britton* [2015] 2 WLR 1593. Lord Neuberger (with whom Lords Sumption, Hughes and Hodge agreed) stated at paragraph [17]:

> "*… The reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant to the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue*

> *covered by the provision when agreeing the wording of that provision.*"

18. Lord Hodge, at [76], accepted Lord Clarke's formulation of the unitary process of construction as explained in *Rainy Sky* (above), but further said at [77]:

> "*This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated … But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used …* "

The Issuer's contentions as to the language of the provisions

19. As explained above, the Issuer's contention is that, where the Borrower elects to obtain the release of a Mortgaged Property by making a prepayment pursuant to clause 17.20(a)(ii) of the ICLA, such prepayment is a "*mandatory prepayment of the Intercompany Loan*" within the meaning of condition 5(b)(iv), entitling the Issuer to redeem Notes without paying a premium. The Issuer's position is that such a conclusion is entirely clear from the language of the provisions in question, regardless of considerations of commercial sense[1].

20. The immediate difficulty with that contention is that clause 17.20(a)(ii) plainly does not impose any obligation on the Borrower to make a prepayment. Other provisions in the ICLA, which do require the Borrower to make mandatory prepayments to the Issuer in specified circumstances, use the word "shall". For example, clause 14 provides that if the transaction becomes illegal, the Borrower "*shall repay the loans in full*" and clause 17.17(h) provides that proceeds of insurance received on the total loss of an unlet building "*shall be used to prepay the Loans"*. In contrast, clause 17.20(a)(ii) contains no imperative wording, but is stated to apply "*if … the Borrower makes a prepayment of the Loans in an amount sufficient ….*". Far from imposing a mandatory requirement to make a repayment, the clause is quite obviously providing the Borrower with an option to make a repayment in order to obtain a release of a Mortgaged Property. The optional nature of the repayment is all the clearer because clause 17.20(a) provides that security will also be released if the Borrower (or another Obligor) provides alterative security by way of cash deposit (17.20(a)(iii)A) or substitutes another property for the Mortgaged Property (17.20(a)(iii)B).

21. The Issuer argues that, although the Borrower's use of clause 17.20(a)(ii) is optional, a repayment under that clause is nonetheless "*a mandatory*

[1] The Issuer also maintains that the construction for which it contends is consistent with considerations of commercial common sense, as discussed in paragraph 42 below.

prepayment … as a result of a release of a Mortgaged Property" because the prepayment will necessarily be made out of the proceeds of sale of the property, effectively simultaneously with the release of the security, the Borrower being obliged to use the specified part of the proceeds to effect the prepayment (and not being obliged to use any surplus). However:

i) whilst it is highly likely that a prepayment under clause 17.20(a)(ii) will, in practice, be made from the proceeds of sale of the Mortgaged Property in question (particularly given that the Borrower is an SPC), there is no such limitation to be found in the clause itself. The Borrower is contractually entitled to make a prepayment (whether sourced from cash, other borrowing or the surplus on the sale of other Mortgaged Properties) to obtain a release and is not obliged to sell the property after its release. The Issuer cannot contend that such prepayments would be "*mandatory*". Yet it would make no sense for some prepayments under clause 17.20(a)(ii) to be regarded as optional (and give rise to a premium on consequent redemption of Notes) and some as mandatory (requiring no premium), depending on how the prepayment was funded or structured;

ii) in any event, the phrase "*a mandatory prepayment of part of the [ICLA]*" in condition 5(b)(iv) must be referring to a contractual obligation to make the repayment under the terms of the ICLA, an obligation which does not arise under clause 17.20(a)(ii) as explained above. In the situation to which the Issuer refers, where the prepayment is made out of the proceeds of sale of the Mortgaged Property at the moment the security is released, the obligation to use those proceeds to repay the Issuer is not derived from the terms of the ICLA but from the obligations undertaken by the parties to the conveyancing transaction in the usual way. Whilst the Borrower may be obliged to use the proceeds to make a prepayment, the obligation is to use them to make a prepayment under the ICLA that it has already elected to effect, not one it was contractually bound to make.

22. It follows that I do not accept that a prepayment pursuant to clause 17.20(a)(iv) of the ICLA can properly be described as a "*mandatory prepayment of part of the [ICLA]*". On the contrary, the prepayment referred to in that clause appears to be a voluntary prepayment which will result in security being released if the further specified conditions are met. Voluntary prepayments are permitted under clause 7.1 of the ICLA, provided that the Borrower also pays a prepayment premium equal to all additional amounts due on early redemption of the Notes under clause 5: it is common ground that condition 5(c), dealing with optional redemptions and providing for the payment of a premium, applies in respect of redemptions with the proceeds of voluntary prepayments.

23. The Issuer contends, nevertheless, that numerous other factors demonstrate that condition 5(b)(iv) must be taken as referring to clause 17.20(a)(ii) and should be so construed, even if the word "*mandatory*" is strictly inapposite.

24. First, the Issuer argues that condition 5(b)(iv) and clause 17.20(a)(ii) are clearly interrelated as a matter of subject-matter and language. Both deal with prepayment of the ICLA in the context of the release of a Mortgaged Property from security and (the Issuer submits) the language of condition 5(b)(iv) appears deliberately to track clause 17.20(a)(ii): it is said that "*arise from or as a result of the release of a Mortgaged Property*" in condition 5(b)(iv) echoes "*in connection with the release of any Mortgaged Property*" in clause 17.20(a)(ii). I see little force in such arguments, based as they are on broad impression rather than substantive meaning. The substance of the provisions seems quite different, and not only because clause 17.20(a)(ii) is dealing with an optional prepayment and condition 5(b)(iv) refers to a mandatory prepayment. It is also clear that clause 17.20(a)(ii) sets out a mechanism whereby a prepayment triggers a release of security, whereas condition 5(b)(iv) is dealing with a prepayment which arises from or is the result of a release of security: the provisions are superficially similar but, on closer analysis, would seem to relate to very different situations.

25. Second, the Issuer submits that, if condition 5(b)(iv) is not intended to apply to a prepayment under clause 17.20(a)(ii) of the ICLA, it is not clear to what else it could have been intended to apply: the Issuer says that the clause would be rendered redundant. The Representative Noteholders refute that submission by pointing to the fact that mandatory repayments are required where performance of any obligations under the ICLA or the Finance Documents becomes illegal (clause 14) or all or part of a Mortgaged Property is compulsorily purchased (clause 17.23): there is no provision in the Conditions other than condition 5(b)(iv) which requires the Issuer to use the proceeds of such mandatory prepayments to redeem the Notes.

26. The Issuer's argument in response is that neither clause 14 nor clause 17.23 refers to the release of security at all, still less to a prepayment "*arising from or as a result of*" the release of security, and neither clause is referred to in the clause of the Composite Debenture relating to release of security (17.3), which refers solely to clause 17.20 (and, further, that condition 5(b)(iv) itself refers to a release from security created by the Composite Debenture). Whilst those points are accurate, it nevertheless seems clear that mandatory prepayments arising under clause 14 or 17.23 would arise in situations where security (created by the Composite Debenture) will be released and that such repayments must fall within condition 5(b)(iv), removing any force in the Issuer's argument that the condition would redundant if it does not refer to clause 17.20(a)(ii). On any basis, the mandatory prepayments under clauses 14 and 17.23 would seem to fall within condition 5(b)(iv) far more naturally than a voluntary prepayment engaging clause 17.20(a)(ii).

27. The Issuer further points out that clause 17.23 (compulsory purchase) was not present in the original version of the ICLA in June 2000 (having been added at the time of the second issue of Notes in 2002), submitting that that adds to the likelihood that condition 5(b)(iv) was designed from the outset to provide for prepayments under clause 17.20(a)(ii) and therefore must still be so construed. However, it is clear that the original version of the ICLA intended to deal with the possibility of compulsory purchase of all or part of a Mortgaged Property,

making the same an event of default (if it has a Relevant Material Adverse Effect): the omission of a provision requiring the proceeds of any such purchase to be repaid to the Issuer would seem to be an obvious omission, not surprisingly cured when the ICLA was first revised. I do not consider that the original omission of what became clause 17.23 provides any real support to the Issuer's argument.

28. Third, the Issuer contends that it is only if condition 5(b)(iv) applies (expressly providing that the Issuer shall be obliged to apply the proceeds of a mandatory repayment to redeem Notes) that the Issuer would be under an obligation to apply the proceeds of a prepayment made to obtain a release of a Mortgaged Property under clause 17.20(a)(ii). Absent that obligation, the Issuer submits, the highly unsatisfactory situation would arise in which security would be released but the proceeds of the Mortgaged Property, once prepaid to the Issuer, could simply be held by the Issuer: condition 5(c) does not impose an obligation on the Issuer to redeem but merely an option to do so. Mr McGhee QC, leading counsel for the Issuer, submitted that this was the strongest factor indicating that condition 5(b)(iv) applies to a prepayment under clause 17.20(a)(ii). However, both clause 7.1 and clause 17.20(a)(ii) of the ICLA provide that the Borrower shall pay the Issuer all amounts payable by the Issuer in connection with the repayment of the Notes, including under condition 5. Those provisions only make sense if (and give rise to an obvious implied term that) the Issuer is to use the sums so paid by the Borrower to redeem Notes (the implication being all the more obvious as the Issuer, an SPC, has no interest in holding the proceeds). As all relevant parties, including the Trustee, are parties to the ICLA, there appears to be no doubt that the Issuer could be required to use proceeds of a prepayment under clause 17.20(a)(ii) to effect a redemption under condition 5(c).

29. Fourth, the Issuer points to the fact that clause 17.20(a)(ii) does not expressly refer to a premium being payable, pointing to the fact that clause 7.4(b) of the ICLA provides that all prepayments shall be made, unless the contrary is stated in the provision governing the relevant prepayment, without premium or penalty. Although the clause does refer to an obligation to pay "*any other amounts payable by the Issuer in connection with the redemption of the Notes (including, without limitation, pursuant to Condition 5 of the Notes)*", the Issuer further points to the fact that other sums may be payable under condition 5, including those required by the obligation to redeem Fixed Rate Notes in multiples of £100,000. However, the simple answer is that clause 17.20(a)(ii) is referring to a situation where the Borrower makes a voluntary prepayment within clause 7.1 which satisfies the further requirements set out in clause 17.20(a)(ii). It is clause 7.1 which "governs" the Borrower's right to make a prepayment and that provision expressly provides for a premium to be paid.

30. Fifth, the Issuer refers to clause 7.1(e) of the ICLA, which provides:

> "*The Borrower may make prepayments of any Loan in the manner and the amounts described in Clauses 17.17 (Insurances), paragraph (a) of 17.20 (Substitution,*

release and addition of new Mortgaged Property) and 17.23 (Compulsory Purchase)."

The full purpose and effect of that provision, located in the clause dealing with voluntary prepayments, is difficult to determine given that clauses 17.17(h) and 17.23 both impose obligations on the Borrower to make mandatory prepayments. The Issuer suggests that the inclusion of clause 17.20(a) in clause 7.1(e) indicates that a prepayment pursuant to clause 17.20(a)(ii) is also to be regarded as mandatory. I see little or no force in that submission. On the contrary, the inclusion of clause 17.20(a) in the clause dealing with voluntary prepayments, expressly stating that the Borrower may make such a repayment, would seem to provide strong support for the view that a prepayment under clause 17.20(a)(ii) is not mandatory. The inclusion of references to the other two clauses in that provision would seem to be the incongruity (and it should be remembered that there was no reference to clause 17.23 in the original draft), one which there is no need to extend to the clause which seems to be appropriately included.

31. It follows that I am satisfied that the language used by the parties is clear and unambiguous. A prepayment made under clause 17.20(a)(ii) of the ICLA is a voluntary prepayment within clause 7.1, resulting in an optional redemption of Notes under condition 5(c). It is not a mandatory prepayment within the meaning of condition 5(b)(iv)[2].

32. Nevertheless, for the sake of completeness and by way of a cross-check of my conclusion as to the meaning of the relevant provisions, I propose to consider the parties' respective arguments as to the commercial sense of the relevant provisions relating to when premium is or is not payable on redemption of the Notes.

The commercial sense of the provisions

33. The commercial purpose and effect of the securitisation is to provide the CW Group (through the Issuer and the Borrower) with long-term finance on the security of its real property (no doubt intended at the date of its inception to be cheaper than other forms of borrowing) whilst providing the holders of Fixed Rate Notes with the specified fixed rate of return at regular intervals over the same lengthy period (until October 2033 in the case of the Class A1 Noteholders).

34. It would make a nonsense of that structure and would undermine the value and benefit of the long-dated Notes (and therefore the viability of the securitisation itself) if the Issuer could redeem them at par at any time (for example, if movements in interest rates made borrowing by means other than the ICLA more attractive).

[2] The Representative Noteholders sought to bolster their arguments as to the construction of the relevant provisions by reference to statements made in the Offering Circulars published prior to the issue of Notes. The Issuer contended that those references were inadmissible parol evidence. Given that I have determined the question of construction in the Representative Noteholders' favour, it is unnecessary for me to consider this further issue.

35. It is therefore not in the least surprising that the ICLA and the Conditions make provision to ensure that the holders of long-dated Fixed Rate Notes cannot be deprived of the long-term value of their investment without being fully compensated (or even over-compensated) at the expense of the CW Group: a premium calculated on the basis of the cost of Treasury Stock producing the same yield as the Notes has that effect.

36. It is also not surprising that the central provision relating to the premium and its calculation is contained in condition 5(c), dealing with "*Optional Redemption*". Consistent with the above reasoning, the Issuer must be required to pay a premium if it is to be permitted to choose to redeem Fixed Rate Notes (for instance, with a voluntary prepayment by the Borrower under clause 7.1 of the ICLA).

37. Beyond the core case of a voluntary prepayment and optional redemption, the Representative Noteholders contend that there is a clear and logical distinction between the situations in which a premium is payable and those where it is not. They say that a premium is payable where a prepayment of the indebtedness by the Borrower (and subsequent redemption of the Notes by the Issuer) results from matters within the CW Group's control or otherwise results from some fault of the CW Group. In those circumstances the Fixed Rate Noteholders are given a premium on redemption. In contrast, where the prepayment results from matters out of the CW Group's control and not its own fault, no premium is payable.

38. In this regard the Representative Noteholders point to the fact that a premium is payable not only where there is a voluntary prepayment (as above), but also if sums are prepaid following the enforcement of security against the Borrower (clause 7.5 of the ICLA and condition 5(b)(ii)). In contrast, no premium is payable where there has been a total insurance loss (clause 17.17(h) and condition 5(b)(iii)) or where the Borrower is entitled to prepay because of a change in tax law (clause 7.3 and condition 5(e)). Neither is there any suggestion that a premium is payable in cases of prepayments in cases of illegality (clause 14) or compulsory purchase (clause 17.23), the Representative Noteholders' case being that those clauses relate to condition 5(b)(iv).

39. The Issuer does not accept the distinction proposed by the Representative Noteholders, making the following points:

    i) that condition 5(c) does not provide for the payment of a premium upon the optional redemption of Floating Rate Notes (although there was initially an uplift for a short period). But, self-evidently, the interests of the holders of Floating Rate Notes in retaining those Notes is considerably less than the interests of the holders of Fixed Rate Notes in retaining their long-term rights;

    ii) that no premium is payable where prepayment follows on compulsory purchase (clause 17.23 of the ICLA), notwithstanding that it may be an event of default under the ICLA. Whilst that is correct, it remains the

case that the actions of the purchasing body would be outside the control of the CW Group;

iii) that no premium is payable where prepayment results from obligations of the Issuer becoming illegal (clause 14 of the ICLA), even though the Issuer has the option whether to give notice triggering the provision, something plainly within its control. However, whilst giving the Issuer an element of control, the underlying reason for the prepayment is outside its control and is not its fault. The basic rationale of the distinction holds good;

iv) that no premium is payable where prepayment results from a change in tax laws (clause 7.3 of the ICLA), despite the Borrower having the option whether to serve a notice of prepayment and cancellation. But, as with clause 14, the underlying reason for the prepayment is a factor outside the CW Group's control.

40. The Representative Noteholders further point to the fact that, if the sale of a Mortgaged Property would not increase the loan to value ratio above 80%, so that the security can be released without a prepayment under clause 17.20(a)(i), the use of any proceeds of the subsequent sale of the Mortgaged Property to prepay the loans and redeem Notes would require the payment of a premium. It would be bizarre, they argue, if release and sale of a Mortgaged Property where the resulting loan to value ratio was below 80% would result in a premium being payable, whereas if the resulting loan to value ratio would be above 80%, no premium would be payable. Indeed, the question would arise as to whether the Borrower could use clause 17.20(a)(ii) to avoid paying a premium even if the loan to value ratio was below 80%.

41. If, as I consider is clearly established, the distinction identified by the Representative Noteholders is valid, it is clear that a prepayment under clause 17.20(a)(ii) falls into the first category, where a premium is payable. It results from a decision to obtain a release of a Mortgaged Property which is entirely within the control of the CW Group. Indeed, in circumstances where property prices have risen, the CW Group could use clause 17.20(a)(ii) to sell every Mortgaged Property: if no premium is payable on such a sale it would permit the CW Group to unwind the entire securitisation at any time at par, exactly the scenario which runs counter to the commercial purposes of the securitisation as explained above.

42. The Issuer's counter argument is that, as the CW Group's business consists of holding, managing and developing property, it makes good commercial sense that it should be permitted to sell one of its assets forming part of the securitisation without having to pay a substantial premium. I do not accept that view of the purposes and effect of the securitisation. In entering the transaction the CW Group leveraged its real property, using it as security to obtain long term finance by selling long-dated Notes, agreeing to pay interest funded by the income streams from its properties. It is inconsistent with that structure and its purpose that the CW Group should be free to sell any or all of those properties whenever it wishes and simply redeem the Fixed Rate Notes secured upon them at par.

Conclusion

43. For the reasons set out above, I find against the Issuer, both as a matter of the language of the relevant provisions and on the basis of the commercial sense of those provisions and of the transaction as a whole. I conclude that the redemption of Fixed Rate Notes using the proceeds of a prepayment made by the Borrower to obtain the release of security over a Mortgaged Property pursuant to clause 17.20(a)(ii) of the ICLA is an optional redemption pursuant to condition 5(c), requiring the payment of a premium in accordance with that condition.

44. The Representative Noteholders and the Trustee are entitled to a declaration to the above effect and also to a declaration that, in relation to the sale of HQ5, the amount of £168,746,800 plus accrued interest is payable to the holders of the Class A1 Notes.