

GHG Theatre Hospitals: Voting rights and disenfranchisement of issuers and sellers in the capital markets

In *Citicorp Trustee Company Ltd v. Barclays Bank PLC & Ors* [2013] EWHC 2608 (Ch) (the "**GHG Theatre Hospitals**" case) the High Court took a novel approach to ensuring that all interested parties to a transaction were bound by the judgment. Apparently of its own motion, the court had a junior noteholder identified and joined to the case as a representative of its class. Although it took no part in the proceedings, the class is now bound by the judgment. The court also confirmed that common provisions disenfranchising notes held by the Issuer and Seller in a securitisation work as drafted and confirmed that contracts conferring an economic interest in securities (including the right to direct votes) are not effective to transfer beneficial ownership.

The GHG Theatre Hospitals case was a much-watched case in the capital markets (and particularly the structured debt markets) because it considers note disenfranchisement provisions. These are terms standard in such transactions, and prevent anyone holding notes by or on behalf of the Issuer, the Seller and their group companies from voting those notes or using them to direct the Trustee.

In the event, the result was reassuring for most of the capital markets community. The court gave effect to the terms of the contracts as drafted without a great deal of analysis. Barclays (who was a Seller, but also played a number of other roles on the transaction) was not disenfranchised because it did not hold its notes *in its capacity as* Seller. The court also rejected an argument that beneficial ownership was somehow transferred

as a result of contracts providing credit protection to the noteholder and giving the providers of that protection the right to direct the votes attaching to the notes.

The more interesting aspect of the case was the technique by which Mr Justice Peter Smith chose to ensure that all interested parties were bound by his judgment. Essentially, faced with a number of parties (including the junior noteholders) who had refused to take any part in the proceedings, Smith J forced the issue.

His approach in relation to the junior noteholders is an express development of that taken by the then Chancellor of the High Court (Sir Andrew Morritt) in *State Street Bank & Trust Company v. Sompo Japan Insurance Inc & Ors* [2010] EWHC 1461 (Ch). In that case, the Trustee was required to present any

Key issues

- The courts will take steps to ensure that noteholders of all classes are both represented in disputes and bound by the judgment in a case.
- Market standard disenfranchisement provisions will be enforced as drafted, including distinctions as to the capacity in which an entity holds notes.
- Beneficial ownership in a security requires a proprietary right therein, not merely a contractual right to direct associated votes or a right to an economic interest in it.

arguments reasonably available to classes of noteholders not represented in the proceedings in order that the court should have the benefit of those arguments when coming to a decision (see our full briefing on the case [here](#)).

In GHG Theatre Hospitals, Smith J was concerned, however, that junior noteholders should not be able to sit idly by whilst their case was being argued by the Trustee, secure in the knowledge that they could simply reargue the case on a later date if things did not go their way. As a result, he ordered that the Servicer be joined in order to identify a junior noteholder to the court, ordered that that junior noteholder be joined anonymously as a representative of the class of junior noteholders and gave them an opportunity to make arguments. He also dispensed with the need for them to file an acknowledgment of service, meaning that even a complete refusal to participate in any way would not prevent the case going ahead and the judgment binding the class. The junior noteholders did not, in the end, participate.

A similar approach was taken in respect of Ambac, who had provided some credit protection to both Barclays and Rabobank in their capacities as noteholders. Ambac later chose to participate fully in the proceedings.

This development in the High Court's approach to non-participating noteholders appeared in GHG Theatre Hospitals to be at least partly motivated by the parties' need for certainty in respect of the approval of a restructuring of the loan underlying the securitisation. That, in turn, suggests that the English Courts are continuing to take a practical and business-oriented approach to the resolution of disputes that come before them.

Accordingly, the extent to which an entity, such as a Seller which holds notes, will be disenfranchised may be more limited than apparent from a cursory reading of the transaction documents.

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