In the first four months of 2016 three more judgments relating to issues of contractual interpretation of provisions contained in documents of securitisation transactions (all three of them for legacy CMBS deals) and involving the trustees for each of such securitisation transactions were issued by the English courts: (i) Canary Wharf Finance II Plc v Deutsche Trustee Company Ltd and others [2016] EWHC 100 (Comm) (28 January 2016), (ii) Hayfin Opal Luxco 3 S.A.R. L. and another v Windermere VII CMBS plc and others (for the purposes of this article, "Windermere VII") [2016] EWHC 782 (Ch) (8 April 2016) and (iii) Credit Suisse Asset Management, LLC v Titan Europe 2006-1 PLC and others, Credit Suisse Asset Management, LLC v Titan Europe 2006-2 PLC and others, Credit Suisse Asset Management, LLC v Cornerstone Titan 2007-1 PLC and Credit Suisse Asset Management, LLC v Titan Europe 2007-2 PLC (for the purposes of this article, "the Titan cases") [2016] EWHC 969 (Ch) (28 April 2016).

In each of the three cases the relevant trustee was one of the defendants. The Part 8 proceedings were initiated either by the issuer or by the holder of the Class X Note or, in the Titan cases by the investment manager of the fund that held the Class X Note.

General principles of contractual interpretation

Before we begin examining each of the aforementioned judgments, we believe that it may be helpful to set out a summary of the general principles of contractual interpretation under English law. Understanding and appreciating such general principles is essential in assisting the trustee to perform an initial assessment of any issues relating to contractual construction presented to it by the issuer, a noteholder or any other transaction party and to determine whether it should be seeking the opinion of leading counsel on the relevant matters (and will also help the trustee to formulate the questions that it will be asking such counsel) or, alternatively, whether (in consultation with all other relevant parties and on the condition that it...
is comfortable that it is not at risk of any costs) it should be initiating Part 8 proceedings.
Knowledge of the general principles of contractual interpretation is also helpful in case the
issuer, a noteholder or any other transaction party want the trustee to be joined in Part 8
proceedings as a defendant (as was the case in all the three cases reviewed in this article) in
order for the trustee to be bound by the court's decision.

The general principles of contractual interpretation have been set out in a series of high profile
cases, such as Investors Compensation Scheme Ltd v West Bromwich Building Society
([1998] 1 WLR 896), Attorney-General of Belize v Belize Telecom Ltd ([2009] 1 WLR 1988),
Chartbrook Ltd v Persimmon Homes Ltd ("Chartbrook") ([2009] 1 AC 1101), Re Sigma
Finance Corporation ("Sigma") ([2010] 1 All ER 571), Rainy Sky SA v Koomkin Bank ("Rainy
Sky") ([2011] 1 WLR 2900), Napier Park European Credit Opportunities Fund Limited v
Harbourmaster Pro-Rata CLO 2 BV ([2014] EWCA Civ 984), Arnold v Britton ([2015] 2 WLR
1593) and Marks and Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd
("M&S v BNP") ([2015] 3 WLR 1843).

It is generally accepted that the aim of contractual interpretation is to determine what the
parties meant by the language used, which involves ascertaining what a reasonable person
having all the background knowledge, which would 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 (Lord Hoffmann in Chartbrook, par. 14). If the language used by the parties has
more than one potential meaning, the court is entitled to prefer the construction which is
consistent with business common sense. However, where the language used by the parties is
unambiguous, the court must apply such language and cannot re-write it in order to make the
contract conform to business common sense (Lord Clarke in Rainy Sky, par. 21 and 23). 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" (Lord Mance in Sigma, par. 12, approving Lord Neuberger's dissenting
judgment in the Court of Appeal).

All three of the recent judgments examined in this article place particular importance on Lord
Neuberger's views set out in Arnold v Britton. In Windermere VII and in the Titan cases, the
judges referred to Lord Neuberger's observation that the meaning of the relevant words has to
be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other
relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract],
(iv) the facts and circumstances (i.e. the background or matrix of fact) known or assumed by
the parties at the time that the document was executed (with the judges in *Windermere VII* and in *the Titan cases* noting that in cases involving traded financial instruments such matters are obviously far less relevant than in the case of a bilateral contract and referring also to Lord Collins' views on this particular matter as set out in *Sigma*, par. 37) and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions (Lord Neuberger in *Arnold v Britton*, par. 15).

Nevertheless, the judges in *Canary Wharf Finance II Plc v Deutsche Trustee Company Ltd and others* and in *Windermere VII* also referred to Lord Neuberger's warning that "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" (Lord Neuberger in *Arnold v Britton*, par. 17). Commercial common sense is not to be invoked in order for the courts to depart from the natural meaning of the language used by the parties and re-write the contracts instead of interpreting them. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.

**Canary Wharf Finance II Plc v Deutsche Trustee Company Ltd and others**

**Optional redemption of fixed rate notes and the application of a Spens clause**

In this case the High Court had to consider the issue whether the redemption of fixed rate notes with the proceeds of a prepayment of sums due under an intercompany loan agreement following a release of a mortgaged property fell within the mandatory or the optional redemption category as set out in the conditions of the notes.

The distinction had significant consequences. If the redemption fell within the mandatory redemption category, the issuer would redeem the notes by payment of their principal amount outstanding (plus accrued interest). If the redemption fell within the optional redemption category, the issuer would pay the higher of (i) the principal amount outstanding of the notes 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). As treasury stock would generally be more secure than the notes, the price of stock that would produce the same rate of return would be significantly higher than the principal amount outstanding in respect of the notes and the difference may be regarded as a premium,
which sometimes is referred to as a "Spens" payment.

The issuer initiated Part 8 proceedings and sought a declaration that the redemption following the release of the mortgaged property in question (10 Upper Bank Street) fell in the mandatory redemption category. The issuer sought a further declaration that, whenever the borrower obtained a release under the same provisions of the intercompany loan agreement, the relating redemption of fixed rate notes would fall in the mandatory redemption category. Representative noteholders opposed to the relief sought by the issuer and sought declarations to the opposite effect. The trustee supported their stance and also sought declarations to the opposite effect.

The judge concluded that, 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, 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 was an optional redemption requiring the payment of a premium.

The judge was satisfied that the language used by the parties was clear and unambiguous, but he also considered the parties' respective arguments as to the commercial sense of the provisions relating to when premium is or is not payable on redemption of the notes. We do not entirely agree with the judge on this point. The aforementioned language does not seem to be entirely clear and unambiguous and that was exactly the reason why the judge had in fact to construe such language in order to ascertain its true meaning. It is true that the judge did not have to assess the meaning of the relevant language in light of its commercial sense (and he only did that in the final part of his judgment for the sake of completeness); that said, in the rest of his judgment he did have to use arguments based on the natural and ordinary meaning of the relevant provisions, their relationship to other provisions in the transaction documents and the overall purpose of the relevant language and the transaction documents.

In any event, the judge did reach the right conclusion and such conclusion was further corroborated by a very thorough analysis based on the commercial sense of the relevant provisions. According to the judge, 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 borrower's group control or otherwise results from some fault of such group. In contrast, where the prepayment results from matters out of the group's control and not its own fault, no premium is payable. For example, no premium is payable where there has been a total insurance loss or where the borrower is entitled to prepay because of a
change in tax law or in case of prepayments where the transaction has become illegal or a mortgaged property has been compulsorily purchased. On the contrary, in case of a voluntary prepayment in order for the borrower to obtain a release of a mortgaged property, the subsequent redemption of the notes by the issuer is an optional redemption, because the decision to obtain a release of a mortgaged property is entirely within the control of the group.

Windermere VII

The issues before the court (set out in a Part 8 Claim) concerned the correct computation of the payments that had to be made to the holder of the Class X Note on two sample quarterly interest payment dates.

The claimants were the holders of the Class X Note. The first defendant was the issuer and the other defendants were the trustee and the cash manager that took a neutral stance in the argument. Since acquiring their interest in the Class X Note and the Class B Notes, the claimants had advanced a number of arguments as to how the amounts payable on the Class X Note should have been calculated and had contended that the amounts paid by the issuer on the Class X Note had been inadequate.

The judge also had to consider the following compelling issues: if there had been underpayments in respect of the Class X Note in the past, would such unpaid amounts carry interest and if so, at what rate? And would such underpayments constitute an event of default in relation to the notes, with the result that the trustee would be entitled or obliged to serve a note enforcement notice in respect of the notes?

Correction by construction and implication of terms into an agreement

One of the arguments advanced by the claimants in order to support their contention that the amounts paid by the issuer on the Class X Note had not been adequate related to the correction by construction or alternatively the necessary implication by the addition of further words to certain definitions in the relevant intercreditor agreement.

Correction by construction can be viewed as a specific aspect of the singletask of interpreting an agreement in its context in order to get as close as possible to the meaning which the parties intended. In relation to the conditions that have to be satisfied in order for a correction to be made as a matter of construction, the judge referred to the process of interpretation discussed by Lord Hoffmann in Chartbrook. First, there must be a clear mistake on the face of the instrument, but also taking into consideration the relevant background and context; and secondly, it must be clear what correction ought to be made in order to cure the mistake (Lord
In relation to the requirements for implication of terms, the judge referred to the strict conditions recently set out by the Supreme Court in *M&S v BNP*. In that case Lord Neuberger restated the law as to implied terms at par. 16-21 and noted, amongst others, that a term can only be implied if it is necessary in the business sense to give efficacy to the contract (with reference to Scrutton U in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605). *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying (with reference to MacKinnon U in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227). On the subject of implied terms, it has also been rightly noted that a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed to it if it had been suggested to them; a term can only be implied if, without the term, the contract would lack commercial or practical coherence. Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of high profile judgments (Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, Lord Wilberforce, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v Irwin* [1977] AC 239, 254, 258, 262 and 266 respectively, Baroness Hale JSC in *Geys v Societe Generale* [2013] 1 AC 523, par. 55 and Lord Carnwath JSC in *Arnold v Britton*, par. 112).

In *M&S v BNP*, Lord Neuberger also referred to the additional conditions that have to be satisfied for a term to be implied, according to Lord Simon of Glaisdale's views as set out in the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 180 CLR 266, 282-283 (such term must be reasonable and equitable, capable of clear expression and must not contradict any express term of the contract) and to the reservations expressed by Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* ("*Philips*") [1995] EMLR 472, 481, where Bingham MR noted that it may well be doubtful whether an omission was the result of the parties' oversight or of their deliberate decision (Bingham MR's approach in *Philips* was consistent with his reasoning (as Bingham U) in the earlier case of *Atkins International HA v Islamic Republic of Iran Shipping Lines* [1987] 2 Lloyd's Rep 37, 42).

Finally, in the same case, Lord Neuberger went on to consider (in par. 25-28) the relationship between the processes of interpretation (which, as already mentioned, also includes correction by construction) and implication of terms: "it is fair to say that the factors to be taken
into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed..."

Nevertheless, on this particular point we would tend to agree with Lord Carnwath, who (in his dissenting opinion in *M&S v BNP*) referred to Lord Hoffmann’s views set out in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, where Lord Hoffmann emphasised (in par. 19) that the process of implication is part of the process of construction of the contract: "the proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority".

In practical terms, irrespective of whether the result of the process by which the court supplies the missing words or terms is characterised as the result of the process of correction of mistakes by construction or as the result of the process of implications of terms, the test that must be satisfied in order for such result to be satisfied is a strict one: the court will only add words to the express terms of an agreement if it is necessary to do so because the agreement is incomplete or commercially incoherent without them.

For the reasons identified in the aforementioned judgments the judge in *Windermere VII* noted that it would very difficult for the court to be confident to add words to the definitions under consideration. In fact, it was impossible for the court to reach a clear conclusion that the parties would, if asked at the time of contract, have adopted the additional wording suggested by the claimants and such uncertainty (on the basis of the authorities referred to above) was fatal to the contention that the alleged mistake could be corrected by construction or that the claimants’ additional wording could be implied.

**Other arguments relating to the alleged incorrect computation of the payments to the holder of the Class X Note**

The claimants also argued that, as a matter of construction, for the purpose of determining the amount of interest due and payable on the Class X Note on the January 2015 payment date, (i) default interest payable by the relevant borrower (i.e. the borrower under the *Nordostpark* mortgage loan) should have been included in the calculation of interest due and payable on the Class X Note and (ii) the payment of servicing fees should not have reduced, to the extent
of such fees, the amount of interest due and payable on the Class X Note. Therefore, the issuer's calculations of interest due and payable on the Class X Note were wrong. The judge concluded that default interest should not have been included in the calculation of interest due and payable on the Class X Note and that the amount of interest due and payable on the Class X Note should have been reduced by the prior payment of servicing fees. Therefore, the claimants' calculation of the interest amount due and payable on the Class X Note on the January 2015 payment date was not correct.

Furthermore, the claimants argued that, as a matter of construction, for the purpose of determining the amount of interest due and payable on the Class X Note on the October 2015 payment date, the capitalisation of unpaid interest on another mortgage loan (i.e. the Adductor mortgage loan) should not have had the effect of reducing, to the extent of such capitalisation, the amount of interest due and payable on the Class X Note, and that therefore the issuer's calculations of interest due and payable on the Class X Note were wrong. The judge concluded that the issuer was correct to reduce the amount of interest due and payable on the Class X Note on the October 2015 payment date by taking account of the capitalisation of interest.

For the aforementioned reasons, the judge did not consider that there had been an underpayment of the interest amount due and payable on the Class X Note on the two sample payment dates.

**Interest on unpaid Class X Note interest**

Although the judge decided that there had been no historic underpayment of Class X interest, he went on to express his *obiter* view on the issue as to whether any amounts of historic unpaid Class X interest would accrue interest and, if so, at what rate.

The judge agreed with the issuer's argument that no monies were payable unless and until the cash manager had actually determined the Class X interest rate and the Class X interest amount. Since the cash manager's determinations would not have included any higher amounts alleged to have been miscalculated, those higher amounts would not have actually become due and payable and therefore they would not have accrued interest.

Finally, on the issue whether a Class X noteholder would have any remedy in the event of a miscalculation and consequent underpayment of amounts that ought to have been paid, the judge accepted that the trustee could, in the absence of agreement as to how to remedy the situation, and subject to the provisions for finality of such determinations and the general
limitations on recourse in the CMBS structure, bring proceedings for breach of contract under which it would be entitled to claim interest pursuant to statute to compensate the noteholders for being kept out of the monies that should have been paid.

Underpayment and events of default

The judge also expressed his obiter view on the issue as to whether, if there had been an underpayment of Class X interest, any such underpayment would have constituted an event of default under the conditions of the notes.

As already mentioned, the judge noted that the only Class X interest amounts that became due and payable on each payment date were those determined to be due and payable by the cash manager. Accordingly, even if there had been a miscalculation and underpayment of a Class X interest amount, that would not have been an event of default in respect of the notes. The judge noted that it would not be logical for the transaction parties to be taken to have intended to create a scenario where "an Event of Default could accidentally occur because of a simple miscalculation of the amount of interest payable, without the fact being appreciated by anyone, and then be incapable of cure at a later date when it was discovered, no matter how solvent the structure might be".

However, it seems that the judge's views that unpaid interest on the Class X Notes would not accrue interest and that any underpayment of such interest would not have constituted an event of default should be approached with a great degree of caution, not only because they are obiter dicta, but also because they do not seem readily reconcilable with the judge's view that a Class X noteholder would be able to bring proceedings for breach of contract in order to remedy the situation arising as a result of a miscalculation and consequent underpayment of amounts that ought to have been paid (subject to the specific terms of each deal documentation, would breach of contract not mean breach of the issuer's obligations under the documents, which would constitute an event of default?). In any event, it would be difficult to accept that a miscalculation and subsequent underpayment of interest payable to a noteholder (whether a holder of a regular note or a holder of a Class X Note) can be viewed just as a simple issue, especially without reference to the particular facts and causes that resulted in such miscalculation and subsequent underpayment. Therefore, it would not be prudent to deploy the judge's obiter views on these two issues in an argument in future cases where, almost inevitably, the wording of the relevant instruments and the surrounding matrix of fact will not be identical. This last contention was very eloquently illustrated by the judge in the final judgment that will be reviewed in this article.
The Titan cases

This judgment relates to four sets of proceedings. The documents constituting the four transactions were materially the same and each set of proceedings raised the same issues of interpretation. Therefore, for convenience, the parties made submissions by reference only to Titan 2006-1. The claimant was the investment manager of a fund which held the Class X Note in each transaction.

Compared to the issues that were considered in Windermere VII, the issues that the judge was asked to consider in this case were more limited. We set out below the two key issues that are of interest for the purposes of this article. The trustee and the agent bank (whose responsibilities included calculating the interest due to the noteholders) were among the defendants in each action. The trustee took a neutral position on all the issues. On the first issue set out below the agent bank (which had always calculated Class X interest without taking into account default interest due under the loans) submitted that the answer was negative.

Taking account of any additional interest due under the loans following a default when calculating the Class X interest rate

The judge concluded that no account should be taken of additional interest following a default under the loans. The issue turned on the meaning of the words "the related per annum interest rate due on such Loan" in one of the relevant definitions in the conditions of the notes. The judge considered that several matters could reasonably lead the informed reader to understand that, giving the words their natural and ordinary meaning, "per annum interest rate" was not intended to include default interest. Such interpretation was most likely to carry the commercial outcome intended by the parties in the light of the admissible background facts, the overall scheme of the notes and the provisions contained in them and in the other transaction documents. The fact that the position could have been made explicit by using another language in the relevant definition did not carry any particular weight. As the judge pointed out, "it is always the case in disputes over the interpretation of contractual documents that the drafter could have made the position clearer".

Interest on unpaid Class X Note interest

Since this issue did not arise in view of his decision on the issue referred to in the previous paragraph, the judge decided not to weigh the arguments and express an obiter view on it. The judge was concerned that his obiter views might be deployed in future cases, where the
relevant instruments and matrix of fact will be different, thus creating more rather than fewer difficulties for a judge in such a case.

**Conclusion — certain considerations for trustees**

All of the three judgments reviewed in this article are important for transaction parties in securitisations and practitioners in this area of law. They offer clear guidance in relation to (i) the application of Spens clauses, which (subject of course to the particular terms of the documentation in each transaction) should apply in case of optional redemptions of notes by the issuer, where the relevant decision to redeem is entirely within the control of the issuer (or the relevant group of companies) and (ii) the calculation of interest due and payable on Class X Notes, where (subject of course to the particular terms of the documentation in each transaction) default interest payable by the relevant borrower should not be included in such calculation. In relation to the issues as to whether any amounts of historic unpaid Class X interest would accrue interest and whether such underpayment of interest would constitute an event of default, further guidance (in a case where the court would find that such underpayment had actually occurred) would be welcome.

**The process of interpretation from the trustee’s perspective**

In broad terms, it would be fair to state that in any post-closure matters where trustee's action is required, the trustee will either act in reliance on the noteholders' direction or it will be asked to exercise its discretion (in the latter case, mainly on the condition that it is satisfied that an amendment or a waiver would not be materially prejudicial to the interests of the noteholders or in order to consent to amendments of a minor or technical nature or to correct a manifest error). Contractual interpretation does not fall in either of these two categories: it is not possible for the trustee to be directed by the noteholders on matters of contractual construction (i.e. the noteholders are not in the position to direct the trustee on how a contractual clause should be interpreted); and the trustee cannot exercise its discretion and simply choose that interpretation of a clause that would not be materially prejudicial (or would be less prejudicial) to the interests of the noteholders either. Similarly, in case of a dispute between noteholders of different classes of notes over matters relating to contractual construction, the trustee cannot rely on the relevant provisions in the trust deed that, in case of a conflict between the interests of noteholders of different classes, would allow it to have regard only to the interests of the noteholders of the most senior class of notes, and thus enable it to choose the interpretation presented by the noteholders of such class.

In a case where the trustee is presented with an issue relating to a contractual interpretation
dispute and it is asked for its views on the matter, the trustee needs to take a proactive
stance, assess the particular situation and decide whether it will be seeking the opinion of
leading counsel on the matter or whether commencement of Part 8 proceedings is warranted.
Needless to say, the trustee's decision will be influenced by the issuer's and the other relevant
parties' stance on the matter (and in particular their willingness to participate in Part 8
proceedings). Therefore, constant engagement with the issuer and all other relevant parties is
of paramount importance. Of course, there are also cases (as was the case in all the three
cases that were reviewed in this article) where the trustee is requested to be joined in

Part 8 proceedings initiated by the issuer, a noteholder or any other transaction party. In those
cases, the trustee is afforded with a more limited scope of strategic choices.

Neutrality and reasonableness

In most of the cases relating to construction of a clause in a securitisation document, as far as
trustees are concerned, the real dispute is between other parties (i.e. disputes between the
issuer and the noteholders or disputes between different classes of noteholders) and the
trustee does not have a real economic interest as to the interpretation that is adopted.
Therefore, it is often said that the trustee is neutral as to the outcome of the construction
process. We think that it would be more accurate to distinguish between three different
scenarios: (i) the trustee is completely neutral as to the outcome of the construction process,
i.e. it does not have a real economic interest as to the interpretation that is adopted and it
does not need a direction as to what action it should be taking (and in such cases, if the other
relevant parties wish to initiate Part 8 proceedings, they will want the trustee to be joined in
order to be bound by the court's decision), (ii) the trustee does not have a real economic
interest as to the interpretation that is adopted, but it needs a direction as to what action it
should be taking (i.e. it is neutral as to the interpretation that is adopted, but it does need an
interpretation to be adopted); in such cases, it is more likely that the trustee will be issuing the
Part 8 proceedings (on the condition that it is comfortable that it will not be at risk of costs) and
(iii) although it does not have a real economic interest as to the interpretation that is adopted,
the trustee decides not to remain neutral and supports the stance of another party in the
proceedings (which was the case in *Canary Wharf Finance II Plc v Deutsche Trustee
Company Ltd and others*); it is more likely that the trustee will decide to support the stance of
another party in the proceedings where all the noteholders are in agreement as to the
interpretation that they want the court to adopt (as opposed to where there is a dispute
between different classes of noteholders as to the interpretation to be adopted, in which case
the trustee will most certainly remain neutral in their dispute). Of course, in order for it to
decide to support the noteholders’ stance, the trustee should be comfortable (having had the benefit of separate legal advice) that the interpretation proposed by them could be found by the court to be reasonable, i.e. their interpretation of the clause in question could be found to correspond to what a reasonable person having all the background knowledge, which would 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.

**Costs protection**

In case of a contractual interpretation dispute, the trustee would not want to be seen as incurring unnecessary costs, as it would then run the risk of not being able to recover such costs under the relevant provisions of the trust deed or being liable for the costs of the other parties in Part 8 proceedings.

Therefore, an effort for the parties to reach an agreement on the dispute without having to resort to the courts should be undertaken by the trustee. If that is proving difficult, the trustee may decide to consider seeking the opinion of leading counsel on the matter, in which case it should promptly inform the issuer of its decision so that it ensures that all relevant costs will be borne by the transaction. When the trustee is not able to obtain a clean opinion from counsel, it may have no other option than to initiate Part 8 proceedings (in consultation with all other parties that need to be involved).

Finally, it should be mentioned that a procedural tool available to trustees is a *Beddoe* application under Part 64 of the Civil Procedure Rules, by means of which the trustee asks for directions from the court as to whether to bring or defend proceedings (a *Beddoe* application was brought for example in *Citicorp Trustee Company Ltd v Barclays Bank PLC and others* [2013] EWHC 2608 (Ch)). The purpose of bringing a *Beddoe* application is for the trustee to obtain court approval for steps taken or to be taken in litigation. Such approval will afford the trustee costs protection.

**RELATED PRACTICES**

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