Neutral Citation Number: [2025] EWHC 1477 (Ch)

Case No: FL-2024-000021

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

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Monday, 16 June 2025

Before :

MR JUSTICE FANCOURT

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BETWEEN:

(1) CAXTON INTERNATIONAL LIMITED
(2) OCM LUXEMBOURG VOF SARL
(3) BOSTON PATRIOT ARLINGTON ST LLC
(4) NORTHLIGHT EUROPEAN FUNDAMENTAL CREDIT MASTER FUND
(5) MFM NORTHLIGHT EUROPEAN CREDIT OPPORTUNITIES
(6) SONA CREDIT MASTER FUND LIMITED
(7) SONA BLUE PEAK LTD
(8) SPARTA GLOBAL OPPORTUNITIES MASTER FUND LP

Claimants

- and –

(1) ESSITY AKTIEBOLAG (PUBL)
(2) ESSITY CAPITAL B.V.

Defendants

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Tom Smith KC and Annabelle Wang (instructed by **White & Case LLP**) for the **Claimants**
Sonia Tolaney KC and Tom Foxton (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 6, 7 May 2025

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APPROVED JUDGMENT

(circulated 10 June 2025)

Mr Justice Fancourt:

Introduction

1. This application raises a short but potentially important question about whether, and in what circumstances, someone who claims to be the ultimate beneficial owner of loan notes can bring a claim against the issuer of the notes, seeking a declaration that an event of default has occurred.

2. The Claimants, who claim to be such persons in relation to three series of notes issued by the Defendants, seek declaratory relief only, on the basis of which (if successful) they say they will know that they are able to direct the custodians of the nominal interests held for them to serve acceleration notices under the notes.

3. The declarations sought (in the amended form on which the Claimants rely) are that:

> "(i) the disposal by Essity Group of its entire stake in Vinda constituted the cessation of a substantial part of Essity's business and/or the whole or a substantial part of the business of a Material Subsidiary of Essity, such that an Event of Default has occurred and is continuing pursuant to the Conditions of the Notes;
>
> (ii) upon the occurrence of an Event of Default which is continuing, the "Noteholder" (as defined in the Conditions) being the party shown in the records of the clearing systems (Euroclear and Clearstream, Luxembourg, as applicable) as the holder of a nominal amount of such Notes, is entitled to give notice of acceleration of the Notes (i.e. to declare that any Note held by it is immediately due and payable)."

4. The question arises upon the application by the Defendants dated 21 February 2025 to set aside permission to serve out of the jurisdiction granted without notice by Miles J on 19 December 2024. Permission to serve out was granted on the basis that the claims are in respect of contacts governed by English law and that England and Wales was the appropriate forum.

5. The sole basis on which the Defendants seek to set aside that order, however, is that there is no serious issue to be tried that a court, hearing the trial, would consider it appropriate to grant declaratory relief in favour of the Claimants, even if they do establish that there was an Event of Default and that acceleration notices can validly be served by their custodians (the account holders with the clearing systems). It is not disputed that the claim passes through a gateway under CPR PD6B (paragraph 3.1(6)(c): claim in respect of a contract governed by the law of England and Wales), nor that England and Wales is clearly the appropriate forum for a trial.

6. For the purposes of this application only, the Defendants do not dispute that there is a real (as opposed to fanciful) prospect of establishing that acceleration notices can be served by the custodians rather than the clearing systems, and that an Event of Default occurred. They maintain that, even then, there is no real prospect of the declarations sought being granted at trial in favour of these Claimants, and therefore no serious issue to be tried on the claim, as framed.

7. The reasons for that, which are the focus of this application, are that:

   i) there is insufficient evidence that the Claimants are the ultimate beneficial owners of any of the notes;

   ii) even if they are, they have no (and never will have any) legal rights under the notes, given the "no look through" intermediated structure in which the notes are held, and the Claimants therefore have insufficient interest to be granted the declarations sought;

   iii) alternatively, it is wrong in principle that someone who is not the contractual counterparty and has no rights under the contract can seek court declarations about the meaning and effect of such notes;

   iv) granting the declarations would serve no useful purpose, as neither the relevant counterparties – the clearing systems – nor those with the those with the benefit of deeds of covenant made by the Defendants (those with securities accounts at the clearing systems to which a nominal amount of the notes are credited) ("the Custodians") – are joined as parties, and so no *res judicata* would arise as between those with rights under the notes or the deed of covenant.

8. I heard focused but excellent argument addressing those questions from Sonia Tolaney KC, leading Tom Foxton, on behalf of the Defendants and from Tom Smith KC, leading Annabelle Wang, on behalf of the Claimants. I am grateful for their assistance.

The Notes

9. The notes in issue are three series of notes forming part of the Essity Group's Euro Medium Term Note Programme. The First Defendant ("Essity") is the issuer of EUR300 million 0.5% notes due on 3 February 2030 and EUR700 million 0.25% notes due on 8 February 2031. The Second Claimant ("Essity Capital") is the issuer of EUR600 million 0.25% notes due on 1 September 2029, which are guaranteed by Essity. It is unnecessary to distinguish between the different series as it was accepted that all are on materially the same terms. I will refer to them collectively as "the Notes" and to any individual series as (e.g.) "the 2031 Notes". The Notes are admitted to trading on the Luxembourg stock exchange.

10. The Claimants claim to be the ultimate beneficial holders of 4.8% of the 2029 Notes, 13.83% of the 2030 Notes and 5.67% of the 2031 Notes – in aggregate, EUR109,974,000 of nominal value. The fourth witness statement of Swati Tripathi dated 28 April 2025 set out an updated table of the Claimants' individual beneficial entitlement, in a confidential schedule. The Claimants seek in that capacity to establish that an event of default took place upon the "Vinda transaction" being completed, and that acceleration notices can validly be served by their Custodians for that reason.

11. The Notes were originally issued as Temporary Global Notes, superseded after a short time by a Permanent Global Note (one for each series), which is a physical instrument held in bearer form by Euroclear or Clearstream, as clearing systems. The form of each Permanent Global Note and the terms of each Note are set out in Schedules 6 and 2

respectively to an agency agreement for each series, made between the relevant issuer, an agent, Citibank, N.A., London Branch ("the Agent"), and a paying agent, Banque Internationale A Luxembourg, S.A. ("the Paying Agent"). There is no Security Trustee or Bond Trustee appointed or contemplated by the terms of the Notes.

12. The following are the relevant terms of the Notes.

13. Paragraph 1 of Schedule 2 of the agency agreement (applicable to the 2029 Notes) states that the Notes are in bearer form, and that:

> "Subject as set out below, title to the Notes, Receipts and Coupons will pass by delivery. The Issuer and the Paying Agents will (except as otherwise required by law) deem and treat the bearer of any Note, Receipt or Coupon as the absolute owner thereof... for all purposes but, in the case of any Global Note, without prejudice to the provisions set out in the next succeeding paragraph.
>
> For so long as any of the Notes is represented by a Global Note held on behalf of Euroclear Bank S.A./N.V. ("Euroclear") and or Clearstream Banking S.A. ("Clearstream, Luxembourg"), each person (other than Euroclear or Clearstream, Luxembourg) who is for the time being shown in the records of Euroclear or of Clearstream, Luxembourg as the holder of a particular nominal amount of such Notes ... shall be treated by the Issuer and the Paying Agents as the holder of such nominal amount of such Notes for all purposes other than with respect to the payment of principal or interest on such nominal amount of such Notes, for which purpose the bearer of the relevant Global Note shall be treated by the Issuer and any Paying Agent as the holder of such nominal amount of such Notes in accordance with and subject to the terms of the relevant Global Note and the expressions "Noteholder" and "holder of Notes" and related expressions shall be construed accordingly."

Accordingly, the account holders (i.e. the Custodians) shown in the records of Euroclear or Clearstream, Luxembourg, are agreed by Essity (or Essity Capital, as the case may be) and the counterparties to be the "Noteholder" within the meaning of the terms, save with respect to the payment of principal or interest, when the relevant clearing system itself is treated as the "Noteholder".

14. Paragraph 10 of Schedule 2 defines "Event of Default", and provides that if any one or more of such events shall occur and be continuing:

> "... then any Noteholder may, by written notice addressed by the Noteholder to the Issuer at the specified office of the Agent, effective upon the date of receipt by the Agent, declare any Note held by it to be immediately due and payable, whereupon it shall become immediately due and payable at its Early Redemption Amount together with accrued interest ... without further action or formality of any kind."

Thus, the Noteholder who may give notice of acceleration upon an Event of Default is the Custodian unless it is held that giving an acceleration notice and causing the Early Redemption Amount to become due and payable is "with respect to the payment of

principal and interest", within the meaning of paragraph 2 above. (This is the issue of interpretation on which it is agreed that each side is assumed to have a real prospect of success).

15. Paragraph 18 of Schedule 2 states:

> "No person shall have any right to enforce any term or condition of this Note under the Contracts (Rights of Third Parties) Act 1999, but this does not affect any right or remedy of any person which exists or is available apart from that Act."

16. Schedule 6 provides (materially) as follows:

> "Payments due in respect of Notes for the time being represented by this Global Note shall be made to the bearer of this Global Note and each payment will discharge the Issuer's obligations in respect thereof….
>
> This Global Note may be exchanged in whole but not in part (free of charge) for security printed Definitive Notes and (if applicable) Coupons, Receipts and/or Talons in the form set out in Schedule 7, 8, 9, and 10 respectively of the Agency Agreement... either, as specified in the final terms:
>
> (a) upon not less than 60 days' written notice being given to the Agent by Euroclear and or Clearstream, Luxembourg acting on the instructions of any holder of an interest in this Global Note; or
>
> (b) only upon the occurrence of an Exchange Event.
>
> An "Exchange Event" means:
>
> (i) an Event of Default (as defined in Condition 9) has occurred and is continuing; …..
>
> If this Global Note is only exchangeable following the occurrence of an Exchange Event:
>
> (a) the Issuer will promptly give notice to Noteholders in accordance with Condition 13 on the occurrence of an Exchange Event; and
>
> (b) in the event of the occurrence of any Exchange Event, one or more of the relevant Clearing Systems acting on the instructions of any holder of an interest in this Global Note may give notice to the Agent requesting exchange ….
>
> Until the exchange of this Global Note, the bearer of this Global Note shall in all respects (except as otherwise provided in this Global Note) be entitled to the same benefits as if he were the bearer of Definitive Notes and the relative Coupons, Receipts and or Talons (if any) represented by this Global Note. Accordingly, except as ordered by a court of competent jurisdiction

> or as required by law or applicable regulation, the Issuer and any Paying Agent may deem and treats the holder of this Global Note as the absolute owner of this Global Note for all purposes.
>
> In the event that this Global Note (or any part of it) has become due and repayable in accordance with the Conditions or that the Maturity Date has occurred and, in either case, payment in full of the amount due has not been made to the bearer in accordance with the provisions set out above then this Global Note will become void at 8:00 p.m. (London time) on such day and the bearer will have no further rights under this Global Note (but without prejudice to the rights which the bearer or any other person may have under the Deed of Covenant executed by the Issuer on 10 May 2019 in respect of the Notes)".

17. Accordingly, upon an Event of Default occurring, the Defendants are required to give notice to the clearing systems, who in turn, acting on instructions of the holder of any interest (or the issuer), may notify the Agent, requesting exchange of the Global Note for Definitive Notes. No notice of an Exchange Event has in fact been given by the Defendants, and so no clearing system has given notice requesting exchange.

18. Further, in the event that repayment in full is not made under the Global Note when due, the Global Note becomes void and the rights of the account holders of the clearing systems are then governed by the Deed of Covenant, which is made by the Defendants as issuers with the account holders of Clearstream and Euroclear. It provides, at clause 1, that:

> "If any Global Note becomes void in accordance with its terms the Issuer covenants with each Relevant Account Holder (other than any Relevant Clearing System which is an account holder of any other Relevant Clearing System) that each Relevant Account Holder shall automatically acquire at the Relevant Time, without the need for any further action on behalf of any person, against the Issuer all those rights which the Relevant Account Holder would have had if at the Relevant Time it held and beneficially owned executed and authenticated Definitive Notes in respect of each underlying Note represented by the Global Note which the Relevant Account Holder has credited to its securities account with the Relevant Clearing System at the Relevant Time.
>
> The Issuer's obligation under this clause shall be a separate and independent obligation by reference to each Underlying Note which a Relevant Account Holder has credited to its securities account with the Relevant Clearing System and the Issuer agrees that a Relevant Account Holder may assign its rights under this Deed in whole or in part."

A "Relevant Account Holder" is defined as "any account holder with the Relevant Clearing System which has Underlying Notes credited to its securities account from time to time".

19. Accordingly, if repayment is not made when due and the Global Note becomes void in consequence, each of the Custodians with a recorded interest in the Notes at the

relevant clearing system has the same rights against the Defendants as they would have had if they had been issued with Definitive Notes.

20. If the Custodians are the Noteholder for the purposes of paragraph 9 of Schedule 2 (above) and an Event of Default has taken place and was continuing, the Early Redemption Amount became due and payable upon service of an acceleration notice by a Custodian; if then unpaid, the Custodians had the same rights as if Definitive Notes had been issued to them.

Factual background

21. The context in which this claim was issued is that, between 16 October 2024 and 24 October 2024, following the Vinda transaction, five different Custodians served acceleration notices in respect of nominal amounts of Notes held for the benefit of some of the Claimants and others, alleging an Event of Default by virtue of the Vinda transaction. In correspondence between the Defendants and those Custodians' solicitors, following the notices, the Defendants denied that an Event of Default had occurred. Since there is no issue about it that needs to be resolved for the purposes of this application, it is unnecessary to explain the Vinda transaction beyond saying that it involved the sale of a majority stake in a business held by a subsidiary of Essity, for cash consideration.

22. In further correspondence between the Defendants and those Custodians, the Defendants then contended that the Custodians did not have a right to serve acceleration notices in any event, because the clearing systems are the only persons entitled to request payment of the Early Redemption Amount, and accordingly the purported acceleration notices were void.

23. There is therefore an issue that has in fact arisen between certain Custodians and the Defendants as to whether acceleration notices were void or validly served, depending on whether an Event of Default had in fact occurred and whether those Custodians were entitled to serve the acceleration notices that they did. However, the Custodians in question have not sought to take matters further themselves, by issuing proceedings or otherwise. The clearing systems have not raised any such question with the Defendants or served any notices.

24. For these reasons, the Defendants contend that there is no dispute between them and their counterparties, namely the clearing systems and the Agent and Paying Agent, nor between them and the Custodians.

Legal test

25. On an application to set aside permission to serve out of the jurisdiction, the test for whether there is a serious issue to be tried is the same as the test that arises on a reverse summary judgment application: is there a real prospect (rather than a fanciful or theoretical prospect) of the claim succeeding. However, the onus is on the claimant to

establish that: Altimo Holdings and Investment Ltd v Kryg Mobil Tel Ltd]2011] UKPC 7; [2012] 1 WLR 1804, per Lord Collins of Mapesbury at [71].

26. It is not appropriate to conduct a mini-trial of factual disputes, though it may be appropriate to reject wholly implausible assertions, if unsupported by credible evidence; and it may be appropriate to resolve short points of law or construction that will not be developed further or affected by more evidence: EasyAir Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch); Magomedov v TPG Group Holdings (SBS) LP [2025] EWHC 59 (Comm).

The Claimants' interest in the Notes

27. Have the Claimants done enough in the evidence to establish that they have a real prospect at trial of proving that they have a beneficial interest in the Notes?

28. The relevant evidence is as follows:

    i) Ms Tripathi's first witness statement dated 13 December 2024 on behalf of the Claimants states that they hold beneficial interests in the Notes in the amounts set out in the confidential schedule to her statement, that they hold the economic interest in the Notes, and that the Claimants hold their interests via Custodians, pursuant to bilateral custodian agreements. She states that the Claimants are the persons who would have the right to obtain repayment of their economic interests by instructing their respective Custodians to accelerate the Notes.

    ii) Ms Tripathi exhibits custodian confirmation letters, confirming the total nominal amount of each series of Notes held on behalf of each Claimant.

    iii) As an example, the custodian confirmation letter from Citigroup Global Markets Inc identifies the First Claimant's fund, its name, the three series of Notes, and states the nominal amount of each series held in an identified Euroclear account "as custodian on behalf of the beneficial holder of the positions" in that fund name. Similar letters (not all of which assert that the owner is a beneficial holder) exist for each Claimant.

    iv) Ms Tripathi also exhibits statements of account from Euroclear and Clearstream, Luxembourg, some of which only identify the nominal amount of each Global Note held in the Custodian's securities clearance account, but most of which record that the clearing system has been notified that the holding in question was allocated on the Custodian's books to a particular Claimant's account with it.

    v) The Eighth Claimant has since the start of the claim disposed of some of its interest in the 2031 Notes and a further custodian confirmation letter from UBS AG was sent by the Claimants' solicitors prior to the hearing. It states that UBS AG hold a settled nominal of a specified number of 2031 Notes in an identified Clearstream Luxembourg account as custodian "on behalf of the beneficial owner of the positions", identifying the Eighth Claimant as that owner.

29. Ms Tolaney argued that there was insufficient evidence here to establish a proprietary interest under a sub-trust, under the intermediated structure of holding the Notes, as distinct from a contractual right that bound only each Claimant with their Custodian. She emphasised that the terms of the interest of any account owner must depend on the terms that they have agreed with their account holder, and that no such terms were put in evidence. In particular, there was no evidence that the terms agreed between each Claimant and their Custodian were terms governed by a law that recognised the concept of a trust, so as to enable a proprietary interest to be conferred on a Claimant.

30. Further, in referring to the beneficial holder of the positions, UBS AG could have been referring to a synthetic position by reference to the securities, not a beneficial interest in Notes under a sub-trust. She pointed out that the Fifth Defendant had initially claimed to have an interest in the 2031 Notes, which turned out to be a Total Return Swap, which would not be the ultimate beneficial interest in the Notes themselves.

31. Ms Tolaney also noted that there was no evidence of terms agreed between the clearing systems and the Custodians, and that, given that this is a Part 8 claim, the evidence that the Claimants intend to rely on at trial has already been filed with the claim, so it could be inferred that the Claimants' evidence is completed.

32. Cogently though this was argued, I consider that the evidence as it stands is sufficient to establish a real prospect of proving at trial that the Claimants have a proprietary interest in the Notes. The evidence already filed is evidence – not just assertion – of an ultimate beneficial interest, because that interest is (apparently) acknowledged by statements from the Custodians, or recorded as having been notified to the clearing system. Read as a whole, the custodian confirmation letter from UBS AG (and others like it) is much more consistent with a beneficial interest under a sub-trust than the holding of a synthetic interest based on the 2031 Notes. The evidence, as it stands, though incomplete, seems to me to be more consistent with a chain of trusts and sub-trusts than a different non-proprietary structure, and so to support a conclusion that there is a real prospect of establishing that at trial.

33. At the time of starting a claim for declaratory relief, it is not known in advance all the points that are going to be taken by a defendant. It was anticipated that the Defendants would challenge the substantial issues of event of default and validity of service of notices by the Custodians, but it was not obvious that the Defendants would say not only that the Claimants do not have sufficient standing as account owners to claim declaratory relief but that they are not ultimate beneficial owners in any event.

34. It is not, in my view, fair to criticise the Claimants for failing to include all the documentation that would prove beyond possible challenge their beneficial interests, and draw an adverse inference at this stage. In view of the issue that the Defendants have now raised, the Claimants may consider that they need to go further with their evidence before a final hearing of the claim. Nevertheless, as things stand, they have enough evidence of ultimate beneficial ownership to get the claim past summary dismissal on that ground.

Insufficient interest to be granted declaratory relief

35. The Defendants' case in this respect is that the Claimants have no legal rights under the contract between the Defendants and their counterparties under the Notes, and at no stage will they have any legal rights. That is not disputed by the Claimants, save that in the event of the Global Note becoming void the Custodians are entitled to be treated as the owners of Definitive Notes, which they in turn will hold on trust for the Claimants.

36. The Claimants do, however, obviously have an interest in the Notes – assuming for present purposes that there is a sub-trust structure and that they have an equitable proprietary interest, which is the ultimate economic interest. If steps need to be taken to protect the Notes, it is the Claimants' interests that are being protected. Their interest cannot be asserted against the Defendants directly, however, only by requiring their Custodians to take steps to protect their interests, either directly against the issuers, or by or through the clearing systems, as appropriate.

37. Mr Smith also pointed out that, in an insolvency event, it is the owners of the ultimate economic interest in notes such as these who are treated as the creditors (Re Petrofac Ltd [2025] EWHC 859 (Ch)), which he submitted is a reflection of the reality of the position. Those Claimants whose Custodians have served acceleration notices also have a contingent interest in the sums due for repayment, if an Event of Default is proved.

38. Ms Tolaney started her analysis with the well-known, partially dissenting judgment of Aikens LJ in Rolls-Royce plc v Unite the Union [2009] EWCA Civ 387; [2010] 1 WLR 31 ("*Rolls-Royce*"), which has been consistently followed in recent cases. It has, if anything, gained weight as a result of the recent disapproval by the Supreme Court in Tyne and Wear Passenger Transport Executive t/a Nexus v National Union of Rail, Maritime and Transport Workers [2024] UKSC 37; [2024] 3 WLR 909 ("*Nexus*") of the approach taken by the majority in *Rolls-Royce*.

39. Having reviewed cases on the exercise of the court's jurisdiction to grant declaratory relief in private cases, Aikens LJ summarised the principles as follows, at [120]:

> "(1) The power of the court to grant declaratory relief is discretionary.
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However the claimant does not need to have a present cause of action against the defendant.
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly moved on from *Meadows*[1]).
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a

[1] *Meadows Indemnity Co Ltd v Insurance Group of Ireland plc* [1989] 2 Lloyd's Rep 298

> "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

40. Whereas there is a tendency for litigants to cherry pick the principle that best suits their case and emphasise it, the principles expressed are clearly intended to provide overall guidance on the appropriateness of granting declaratory relief where there is no subsisting cause of action between the parties. The different principles expounded are complementary and ought to be read together. It is not the case that, for example, principle (2) has greater weight than principle (4), or that principle (4) needs to be read restrictively because it is potentially inconsistent with principle (2).

41. In Milebush Properties Ltd v Tameside MBC [2011] EWCA Civ 270; [2011] PTSR 1654 ("*Milebush*"), Mummery LJ, giving the judgment of the majority, agreed with counsel for the appellant that declarations can be granted in private law proceedings about the disputed construction of a document affecting the claimant, even though the claimant is not a party to it. Jackson LJ agreed.

42. Moore-Bick LJ, dissenting on the ultimate decision, set out in some detail the history of the willingness of the court to grant declaratory relief. He referred to In re S (Hospital Patient: Court's Jurisdiction) [1996] Fam 1, in which Millett LJ had explained how the court's jurisdiction had grown to a point where it was willing to grant something approaching an advisory declaration, and said:

> "… the only kind of rights with which the court is concerned are legal rights; and that accordingly there must be a real and present dispute between the parties as to the existence or extent of a legal right. Provided that the legal right in question is contested by the parties, however, and that each of them would be affected by the determination of the issue, I do not consider that the court should be astute to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself."

43. Moore-Bick LJ summarised his review of the cases (including *Rolls-Royce*) as follows, at [88]:

> "In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings. That was certainly the view of the court in *In re S* ... and it is also the clear implication of the observations in *Feetum v Levy*[2]... and the *Rolls-Royce* case … that things have moved on since the *Meadows* case. In

[2] *Feetum v Levy* [2006] Ch 585.

> the *Mercury*[3] case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that Mercury did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but Milebush has no rights. I can see no reason in principle why the nature of the underlying obligation should be critical, although there may well be other reasons why in the particular case a declaration should not be granted. The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court."

44. It is therefore no impediment to granting a declaration in this case that the Claimants are not parties to the Notes and do not and will not have legal rights under the contract, if the legal rights of the Defendants are contested and the determination of them sufficiently affects the interests of the Claimants. The Claimants have a legitimate interest in having it determined whether there has been an event of default and whether their Custodians can serve acceleration notices (and indeed, in some cases, whether the notices already served were valid and effective) because that will enable them to take appropriate steps to protect their rights derived from the Notes.

45. Ms Tolaney argued that the grant or refusal of the declarations would not affect the Claimants' legal rights, because they have the same rights under their contracts with their Custodians regardless of the decision. They therefore have no legitimate interest in the questions raised by the claim. That would be so if the Claimants had no more than contractual rights against the Custodians. But on the assumption that the Claimants have equitable interests in the Notes, their rights are directly affected: instead of having an indirect interest in a Global Note owned by the clearing system and held on trust for the Custodians, the Claimants would have (if acceleration notices have already been served) or could have (by causing notices to be served) a more direct interest in Definitive Notes owned by their Custodians, if issued, or rights pursuant to the Deed of Covenant. The declarations sought will also affect how the Claimants exercise the rights that they have, and consequently the value of their interests. They may determine whether they obtain full repayment of their debt now, or on the final maturity dates of the Notes, or not at all.

46. Ms Tolaney argued that the court should be very reluctant to allow a non-party to seek declarations about rights under others' contracts. She cited Federal-Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd [2014] EWHC 2002 (Comm), a decision of Eder J. That was a claim by a trust set up to pursue and administer claims on behalf of asbestosis victims, which raised questions about liability under contracts of insurance and re-insurance to make payments to the principal defendant and insurer respectively. The insurer and re-insurers were additional defendants. Declarations sought included ones as to the obligations of the insurer and re-insurers on the true construction of the policies and trust distribution procedures. The re-insurers challenged the standing of the trust to seek declaratory relief in relation to contracts to which it was not a party.

47. Eder J accepted several reasons advanced by Counsel for the re-insurers as to why the trust should not be permitted to interfere in other parties' contracts, including that

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3 *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48

insurance contracts were paradigmatically ones on which third parties cannot rely. Eder J referred to *Rolls-Royce* and *Milebush*, and said at [93]:

> "Specifically, so far as I am aware, there has been no case in relation to an ordinary commercial situation, where a third party has been found entitled to a declaration as to the meaning or performance of a contract to which he is not a party, in circumstances where the parties to that contract are not in dispute."

And, at [94]:

> "In summary, I therefore accept the main thrust of Mr Butcher QC's submission that a person not a party to a contract generally has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of rights of other parties to that particular contract at least where the contracting parties themselves are not in dispute as to their respective rights and obligations. … it seems to me that this remains the general position at least as a matter of the court's discretion even after the more recent cases cited above including the *Rolls-Royce* case. In particular, as emphasised by Aikens LJ in para 2 of his summary of the applicable principles in that case: "There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them" (at para 120) – although, at the risk of stating the obvious, I fully recognise the importance of the words "in general".

48. I fully accept that in most commercial cases it is unlikely that a non-party will have sufficient interest in a contract or its effect to justify seeking declaratory relief. I do not accept that, by using the words "save in exceptional circumstances", Eder J meant to go further than the principles expounded in *Rolls-Royce*. What he recognised was that, in a commercial context, particularly where the contract specifically excludes third party rights, it will be rare for a non-party to have sufficient interest to have standing to seek declaratory relief.

49. On the facts of this case, I find that there is at least a good arguable case that the Claimants have sufficient interest in principle to justify seeking declaratory relief, subject to other considerations, and therefore a serious issue to be tried. The fact that the Claimants do not have direct rights against the Defendants is no bar, and the Claimants clearly do have a legitimate interest in having the matters in dispute determined. By obtaining the declarations, they will know that, if they instruct their Custodians to serve acceleration notices, the notices will be valid. The declarations will also determine the validity of some of the acceleration notices that have already been served.

50. In JP Morgan International Finance Ltd v Werealize.com Ltd [2025] EWCA Civ 57 ("*JP Morgan*"), a case about the terms of a shareholder agreement, Lewison LJ referred to *Rolls-Royce* and said:

> "Whether to grant a declaration is a discretionary decision. The primary considerations are whether a declaration serves a useful purpose and whether it is the most effective way of disposing of the dispute that has arisen. It is also important for the court to be satisfied that all those affected

> by the declaration are either before or will have their arguments put before the court."

51. Whether the declarations would serve a useful purpose is a broader question than whether the Claimants have a legitimate interest in pursuing them, and I will turn to that question in due course.

Infringement of "no look through" principle

52. The Defendants further object to the declarations sought on the basis that to allow an ultimate beneficial owner (if that is what the Claimants are) to seek determination of rights under the Notes is wrong in principle, and contrary to the deliberately "no look through" structured chain of relationships that exists for such securities in the capital markets, for good reason.

53. Ms Tolaney argued that issuers do not bargain for dealings between them and those with the ultimate economic interest (i.e those who provide the funding secured by the Notes), and that a structure is deliberately created, in the interests of market efficiency and stability, where each person involved has to deal only with their direct counterparty, that is to say the issuer with the agent and the clearing system, the clearing system with their customers, the account holders (Custodians), and the account holders with the account owners (ultimate beneficial owners), and vice versa in each case.

54. Ms Tolaney said that the Claimants were seeking to subvert market practice, and that notes of this kind must be seen to operate in "the usual way". Granting declarations of this kind would be disruptive, when the right parties were not before the court. The Claimants' only true interest, she suggested, was to get payment by the back door. The only person able to serve an acceleration notice or an exchange notice is the clearing system that holds the Global Note, neither of which has made any allegation of an event of default. In those circumstances, it was not permissible for someone who claims the ultimate economic interest in the Notes to bring this claim. Disavowing any submission *in terrorem*, she said that allowing the Claimants to claim would have huge ramifications and would undermine the structure of the market

55. In support of that argument, Ms Tolaney cited Secure Capital SA v Credit Suisse AG [2017] EWCA Civ 1486; [2017] 2 Lloyd's Rep 599 ("*Secure Capital*"). The claimant sought damages pursuant to a Luxembourg law on the circulation of securities, alleging that the defendant was in breach of a term of the notes (which were governed by English law). Like the Claimants here, the claimant was an ultimate beneficial owner but not the counterparty or the holder of life policies issued by the defendant, which were held through the Clearstream system. Hamblen J decided that the issue was correctly characterised as contractual, and that, as a result, the claimant had no claim. The claimant appealed on the basis that the issue should be characterised instead as a *sui generis* issue of entitlement to sue on a bearer note, which should be governed by Luxembourg law.

56. David Richards LJ, with whom the other Lords Justice agreed, described the intermediated structure for holding interests in bearer securities and said:

> "10. The system operates on the basis of a "no look through" principle, whereby each party has rights only against their own counterparty. Payments of sums due on the securities are made by the issuer or other payer to Clearstream which then makes payment to the Account Holders in respect of their recorded interests. The Account Holders pass on the appropriate sums to their Account Owners."

57. His Lordship rejected the attempt of the claimant to characterise the issue as one other than a contractual issue:

> "55. … In the case of immobilised securities, Clearstream and other settlement systems exist to facilitate sufficient trading interests in securities, not in the securities themselves. The fact that security issues are organised in this way so as to facilitate such trading is nothing to the point. Participants in the market know that they are trading in interests, not in the underlying securities. They are interests in contractual arrangements constituted by the Notes and ancillary documents. The documents expressly provide for English law to be the proper law and expressly identify the parties who may either generally or in limited circumstances sue for breach of the terms of the Notes. Those provisions are as much part of the package of rights as the payment terms and any other terms of the Notes. Market participants trade in interests in that total package of rights."

58. He rejected the argument that to deny the claimants a right to sue would create a lacuna in the system, stating that if there was an intention that Account Holders or Account Owners should be able to sue on the Notes, they would have so provided. The assertion to the contrary was unsupported by evidence or academic or other literature:

> "It is contradicted by the extensive literature to which the judge referred in his judgment at para 58, which emphasises that the purpose of immobilised securities is to prevent a direct link between investors and the issuer. It is apparent from the literature that market participants operate on this basis." [59]

59. Once it was decided that the issue was to be characterised as contractual, Secure Capital's claim was doomed to failure. There is obviously no contractual claim for damages that an account owner can bring directly against the issuer. Ms Tolaney suggested that there was equivalence with this case, as what the Claimants are seeking is, effectively, enforcement of contractual rights, by deciding that conditions of the Notes have a certain meaning and effect that requires payment to be made by the Defendants. A declaration that an Event of Default has occurred would have the effect that, if the Notes are not paid, the Global Note would become void, conferring rights on the Custodians under the Deed of Covenant that they have not claimed. That, she argued, would be to grant relief that circumvents the established structure emphasised in *Secure Capital*.

60. Though payment to counterparties and onwards down the chain may be the consequence, it seems to me that the question raised by this case is subtly different from whether contractual rights exist and can be enforced by the Claimants. As is common ground, the Claimants have no contractual rights. The question is whether, in circumstances in which a disagreement has arisen about rights under the Notes, which uncertainty affects the Claimants' interests, the Claimants are precluded from seeking a determination of those issues because of their lack of contractual rights – notwithstanding (if it is the case) that the declarations would otherwise serve a useful purpose and be the most effective and just way of resolving the issues. I do not accept that the disagreement has gone away just because the Custodians have not themselves taken further steps to establish their rights. It plainly has not, in view of the Claimants' claims.

61. Given that there is no contract precluding the Claimants from doing so, I find it hard to see why a genuine dispute about rights under the Notes should not be determined at the instance of the Claimants, if (but only if) they have a sufficient and legitimate interest and other considerations (to which I will turn) are satisfied. The fact that the consequence of that may be repayment of those Claimants who have already served acceleration notices does not mean that the Claimants are seeking illegitimately to enforce payment from the Defendants. Rather, as Mr Smith submitted, they are seeking to give effect to the structure, by establishing that rights to accelerate exist, which has various predetermined consequences.

62. Although the Defendants protest at the threat to the integrity of the intermediated structure and say that the risk of such litigation is not one to which the issuers subscribed when they issued the Notes, the Notes were issued in a structure that was intended to attract investment from persons in the position of the Claimants. In substance but not in form, the Claimants are the real creditors, as the position upon insolvency recognises. The protection for the Defendants is that the court has its usual resources to prevent abuse of process, where there is no live dispute that directly affects the rights of a claimant, unlike in this case.

63. I do not therefore consider, on the evidence before the court, that the Claimants are wrongly subverting a structure that does not permit them to seek a determination. The evidence does not establish that the counterparties to the Notes have taken a different position, only that their position is unknown. The Claimants are therefore not seeking a determination that is known to be contrary to the interests of those above them in the structure.

64. There was no evidence, only assertion, that allowing ultimate beneficial owners in such circumstances to seek declaratory relief would impair or subvert the Luxembourg stock exchange, or any other capital market. The evidence was only to the effect that the Claimants purchased their interests knowing of the structure, and that other interested persons not before the court could be impacted by the declarations sought. The reality is that the Claimants could probably seek the declarations through their Custodians in any event, particularly those who have already directed the service of acceleration notices. I recognise that this point arguably cuts both ways, in that the Custodians have not been joined to the claim.

65. The real questions seem to me to be whether, in these circumstances, there is a real prospect at trial that the declaration that will only bind the parties and not the clearing

systems or the Custodians will be considered to serve a useful purpose, and be a convenient way of resolving the issues that have undoubtedly arisen. The only issue before me is whether this claim should be stopped in its tracks, without a trial, on the basis that there is no real prospect of the court making the declarations, even if an Event of Default were proved. While, on applications of this kind, the court does sometimes decide that there is no real prospect of a declaration being made (see, e.g., Tesla, Inc. v Interdigital Patent Holdings, Inc. [2025] EWCA Civ 193 ("*Tesla*")), the court will only so determine in a clear case, given that what is being sought is a discretionary remedy that is not narrowly confined by the parameters of causes of action.

Will the declarations sought serve a useful purpose?

66. This question raises the following sub-questions:

    i) will the court be willing to make declarations in the absence of the contractual counterparties?

    ii) is it fair to the parties and those who are not parties to the claim to grant declarations?

    iii) will all relevant arguments that could be raised by non-parties be adequately presented at trial?

    iv) will the declarations have effect in the real world?

67. They arise from the fact that the Custodians in particular are not parties to the claim. Nor are the clearing systems, but, as Mr Smith said, their position is recognised to be purely ministerial, and they would not be expected to take a stance, or exercise any discretion, but only to comply with their obligations under the Notes and their obligations to their account holders.

68. The position with the Custodians may be different, in that they may have interests under the Notes in their own right, as well as having numerous account holders with investments in them, not all of whom will necessarily give them the same instructions. The views of individual Custodians about the issues in this case are unknown.

69. In *Nexus*, the Supreme Court addressed a claim by an employer against a union for rectification of a non-binding agreement between them that was incorporated into contracts of employment. It was held that rectification of the terms of employment contracts could not be ordered by the back door in proceedings to which the employees were not parties. The judgment was given by Lord Leggatt and Lady Simler jointly. They considered whether the procedural course taken by the courts in *Rolls-Royce* (not the principles expounded by Aikens LJ) was wrong in principle and said, at [67]:

> "… no support can be derived from that case for the course taken by Nexus of bringing this claim against the unions rather than any of its employees. This is not to adopt an "unduly purist" or formalistic approach as Nexus suggests. As a matter of basic principle, the proper parties to an action are those whose legal rights will be determined by the court. In this case those

> parties are the employees into whose employment contracts the letter agreement was incorporated and whose legal rights will therefore be altered by any order to rectify it. If Nexus wishes to establish its obligations to those employees by taking legal action, it must bring a claim against them (or representatives of them) and not against the unions, to whom Nexus has no relevant legal obligations and who have no relevant legal rights."

70. As pointed out by Arnold LJ in *Tesla* at [92], this was a claim for rectification, not a claim for declaratory relief. However, Lord Leggatt and Lady Simler had previously cited Viscount Maugham in London Passenger Transport Board v Moscrop [1942] AC 332 at 345:

> "the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

The same passage was invoked by Phillips LJ in *Tesla* as a reason why Tesla's claims for declaratory relief could not succeed.

71. There are three aspects to this. First, the right to be heard before one's rights are determined by the court. Second, whether all relevant arguments will be presented. Third, whether non-parties whose rights will be affected will be bound, and, if not, whether that would undermine the value of any declarations made.

72. This is not the type of case in which an absent party could sensibly object on the basis of denial of a right to be heard, provided that all relevant arguments are advanced to the court. The contractual counterparties do not have economic interests in the Notes, save for Custodians who own interests in their own right. There is no particular position that a clearing system or a Custodian could advance on the substantive issues in dispute that will not be advanced by the parties. Even if not joined, the non-parties can be notified of the proceedings and have the opportunity to join, if so advised. The first aspect should therefore not prevent the declarations being made, if the Claimants otherwise succeed.

73. Each of the substantive issues raised by the claim is binary: either the Vinda transaction was an Event of Default, as defined, or it was not; either the Custodians are the Noteholders for the purpose of giving acceleration notices or they are not, as a matter of interpretation of the Notes. There is no issue about the terms of the Deed of Covenant.

74. The Claimants will advance the case that there was an Event of Default, and it is very hard to imagine that the clearing systems or any of the Custodians will be better placed in that regard. The contrary argument will be presented by the Defendants, who are uniquely well-placed to do so. In theory, the Agent and Paying Agent are counterparties to the agreement that contains the terms of the Notes, but it was not suggested that they should be parties, nor is it likely that they, or the depositary or clearing systems, will have any admissible evidence on the interpretation of the terms of the Notes.

75. The only question on which it is possible to envisage a different approach from one or more Custodians is on the appropriateness of making declarations, given the possibility

of their having conflicting interests.

76. The position of each of the Custodians is unknown. Mr Smith said that they "had no skin in the game", but that is not clear. It is not known why those Custodians who served acceleration notices have not pursued the disputed matters raised by or on behalf of the Defendants. Nor is it known whether they agree or disagree with the stance of the Claimants. That may be of significance because it is possible that some or all of them have account owners with different views about whether the Defendants' liability should be accelerated. The Event of Default alleged was the sale of a business interest for cash, and it is possible that account owners have different views about the benefits of that, as well as whether they wish to be repaid early, sell in the market or retain their investments.

77. In the absence from the evidence as it stands of the Custodians' contracts with the Claimants, it is unknown to what extent they have discretion or their duties are purely ministerial.

78. The position of the clearing systems is different. It can safely be assumed that they have no interest other than to comply with instructions that are given to them, in accordance with the terms of the Notes and the terms agreed with the account holders. No useful purpose would be served by joining the clearing systems.

79. A further point is that non-parties to the claim will not be bound by the outcome, whether or not declarations are made. That means that if the Defendants were to succeed, the Custodians, if instructed by other account owners to do so, or in their own interest as investors, could seek to establish the contrary in different proceedings. The chances of that occurring are, perhaps, limited if the court is satisfied that all relevant arguments will be presented at the trial, but the possibility remains that more litigation will follow. However, that would be so even if some of the Custodians had brought this claim.

80. The possibility of further disputes would probably be reduced if the Claimants' Custodians were joined. While the declarations sought can be said still to serve a useful purpose, in that the court will give what Millett LJ termed "something approaching an advisory declaration", the benefit would probably be increased by joinder of the Custodians, as claimants if willing or as defendants if unwilling. This is sometimes done to give an equitable assignee title to sue, or where a trustee in breach of duty has failed to bring a claim (Vanderpitte v Preferred Accident Insurance Corp of New York [1933] AC 70). The same course can be taken if joinder is necessary to make declarations serve a useful purpose.

81. The effect would be to make it more likely, in the real world, that the declarations would have effect. That is the most effective way of disposing of the disputed issues, to use the language of Lewison LJ in *JP Morgan*. To proceed without the Custodians is arguably a less effective way, though if in fact the Custodians have nothing to add and no position to take, not joining them would be justified on the ground of saving unnecessary costs.

82. While I can acknowledge the possibility of a judge at trial deciding not to make declarations, in the exercise of their discretion, in the absence of the Custodians or without clarity as to their position, I am unable to conclude that that is bound to happen,

so that the Claimants have no real prospect of success. The evaluation of the ultimate question of whether the declarations would serve a useful purpose may be affected by further evidence or documents disclosed, even in a Part 8 claim. The evidence is not yet closed.

83. I will therefore dismiss the application to set aside the Order of Miles J because there is a serious issue to be tried.