Alex Martin and **Christopher Sullivan** of **Latham & Watkins** report below on an order for injunctive relief

CLAIM FOR INJUNCTIVE RELIEF FOR DISCLOSURE OF SECURITISATION ASSET DOCUMENTS

Banca Generali S.P.A. v CFE (Suisse) SA and Another

[2022] EWHC 1450 (Ch)

This order for injunctive relief serves as a cautionary tale for originators, sponsors and securitisation special purpose entities (SSPEs) in respect of disclosure obligations for European securitisation transactions. In granting the order to deliver documents in accordance with a contractual disclosure provision, the High Court considered whether the underlying documents in respect of the assets held in the securitisation (the asset documents) could be considered to have sufficient nexus with the securities issued to investors so as to require them to be disclosed.

By granting the injunction, the court essentially made a full trial unnecessary. However, this decision highlights an important lesson for originators, sponsors and SSPEs: when setting up a securitisation, agreeing to disclose all documentation necessary to satisfy the initial investor's compliance obligations could mean handing over more than one might expect.

FACTS

This case concerns three receivables securitisation transactions whereby a Luxembourg SSPE purchased separate portfolios of receivables from CFE (Suisse) SA (CFE and, together with the SSPE, the defendants). The securitised assets consisted of trade finance receivables relating to exports from Europe to emerging markets such as Cuba and Sudan. The assets included amounts owed under letters of credit, promissory notes and similar instruments issued by government and private entities.

The claimant bank, Banca Generali S.p.A. (the Bank) was a party to the transaction documents in order to exercise rights on behalf of its clients, to whom it sold the majority of the senior notes. When the SSPE failed to redeem a fourth transaction backed by similar receivables, the Bank had concerns that inaccurate information was provided in respect of the assets backing the three other transactions.

The Bank sought to enforce its contractual right to disclosure under the securitisation transaction documents, arguing that the asset documents were necessary to comply with its regulatory obligations to report the "fair value" of the notes to its clients[1] and act in its clients' best interests.[2]

The defendants had altered the data provided to the Bank in order to conform to the form of disclosure required under Art 7 of the EU Securitisation Regulation.[3] Prior to the implementation of the statutory reporting templates, the Bank considered the information provided in the regular investor reports as adequate for its purposes. Among other things, there were material changes to how the securitised assets and related security were characterised (eg "sovereign letters of credit" described as "loan/leases" or "syndicated term loans" or "sovereign debt under restructuring"), and the information no longer disclosed which assets were supported by export credit agency guarantees. The inconsistencies meant that the Bank was no longer able to accurately determine the risk of the assets and calculate a fair value for the notes.

The Bank had lost confidence in the defendants' ability or willingness to report accurately and applied for an injunction to compel the defendants to provide all asset documents on the basis that it needed them to satisfy its MiFID II reporting obligations to its own clients.

DECISION

The court considered arguments addressing whether the asset documents, as opposed to documents related to the securitisation itself, were necessary for the Bank's ability to properly value the notes and report to its clients. The fiscal, calculation and intercreditor agreements required disclosure of all information that must be given to prospective investors and noteholders in accordance with Art 7. The contracts also required the delivery of all documents reasonably requested for the purposes of compliance with applicable law, unless such documents were not reasonably available and could not be obtained using reasonable efforts.

The Bank argued that the asset documents were essential for the understanding of the transaction, even though they were not transaction documents (and therefore not included in the non-exhaustive list set out in the statute[4]) because the main features of the securitised assets and related security comprised material information necessary for the valuation of the notes sold to the Bank's clients.

The defendants argued that the asset documents were not necessary because the initial teething problems with the transition to the new EU Securitisation Regulation disclosure templates had been fixed, and the information provided should have been sufficient for the Bank's purposes. The defendants argued that the contractual language, "reasonably requested for the purposes of compliance with applicable law", amounted to a test of necessity and the contractual provision only conferred a limited right to documents and information relating to it, its operations, or the notes. In other words, the defendants argued that the provision meant that a request for documentation could only properly be made if the material sought was objectively required for the purpose of complying with applicable law, and in this case the Bank should have been able to comply with its regulatory obligations with the information already provided.

The court was satisfied that the Bank would be likely to establish at trial that the documents sought would have been reasonably requested within the ambit of the contractual disclosure provisions. In granting the injunction, the court held: (i) the fact that Art 7 requires securitisation-level transaction documents does not preclude the parties from agreeing that additional information or documentation can be provided; (ii) the Bank's request for all "transaction documents" – including the asset documents constituting the receivables, such as loan agreements, guarantees and security documents – was a proportionate response to concerns about the securitised assets and related security; and (iii) the asset documents could be relevant to the valuation of the notes, especially if the securitised assets were in arrears or at risk of becoming non-performing.

Because of the nature of the remedy sought, the court applied a higher test than that set out in *American Cyanamid*.[5] Typically, the starting point for granting an interim injunction is whether there is a serious question to be tried, whether damages would be an adequate remedy, and where the balance of convenience lies. However, the court was concerned with the risk of injustice if the order had been wrongly made – granting a mandatory injunction requires a party to take a positive step, which by upsetting the status quo carries a greater risk of injustice than an order prohibiting an action. Granting a "temporary" order for disclosure would essentially render a trial unnecessary. However, the Bank's request was motivated by its need to comply with its MiFID II reporting requirements, and damages would likely be an inadequate remedy at trial. The court concluded that granting the order was likely to cause the least irremediable prejudice and carried a lower risk of injustice than refusing relief.

COMMENT

Providing all underlying documents in respect of the assets held in a securitisation can be a time-consuming and expensive exercise. In this case, the defendants estimated that two to three months would be required to collate and provide hundreds of documents, plus time to check the confidentiality provisions in each. In addition, local counsel would need to be engaged for any documents governed by foreign law.

This decision demonstrates the extent to which the court will interpret contractual disclosure provisions widely so as to capture documentation not expressly listed under the guise of "relevance". Careful drafting is important. If the intention is to accommodate requests for information for the purpose of complying with applicable law, then ideally the language should be specific enough for both parties to know in advance what documents will be caught. If the originator, sponsor or SSPE have no intention of providing all underlying asset documents, then the contracts should make that clear. ■

1 Articles 60 and 63 of Commission Delegated Regulation (EU) 2017/565.

2 Directive 2014/65/EU (Recast Markets in Financial Instruments Directive, or MiFID II).

3 Article 7 (Art 7) of Regulation (EU) 2017/2402 (EU Securitisation Regulation) specifies the minimum information that must be made available to regulators, investors and potential investors, and requires a designated party to make available to investors investor reports and loan-by-loan credit quality and performance data that conform to prescribed reporting templates.

4 Article 7(1)(b) of the EU Securitisation Regulation requires the provision of all underlying documentation that is essential for the understanding of the transaction, including a non-exhaustive list of potential transaction documents. The non-exhaustive list mentions only securitisation-level documents and no documents relating to the underlying assets.

5 *American Cyanamid v Ethicon Ltd* [1975] AC 396 (*American Cyanamid*).