

Tuesday, 12 November 2019

(10.30 am)

MR JUSTICE SMITH: Ms Tolaney, good morning.

Submissions by MS TOLANEY (continued)

MS TOLANEY: My Lord, I promised you a section on release this morning.

MR JUSTICE SMITH: You did.

MS TOLANEY: Your Lordship will have read our skeleton arguments, so I will just pick out the salient points. Your Lordship has the point that there are two arguments either a full release and the alternative a partial release, and in relation to the full release, which is our primary case, there are six key points.

The first is the method by which we say the release occurred, and that is by the Settlement Agreement in 2011, LBHI agreed to release all causes of action against PLC, subject to certain carve-outs, none of which are applicable here, and the release was in the broadest of terms. The key point for present purposes is that the release occurred when LBHI acquired the claim against PLC in 2017 i.e. when it came into its hands.

MR JUSTICE SMITH: Yes.

MS TOLANEY: The second point is the purpose of the release.

In broad terms, my Lord, the release was entirely

1 consistent with the objectives of LBHI and PLC, who are
2 in terminal insolvency processes and who wanted to draw
3 a line under their disputes in order to facilitate the
4 expeditious distribution of assets to their creditors.
5 You see that first from the recital that Mr Phillips
6 took you to, which was the last recital in the agreement
7 and, secondly, when we come on to it in due course, you
8 will see that from the declaration and the surrounding
9 documents, as well as standing back, a matter of common
10 sense, when one looks at the purpose of the Settlement
11 Agreement.

12 There are two other points to make in this regard;
13 first, that the Settlement Agreement is one of a number
14 of settlement agreements entered into and that was
15 incorporated into LBHI's US Chapter 11 plan.

16 MR JUSTICE SMITH: You make a point, I think, in your
17 written submissions that one can draw, or may be able to
18 draw inferences, as to what was meant from the terms of
19 other settlement agreements which actually deal with the
20 question of after-obtained assets.

21 MS TOLANEY: We do. As a secondary point, your Lordship
22 will have seen that, and my primary case is that it is
23 absolutely clear on the language, and that is a matter
24 for your Lordship, and as I am going to come on to
25 develop, although it is governed by New York law, the

1 principles are not materially different, we would
2 submit; perhaps save in one regard to English law, the
3 principles are largely agreed. I doubt your Lordship
4 will derive a huge amount of benefit from the expert
5 evidence, but I won't prejudge it. The matter is one
6 firmly for your Lordship as to the matter of
7 construction of the release clause within the agreement.

8 If your Lordship thinks there is any ambiguity,
9 which we submit there is not, then your Lordship is
10 entitled as a matter of New York law to look at
11 extrinsic evidence, including evidence from around the
12 time of the agreement plus post-contractual conduct, as
13 long as that conduct is unequivocal.

14 What we say is the only unequivocal conduct that may
15 be relevant to your Lordship are examples of other
16 agreements which may shed light on some of the points
17 being made by Mr Phillips.

18 My Lord, the second point I was just about to make
19 was that the US Chapter 11 plan for LBHI and its
20 affiliates described the settlement agreements I have
21 mentioned as being comprehensive settlements which would
22 provide certainty and finality to the debtors and all
23 parties in interest. That is quoted in our skeleton,
24 which is in bundle B at tab 3.

25 The third of my six points is that consistently with

1 the purpose that I have outlined, there is nothing in
2 the terms of the Settlement Agreement that limits the
3 scope of the broad release in section 802 to specific
4 claims held by the parties to the agreement at the time
5 of the agreement. And that is the case essentially that
6 is advanced against me.

7 What we submit to your Lordship is in fact the
8 opposite is true. Because the terms of the release are
9 so broad as to expressly include unforeseeable and
10 unknown claims, they also crucially include secondary
11 claims that LBHI could only acquire after the date of
12 the Settlement Agreement. That is quite an important
13 point in the context of the case I have to meet.

14 We say that it couldn't be therefore clearer that
15 after-acquired claims fall within the scope of the
16 release clause on the face of the clause itself.

17 My Lord, the fourth point is that there is nothing
18 surprising or uncommercial in Deutsche Bank's
19 construction of the release. The releases in the
20 Settlement Agreement were mutual, and both the debtors
21 and UK affiliates benefitted from the finality of the
22 release of unknown and unforeseen claims in each other's
23 hands. And one of the points to be made here is that
24 LBHI acquired the PLC sub-debt by assignment from its
25 direct subsidiary in April 2017. It did not acquire the

1 debt from a third party on an arm's length basis, and
2 the notice of assignment, and for your Lordship's
3 reference that is at F10, at page 5408, the notice of
4 assignment shows the same person signing on behalf of
5 the assignor and the assignee.

6 Whether or not LBHI appreciated the effect of the
7 Settlement Agreement entered into years earlier, was --
8 MR JUSTICE SMITH: To be clear, Ms Tolaney, you say the same
9 consequences follow, even if it was a completely arm's
10 length transaction.

11 MS TOLANEY: We do, but if I am attacking some of the
12 commercial points that have been made against me, that
13 is a relevant point, but I absolutely do say it wouldn't
14 have mattered if it was arm's length, but it is relevant
15 to note that this was all internal. And the fact that
16 it might not be -- might not have been appreciated, if
17 indeed it wasn't, we don't know that, that this was the
18 effect, is irrelevant to your Lordship. It may have
19 been a mistake, it may have been a bad mark bargain.
20 There may in fact have been a knowledge but a motivation
21 behind it, and I will explore that when it comes to the
22 evidence. But I just make that marker now that
23 your Lordship could not be satisfied just on the basis
24 of this transfer that that was the effect of the
25 Settlement Agreement, was not to release the debt,

1 otherwise the transfer wouldn't have happened.

2 My Lord, the fifth point is that it is common ground
3 that the Settlement Agreement is governed by New York
4 law, as your Lordship knows. But there is nothing in
5 New York law that would prevent the court giving effect
6 to the clear terms of the release recorded in the
7 Settlement Agreement.

8 And sixth and finally, insofar as LBHI seeks to rely
9 on evidence of post-contractual conduct, to go behind
10 the clear terms of the release, we say it is
11 inadmissible, as I have just said to your Lordship.

12 But even if it is admissible, other than the
13 agreements to which I have referred, any other conduct,
14 including conduct of other parties, is simply not
15 a reliable guide to the parties' intentions. What other
16 parties may or may not have done, or had commercial
17 motivations to do, or one party may have done, cannot
18 shed light on what the intention was behind the
19 agreement that is in question here.

20 My Lord, your Lordship has seen the Settlement
21 Agreement, and can I just remind you of its terms
22 briefly, and I just want to make a few points on the
23 clause itself, and then I will explore it in evidence.
24 It is at E16. And the relevant clause 802 is at
25 page 498.

1 MR JUSTICE SMITH: Yes.

2 MS TOLANEY: If your Lordship has our skeleton argument, the
3 relevant section starts at 67, and, my Lord, the
4 discussion of the terms starts at paragraph 110 on
5 page 38.

6 MR JUSTICE SMITH: Yes.

7 MS TOLANEY: What your Lordship will see, just looking at
8 the clause itself, is that the clause takes effect, the
9 release takes effect upon the occurrence of the
10 effective date, and that date is, as Mr Phillips
11 said, March 2012, and your Lordship will remember from
12 earlier in the agreement at the beginning on page 457,
13 that the date of the Settlement Agreement is
14 24 October 2011.

15 MR JUSTICE SMITH: Yes.

16 MS TOLANEY: So you will see there is a gap between the date
17 on which the agreement is made and entered into, and the
18 date upon which the release is said to take effect. And
19 you then see the various carve-outs in paragraphs 1 to
20 4, none of which are applicable. But if your Lordship
21 goes back to the definitions, just to follow through
22 what they are, you will see on page 460 the definitions
23 start, and what your Lordship will see is that allowed
24 claims and admitted claims are defined on page 460.

25 MR JUSTICE SMITH: Yes.

1 MS TOLANEY: And you will see therefore that they are
2 specifically identified, some in more general terms than
3 others. You will also see the definition of excluded
4 items on page 463.

5 MR JUSTICE SMITH: Yes.

6 MS TOLANEY: So what your Lordship will see with all of
7 those exclusions is that they are not narrow
8 necessarily, but they are clear categories that the
9 parties have identified, the effect of which on the face
10 of the clause is save for those exclusions, one can then
11 pick up the language: "each debtor on behalf of itself"
12 and so on; and if one then drops down, my Lord, "hereby
13 fully and forever releases, discharges and acquits each
14 debtor party from all causes of action".

15 My Lord, just pausing there. You have obviously got
16 a very wide release, including all causes of action.
17 And if one turns then to the definition of causes of
18 action at page 461, you will see just what the width of
19 that definition is. It means:

20 "All manners of cause of action, cause of action,
21 judgments, executions, debts, liabilities, demands,
22 rights, damages, costs, rights, expenses and claims of
23 every kind, nature and character whatsoever."

24 If one then goes back to the clause, my Lord, you
25 pick up then that the causes of action are whether at

1 law or in equity, whether based on contract, statute,
2 regulation, tort or otherwise, with the two exclusions
3 in relation to fraud. And then you pick up again
4 a widening, even yet further, accrued or unaccrued,
5 foreseen or unforeseen, foreseeable or unforeseeable,
6 known or unknown, matured or unmatured, and so on it
7 goes.

8 MR JUSTICE SMITH: Yes.

9 MS TOLANEY: And the linkage comes with the words:

10 "... in each case that arise from, are based on,
11 connected with, alleged in or related to any facts or
12 circumstances in existence prior to the date hereof."

13 So you have the widest of releases in relation to
14 all causes of action in the terms I have shown
15 your Lordship, and the causes of action can be known or
16 unknown, foreseeable or unforeseeable, matured or
17 unmatured, but they need to be connected, alleged or in
18 or related to any facts and circumstances in existence,
19 again a very wide sub-clause, prior to the date of the
20 Settlement Agreement.

21 And there can be no doubt that LBHI's claims under
22 the PLC sub-debt are causes of action, and the PLC
23 sub-debt facilities, as your Lordship knows, were agreed
24 and utilised prior to the date of the Settlement
25 Agreement. So on the face of it, this is met.

1 MR JUSTICE SMITH: Yes, I see. And you say the fact that a
2 transfer occurred afterwards is not a fact or
3 circumstance that is relevant to the part you just read?

4 MS TOLANEY: That is right, because the cause of action --

5 MR JUSTICE SMITH: The cause of action, you say exists
6 beforehand, and all that has happened it has been
7 transferred.

8 MS TOLANEY: That is right, and just standing back, my Lord,
9 there are two points to make on that. The first is one
10 can see as a matter of logic, that having gone to the
11 time and effort to enter into a Settlement Agreement of
12 this nature, there would be something quite perverse
13 about the party having entered into a release of this
14 kind, and then to go and purchase other people's claims,
15 and say: well, I can now sue you on this basis instead.
16 So one can see the absolute logic of this.

17 And if it were not enough that one approached it on
18 a matter of logic, you can actually see an indication of
19 that in the clause itself. Because if your Lordship
20 then goes on to read further in the clause, one picks up
21 at "related to any facts or circumstances in existence
22 prior to the date hereof including"; and then if
23 your Lordship reads what that includes, you will see
24 "the inclusion of any claims based upon it and asserted
25 right of subrogation, indemnification, contribution,

1 reimbursement, including any such claims in connection
2 with distributions to any of the UK affiliates or any of
3 their creditors based upon a guarantee".

4 And just on that point, my Lord, as at the date of
5 the Settlement Agreement, LBHI had not made any
6 distributions to its UK affiliates based upon
7 a guarantee, and it could not have done so until the
8 Chapter 11 plan was confirmed. So you can see that the
9 clause is capturing events between the date of the
10 Settlement Agreement and the release and the Chapter 11
11 plan.

12 There is also the further point that the scope of
13 the general release includes claims of LBHI based upon
14 the secondary liability arising in connection with
15 payments under the guarantee in respect of the PLC
16 sub-debt on the face of the clause, the language I have
17 just shown your Lordship. And if that is right, it
18 would be illogical that the general release doesn't
19 include claims on the primary liability and yet releases
20 claims on the secondary liability. And again, I will
21 develop that point, but I leave that with your Lordship
22 because it is apparent on the face of the clause itself.

23 MR JUSTICE SMITH: Yes. Thank you.

24 MS TOLANEY: So, my Lord, what we would submit to

25 your Lordship is this is quintessentially a matter for

1 construction for your Lordship looking at the terms of
2 the agreement. The expert evidence on New York law is
3 going to be of limited assistance to this extent, that
4 experts have helpfully agreed the relevant principles of
5 New York law. There may be a slight difference on one
6 point, but largely they are agreed.

7 And your Lordship will be all too aware that expert
8 evidence of foreign law is only admissible as to the
9 principles of construction, but inadmissible as to how
10 those principles should be applied. The latest
11 statement of that very well-known proposition is, of
12 course, the BNP Paribas case which, my Lord, is in the
13 authorities bundle at tab 151. The relevant passage for
14 your Lordship's note is in the judgment of
15 Lord Justice Hamblen at paragraph 45.

16 So my Lord, I say nothing further at the moment
17 except to make that marker.

18 MR JUSTICE SMITH: Yes.

19 MS TOLANEY: The other point, my Lord, is that it may be
20 helpful for your Lordship to have a look in advance,
21 before the experts are called on Friday, at the ProSat
22 decision, which we address in our skeleton argument,
23 which is in the expert bundle D at tab 89, and we
24 address that at paragraphs 98 to 105 of our skeleton
25 argument. That is at pages 34 to 36 of B, tab 3.

1 The final two points, my Lord, which I think
2 your Lordship has already foreshadowed are in relation
3 to pre-contractual conduct, Deutsche Bank relies upon
4 other bilateral settlements to the extent that that
5 material is admissible at all, and that is set out at
6 paragraph 137 of our skeleton, relating to the DBB
7 Settlement Agreement, and in particular the terms of
8 clause 7, which your Lordship has picked up.

9 MR JUSTICE SMITH: Yes.

10 MS TOLANEY: And, my Lord, the second point is as for
11 post-contractual conduct, the experts agree that is only
12 admissible if it is unequivocal and consistent. The
13 reference to that is the joint report at paragraph 20,
14 bundle D, tab 4. And the only unequivocal conduct is
15 the 2014 Settlement Agreement between LBIE and LBHI,
16 which again demonstrates that when the parties wanted to
17 exclude or include after-acquired claims, it is quite
18 apparent, and we say therefore it is quite apparent on
19 the face of the release clause your Lordship is
20 considering that after-acquired claims were meant to be
21 included.

22 My Lord, I won't say anything about the evidence of
23 Mr Geraghty at the moment -- I will explore that with
24 him -- save to say that again, the relevance of evidence
25 as to what any individual person thought, may have

1 thought, may have intended is entirely inadmissible and
2 cannot change the meaning of the clause, and it is
3 highly dangerous if it did.

4 My Lord, the alternative case on release is set out
5 in our skeleton argument and your Lordship will have the
6 point that the debate is essentially between the
7 relevant principle that a part-payment by a guarantor
8 will reduce the principal claim, and we have addressed
9 that at paragraph 147 of our skeleton, which Mr Phillips
10 tries to distinguish on the basis of an insolvency
11 principle, whereby the surety and the principal can
12 prove for the same debt in the full amount.

13 And as we say in our skeleton argument, the rules
14 behind that, or the policy behind that rule is clear,
15 because it is trying to ensure that the party who
16 eventually gets paid out is paid out the full amount,
17 and then no doubt credit can be given, but the rules
18 have no application here where there is only one party
19 trying to prove, and once the surety has released its
20 claim, because there is no potential for a double claim.
21 And so the insolvency rule, yes, is right, but it has
22 absolutely no application in the present situation.

23 My Lord, that then takes me on to PLC ranking, which
24 I can take briefly, having outlined yesterday the
25 commercial points that may be of assistance to

1 your Lordship.

2 MR JUSTICE SMITH: Yes.

3 MS TOLANEY: If your Lordship wishes to pick this up in our
4 skeleton at paragraph 159, that may be the easiest place
5 to follow it from.

6 MR JUSTICE SMITH: Yes. Thank you.

7 MS TOLANEY: And that is at page 56. My Lord, the starting
8 point is that both Deutsche Bank and GP1 submit that PLC
9 sub-notes are senior to the sub-debt and it is only LBHI
10 contending again for pari passu ranking.

11 MR JUSTICE SMITH: Yes.

12 MS TOLANEY: Ms Hilliard will develop GP1's case on
13 construction. She set it out very clearly in her
14 skeleton.

15 MR JUSTICE SMITH: Yes, indeed.

16 MS TOLANEY: And we submit that the same approach is reached
17 on Deutsche Bank's construction, and we give you another
18 route to reach the same result, which we say is the
19 right result. Both we and Ms Hilliard start from the
20 position that the court cannot determine the relative
21 ranking of PLC's subordinated debts without giving
22 effect to the express terms of the contract. What we
23 suggest is that unless your Lordship can reach the end
24 result on the express terms of the contract, then one
25 then has to look at where you get to. And your Lordship

1 has our circularity point.

2 MR JUSTICE SMITH: Yes.

3 MS TOLANEY: It is worth noting, my Lord, that both on
4 Deutsche Bank's argument, which is alternative,
5 obviously, to Ms Hilliard's, but in fact also on LBHI's
6 argument, both of us start from the position that
7 a literalist textual interpretation is not possible. We
8 are both saying that, and if your Lordship wants the
9 references in LBHI's skeleton, it is at paragraphs 212,
10 214 and 219.

11 Where we differ is that Deutsche Bank's approach
12 gives effect to the express terms so far as they go and
13 therefore reflects what the parties intended and
14 recorded. And then one gets to the point of which debt
15 is junior, which debt is senior, whereupon it does
16 become apparent why the commercial consequences
17 I outlined to your Lordship, and showed you from the
18 documents, may well provide some comfort to
19 your Lordship in providing the answer on an
20 Arnold v Britton basis.

21 What I can say to your Lordship at this stage is
22 that Mr Phillips' argument really doesn't fly, and it
23 doesn't fly because although he is correct to say that
24 if the parties have not agreed otherwise to debts ranked
25 pari passu under the Insolvency Rules, the same argument

1 that was being advanced on LBHI, that is not correct
2 where the parties have reached agreement that the debts
3 should not rank pari passu. What we say is as we set
4 out in our skeleton argument, and in particular at
5 paragraph 177, what the parties have clearly done here
6 is to make it plain that the debts do not rank
7 pari passu.

8 MR JUSTICE SMITH: Yes.

9 MS TOLANEY: So Mr Phillips' argument is the only argument
10 that is actually, we would say, prohibited by the terms
11 the contract, which is no doubt why he submits
12 a literalist interpretation shouldn't be given to these
13 terms.

14 MR JUSTICE SMITH: Yes.

15 MS TOLANEY: In particular, my Lord, what you will see is as
16 we set out at paragraph 177, that both sets of
17 instruments have the relevant definitions that
18 your Lordship will have seen, and perhaps your Lordship
19 might wish to have the clauses in front of you. They
20 are at -- one starts with E, tab 6.

21 MR JUSTICE SMITH: Yes.

22 MS TOLANEY: You see at page 87 to 88 the broad definitions,
23 starting with, at page 88, the definition of liabilities
24 which encompasses all of PLC's debts. The senior
25 liabilities mean all the liabilities except the

1 subordinated liabilities and excluded liabilities; we
2 have seen this before.

3 MR JUSTICE SMITH: Yes.

4 MS TOLANEY: The subordinated liabilities means all
5 liabilities to the lender in respect of each advance
6 made under this agreement, so that captures what is due
7 under this agreement. And the excluded liabilities over
8 the prior page are liabilities that are junior. So what
9 those definitions show, and I am just going to come on
10 to show you the contrast, is that there is no room for
11 a pari passu ranking because they are either
12 subordinated or excluded; they are not pari passu.

13 And one gets that very clearly from the contrast at
14 tab 9 in the PLC notes where one sees a different
15 definition at page 128 of subordinated liabilities where
16 the possibility of a pari passu ranking is envisaged.

17 MR JUSTICE SMITH: Yes.

18 MS TOLANEY: What that demonstrates, my Lord, is that the
19 debt doesn't envisage ranking pari passu with other
20 subordinated debt, and therefore that is why we say that
21 on the face of the terms, what is clear is that the one
22 construction being contended for by Mr Phillips is the
23 one that actually the terms preclude. That then does
24 provide a starting point and an indicator that one must
25 be subordinate to the other, and that is where

1 Ms Hilliard has explained a textual construction, we
2 have explained a commercial construction that takes you
3 to the same result that the notes are senior.

4 My Lord, lest it be said against me, the
5 Arnold v Britton principle is there for a reason. It is
6 obviously not the obvious starting point, but it is
7 there for a reason where the court has to do its best to
8 give it an effect from objective inferences, not
9 subjective but objective inferences as to what the
10 parties would have intended, having looked at all of the
11 circumstance. And what we say is you start with the
12 terms, you look at the funding structure, and you look
13 at all the objective points that I have shown
14 your Lordship as to why it is that the flow of funds was
15 so important, and that is where one reaches the
16 construction for which we contend.

17 MR JUSTICE SMITH: Yes.

18 MS TOLANEY: My Lord, those are my opening submissions. If
19 I can be of any further assistance.

20 MR JUSTICE SMITH: No, Ms Tolaney, I am very grateful.

21 Thank you very much.

22 MR PHILLIPS: My Lord, we are ahead of the timetable.

23 My Lord, we now wish to call Ms Hutcherson.

24 MR JUSTICE SMITH: Yes.

25 MS HILLIARD: My Lord, before Ms Hutcherson is called,

1 bearing in mind Ms Hutcherson is going to be all the way
2 over there, and I am going to be doing some examination
3 and I am all the way over here, I am just wondering
4 whether it might be possible at some point, not
5 immediately, to move a bit closer. I have a loud voice,
6 but ...

7 MR JUSTICE SMITH: No, I quite understand, it is one of the
8 problems with the width. It may be that we can do some
9 rearrangement.

10 MR BELTRAMI: I am very happy to swap when the time comes.

11 MS HILLIARD: Thank you very much, my Lord.

12 MR JUSTICE SMITH: Thank you very much, most helpful.

13 MR PHILLIPS: My Lord, may I call Ms Hutcherson.

14 MR JUSTICE SMITH: Yes.

15 MS SOPHIE HUTCHERSON (affirmed)

16 Examination-in-chief by MR PHILLIPS

17 MR JUSTICE SMITH: Ms Hutcherson, do sit down, make yourself
18 comfortable. I hope you have a glass and some water
19 there.

20 MR PHILLIPS: Thank you very much, my Lord. Ms Hutcherson,
21 I am hoping that you can have handed to you a bundle
22 which is bundle C. I am hoping it is going to be handed
23 to you. (Handed)

24 Yes. Is that open at tab 6, divider 6?

25 A. Yes, it is.

1 Q. And do you see that that is a witness statement of
2 Sophie Louise Hutcherson, and it is dated 18 April; do
3 you see that in the top right-hand corner at the front?

4 A. Yes, it is.

5 Q. And if you could turn to the back page. Is that your
6 signature?

7 A. It is indeed my signature yes.

8 Q. And is this your witness statement?

9 A. This is my witness statement, yes.

10 MR PHILLIPS: Thank you very much. If you wouldn't mind
11 waiting there, I think there will be some questions for
12 you.

13 Cross-examination by MR BELTRAMI

14 MR BELTRAMI: Ms Hutcherson, good morning.

15 A. Morning.

16 Q. Could I just say in terms of the process, you will be
17 handed some documents, I hope, from time to time from
18 those files behind you, and we will have to get rid of
19 them and go back to some of them as we go on. The one
20 in front of you at the moment, bundle C, if you keep
21 that at all times, because that has your statement, so
22 best not to hand that back at any point if you can
23 remember.

24 Can you pick up that bundle and that tab and go to
25 paragraph 7, and just to confirm your role at Lehman.

1 What you say, as I understand it, is this right, that
2 you were employed from 1990 at the SFA, which then
3 became the FSA, and your work included work on capital
4 adequacy and supervision, is that right?

5 A. Yes. I was -- my role at the SFA was in a number of
6 roles as supervision and then in policy, working on
7 capital adequacy policy rules.

8 Q. Thank you. At paragraph 8 you moved to Lehman, and you
9 worked -- and your various job titles, essentially in
10 compliance. Yes?

11 A. Yes, I worked in the compliance department.

12 Q. Would it be fair -- sorry to cut you off -- that you
13 were at least a major contact with the FSA for
14 Lehman during this period?

15 A. Yes, I was a major contact for Lehman during that
16 period. During that period, for different parts of
17 Lehman, for example when I was head of the equities
18 compliance team, in respect of equities compliance
19 matters, and latterly on the more prudential matters
20 like capital and risk.

21 Q. Presumably you had a good relationship with people
22 there, and that is why you were dealing with them, would
23 that be fair?

24 A. Yes. We -- we cultivated a -- a good, open
25 relationship.

- 1 Q. Now, can we ask you now something about regulatory
2 compliance and can you turn, in the same bundle, to
3 tab 19. First can I just ask you to explain, this is
4 a transcript of an interview which you gave, is that
5 right, on 25 March 2019?
- 6 A. Yes.
- 7 Q. It is exhibited to your witness statement as part of
8 your evidence?
- 9 A. Yes.
- 10 Q. Can you go, please, to page 245, so two numbers at the
11 bottom, the larger number in the bottom right-hand
12 corner, to 245, and head down to line 27. And the
13 context of this, you are being asked about the switch
14 from IPRU to GENPRU on 1 January 2007. And specifically
15 the fact that as we all know now, under IPRU there were
16 standard forms, and under GENPRU there were not. That
17 is right, isn't it, and what you say in your transcript
18 at 27 and 28 is that all of the industry were appalled
19 when they got rid of the standard form agreements
20 because the industry found them incredibly useful.
- 21 Just one question. How are you able to speak about
22 the industry as in general?
- 23 A. My Lord, the -- my comments in that interview were
24 intended to be of help to all of the parties. My
25 comments about the industry as a whole, I would clarify

1 mean the people who were working in various different
2 firms who worked on subordinated loan documentation.
3 There were discussions between members of staff from
4 different companies through trade associations,
5 for example, people who knew each other from history,
6 and when the rules were changed and going through
7 consultation periods, we would discuss the potential for
8 how the rules would be applied. And those people who
9 worked for ex-securities firms, as opposed to banks, had
10 always found these standard agreements very useful.

11 And there was a general feeling amongst those that
12 I spoke to at the time that doing away with standard
13 agreements was actually a -- a step which was not
14 welcome to us because we knew where we are -- where we
15 were with standard forms.

16 Q. Yes, thank you. And can you move on to page 246, the
17 next page, and what you say, just to follow on from what
18 you just explained, if you go to line 8:

19 "A lot of the industry just carried on using the old
20 loan agreements because they knew that they worked."

21 Can I ask you how prevalent was that?

22 A. If -- in terms of how many other firms carried on using
23 them, I couldn't answer that exactly because I don't --
24 I don't have that information.

25 Q. But your understanding, is this right, that a lot of

1 other people within the industry thought it just as
2 convenient to carry on using the old agreements because
3 they still worked and you knew where you stood?

4 A. That was my understanding at the time, yes.

5 Q. Thank you. Can I now ask you about your own role in the
6 drafting. You are aware of the 2007 notes, which are
7 the -- one of the subject matters of this dispute, the
8 notes of 1 May 2007?

9 A. The -- do we mean LBHI eurobond?

10 Q. Yes.

11 A. Yes.

12 Q. Can you go back to your witness statement, please,
13 tab 6, paragraph 84. Page 87. What you say here is
14 that your role in respect of the notes was in part to
15 co-ordinate with the FSA. And we will see later that
16 you did in fact write a letter to the FSA about the
17 notes. Do you see that, looking at the first sentence?

18 A. That is correct, yes.

19 Q. So my question is: did you have any other role in
20 respect of the notes other than the co-ordination with
21 the FSA?

22 A. As my witness statement says, my role was to co-ordinate
23 with the FSA to send the letters or the explanations,
24 organise phone calls or meetings at which the plans
25 around restructuring in 2006 and 2007 were actually

1 being articulated. My role was to work with the other
2 members of staff from other departments within
3 Lehman Brothers, to prepare the presentations, the
4 letters, PowerPoints, as a member of that group.

5 Q. All in connection with co-ordination with the FSA?

6 A. That is correct, yes.

7 Q. Did you have any role in the drafting of the notes?

8 A. No, my role was not to draft the notes.

9 Q. Did you ever see any of the drafting of the notes?

10 A. I don't remember ever seeing the drafts of the notes.

11 Q. Do you remember when you first saw the draft of the
12 notes?

13 A. No. I don't remember that.

14 Q. When you say you don't remember that, there are just
15 these two possibilities: do you think you would have
16 seen them when you were at Lehman, or do you think the
17 first time you saw them was after you left Lehman?

18 A. I think while I was at Lehman, the only time I would
19 have seen the note documentation was as an appendix to
20 a waiver application, and I would not have read through
21 the detail of those -- that documentation.

22 Q. Yes, well, there wasn't a waiver application for these
23 notes because they were under GENPRU, and waiver wasn't
24 required. So would that suggest, as far as you can
25 remember, you probably didn't see them when you were at

1 Lehman at all?

2 A. Probably not. No, probably not.

3 Q. Insofar as your involvement on the notes can be
4 discerned, can you be handed bundle F4 and go to
5 page 1880. Do you have that? It is an e-mail from you
6 dated 13 March 2007?

7 A. Mmm mm.

8 Q. And if you go over the page just to see the context,
9 because obviously we have to work backwards with
10 e-mails, if you go to 1881, in the middle of that page
11 it is an e-mail from Huw Rees, who is he? You don't
12 remember? It doesn't matter; it is not a test.

13 A. I believe, my Lord, that Huw Rees worked in the treasury
14 department.

15 Q. Thank you. And what he says -- you are copied on the
16 e-mail -- is that there is a plan to do a restructuring
17 of the LBHI2 debt to replace the debt of \$7.1 billion
18 with the equivalent in a Cayman floating rate note,
19 which can be traded:

20 "... and specifically allowed a sale ... around
21 700 million to another Lehman entity, Luxembourg Finance
22 SARL, which in turn is obtaining funding at an
23 advantageous rate from outside the group."

24 Do you remember that? So we will look at that
25 transaction. This was a transaction which didn't

1 actually happen, but just to follow it through. At
2 1880, you are indicating that you will be writing
3 a letter to the FSA about that transaction, so you see
4 the end of your e-mail, 1880, "will send round a draft
5 FSA letter later today".

6 So at that stage, you were planning -- you were told
7 about the transaction, and your role, or that
8 transaction, was to circulate a draft letter ultimately
9 to go to the FSA; would that be right?

10 A. Yes. That's correct.

11 Q. And if you go to 1883, we can see the letter you did
12 write to the FSA dated 16 March 2007, notifying them of
13 what was then thought as the plan.

14 MR JUSTICE SMITH: Do you want to just take a moment to
15 refresh your memory of the letter?

16 A. Yes, no, no, I do -- I remember seeing this letter
17 before. Yes.

18 MR BELTRAMI: There is a danger with all lawyers, because we
19 have read these documents already, we know what they
20 say, I hope, anyway. So by all means read anything that
21 you are shown, and don't let me rush you through it.

22 So you see the big paragraph in the middle, you are
23 explaining to the FSA that there is a proposed
24 transaction of a 7 billion eurobond which will be part
25 transferred to a different entity which will be financed

- 1 out of the group. That is the finance through
2 Liberty Hampshire; do you remember that?
- 3 A. I have a recollection that at some point, there were
4 plans discussed to source funding from
5 Liberty Hampshire, but that actually this never -- never
6 came to fruition. The plans were changed.
- 7 Q. No, I will come back in a minute, I am sorry to say,
8 about -- a couple of points about that particular
9 transaction. But at the moment I am just trying to
10 follow through the sequence, if I can, so that on
11 16 March, you were writing to the FSA about a then plan
12 involving Liberty Hampshire, and there was a follow-up
13 letter to the FSA on 1885, which was 20 March, by
14 Mike Phillips, which enclosed some charts. Did he work
15 with you at the time?
- 16 A. Yeah, he was a colleague of mine in the compliance
17 department.
- 18 Q. Thank you. But by -- so that is 20 March, but by
19 26 March, if you go on to 1892, it seems that it had
20 been decided to do a different transaction. The e-mail
21 at the bottom of 1892 is an e-mail from Jackie Dolby, to
22 which you are copied, with a description of a different
23 transaction; do you have 1892?
- 24 A. Yes, I do.
- 25 Q. And the different transaction is ultimately the eurobond

1 that we are now familiar with, do you want to read that
2 just to remember? (Pause)

3 A. Yes, I remember that e-mail.

4 Q. So about a week later a different transaction came up,
5 and your role again for the different transaction was
6 going to be to tell the FSA about that, wasn't it?

7 A. That is correct yes.

8 Q. Because if you go on to 1984, 1984 is an e-mail from
9 Jackie Dolby to you saying in fact that she has produced
10 a first draft of a letter to the FSA. Do you remember
11 that, and the first draft is at 1985?

12 A. Yes.

13 Q. It is a draft in your name to the FSA telling them about
14 the latest transaction which is being proposed.

15 A. Yes, I recollect that.

16 Q. And she asks you for your thoughts, and your thoughts
17 were if you go to 2006, at the bottom of that page is
18 the e-mail we just looked at, just above that so middle
19 of the e-mail is your e-mail to Jackie Dolby on
20 10 April, where you say -- I think it should be:

21 "I have [played] with the letter -- are you all
22 happy for it to be sent?"

23 I think that is what that -- the typo there?

24 A. Yes, yes, it is a typo.

25 Q. If you go to 2008, you have made some amendments to the

1 letter, which I think are largely replacing some of the
2 things in slightly different places in the letter, which
3 was ready to be sent to the FSA, is that right?

4 A. I would say this was certainly a further iteration of
5 the letter.

6 Q. Yes. Okay --

7 A. But I am not sure whether this would have been the final
8 version because it looks like there would have been
9 a need for all of us, myself, Gareth, Jackie, treasury,
10 it looks like Dave Rushton, to have actually signed it
11 off before it went.

12 Q. So you certainly say at 2006:

13 "Are you all happy for it to be sent?"

14 And if you go to 2049, it is from Jackie Dolby to
15 you on 12 April, the top e-mail:

16 "We are now good to go on the attached and submit to
17 the FSA. Please use letter below and this structure
18 chart."

19 And I think it is the same draft, the 2049, that
20 e-mail, you are good to go, and 2055 is the actual
21 letter of 12 April, which I think follows the same draft
22 that we just looked at.

23 So that is the sequence -- I wanted to take you
24 through that -- that was the sequence of events that we
25 have seen from the file, which is, I think, consistent

1 with what you said earlier that your role would be to
2 report to the FSA, culminating in the letter to the FSA.
3 There is not anything in the file that suggests you had
4 any other involvement in the transaction. Would that be
5 consistent with the nature of your actual role?

6 A. Yes, that would be consistent with my role in the
7 compliance department.

8 Q. Can you go back now to 2056 -- no, I didn't mean --
9 sorry.

10 Let us go back to 1883; I am sorry, that was my
11 fault. I am told it is not exactly the same. 1883 is
12 the letter we just looked at, which was your letter to
13 the FSA about the earlier -- the Liberty Hampshire
14 transaction. And what you describe at that stage as
15 being proposed, as we discussed, was the 7 billion
16 eurobond with 725 million transferred to a different
17 company and financed through Liberty Hampshire. And you
18 can see that if you go to 1887, which is a structure
19 chart, and you can see that on the left-hand side is the
20 Lehman internal regulatory chain, if that is the right
21 way of describing it, where the plan was for 725 million
22 of the eurobond to be sold to a different company, which
23 is on the right-hand side, Luxembourg, which is to be
24 financed by an outside party, Liberty Hampshire. That
25 is what that shows, isn't it?

- 1 A. Yes, I believe it does.
- 2 Q. So this would have been an alternative way of funding
3 some of this capital, wouldn't it, ultimately through
4 a third party external investor?
- 5 A. I believe this was a -- that was a proposal that was
6 made. But to clarify, it was dropped and I cannot
7 remember the reasons why it was dropped.
- 8 Q. No, I understand it was dropped, but I am just seeing
9 about what was being thought about at the time was
10 a proposal under which part of the eurobond was going to
11 be sold to a different Lehman company and was going to
12 be financed by an external borrower -- external lender,
13 wasn't it? That is what is being proposed in the --
- 14 A. I think my understanding of it was that the bond was
15 going to be owned by Luxembourg Finance SARL which was
16 somehow connected to the Lehman Group but which was
17 going to borrow money from Liberty Hampshire which was
18 a third party.
- 19 Q. Yes, so the bond would be put into a different
20 Lehman company and would be financed by a third party,
21 and presumably for that purpose, the third party would
22 have to have the security of the bond?
- 23 A. I don't remember ever thinking about that at the time.
24 It's --
- 25 Q. But in any event, that plan was sufficiently advanced to

1 notify the FSA about it?

2 A. Indeed it was.

3 Q. Yes. And it changed presumably because someone thought

4 there was a better tax advantage doing it a different

5 way?

6 A. It changed, but I don't remember exactly why.

7 Q. Okay. But it was the case, wasn't it, that within

8 Lehman, there was a team of people, probably several

9 teams of people, who were working out these structures

10 to find the best tax advantage outcome?

11 A. My understanding and my -- my recollection was that

12 there were groups within the treasury function, within

13 the tax department, who were focused on the best

14 possible outcome from a funding and liquidity

15 perspective, and from a tax perspective, and they took

16 advice from external advisers and from some internal

17 expert groups.

18 Q. Yes. If you go back, please, to your transcript which

19 is bundle C, tab 19, page 256. From about line 21,

20 I think you describe what you just said, which is that:

21 "... the logic was always, if a structure could be

22 proposed that would work from a financial-resources

23 regulatory-capital perspective that the regulator could

24 get happy with, that would save the bank paying tax,

25 would save cost, that should always be looked at. And

1 if it can save us quite a lot of cost, then great --
2 let's try and do it. If it gives you more flexibility
3 [next line] ... whether that was happening at exactly
4 the same time that we were moving the companies around
5 ... doesn't the letter go into some detail?"

6 But that was the reality, wasn't it, that within
7 Lehman, there were people seeking to structure things
8 from time to time in order to secure the best taxation
9 and cash flow advantages?

10 A. I think that that is a fair description of some of the
11 work that tax, treasury, regulatory capital team were
12 doing to the benefit of the Lehman Group as a whole.

13 Q. And if we now go back to what you said to the FSA about
14 the eurobond transaction that happened, which is 2056,
15 you described the transaction, and if you go to 2057,
16 you described the steps in which the bond would be
17 issued and transferred within the group ultimately to
18 SLP3.

19 MR JUSTICE SMITH: I think, Mr Beltrami, the witness
20 probably ought to read it. You have not taken her to
21 this document before.

22 MR BELTRAMI: Yes, sorry. 2057, under the heading
23 "Intermediate 2, timing", you describe the current
24 situation, and then through a number of steps, you
25 intend to replace the stream of subordinated debt with

1 tier 2 subordinated notes. Steps to achieve this are
2 detailed below.

3 The next paragraph, you identified the issue of the
4 bond, as such. The next paragraph, it wouldn't affect
5 ECAPS, don't worry about that. The next paragraph, you
6 then describe how the structure will continue, ending up
7 at the end of that paragraph with SLP3.

8 A. Yes.

9 Q. I mean, there is no sort of catch with that. You were
10 describing the transaction as it was envisaged at that
11 time?

12 A. Yes, as -- as to how mechanically it was going to
13 actually happen.

14 Q. Yes.

15 A. I mean, to clarify, that that's -- that was part of my
16 role so that we could explain to the supervision team
17 who our primary point of contact at the -- what was then
18 the FSA, so they could understand all the steps that we
19 were going through, and that was the mechanics of how it
20 was going to work.

21 Q. Yes, but you didn't commit to the FSA that that
22 structure would always be kept in place, did you?

23 A. No. We would never have -- no, we didn't commit to
24 something being permanent and forever.

25 Q. Of course not.

- 1 A. Because we knew it would change.
- 2 Q. Yes. And it would change, presumably, depending on
3 whether some taxation advantage popped its head in the
4 future?
- 5 A. Indeed. And that would have been discussed at regular
6 supervision meetings over the previous years, from when
7 we had started looking at, for example, the APB 23 plans
8 that started way back at the beginning of the --
9 2001-ish, and the FSA understood that there was an
10 evolution that -- and we took them on that journey with
11 us.
- 12 Q. Yes, so whatever the intention was on 12 April 2007,
13 that was just the intention on 12 April 2007, wasn't it,
14 and what happened in the future would happen in the
15 future?
- 16 A. That is correct.
- 17 Q. Thank you. You can put away that bundle, I think, and
18 can you go back to your witness statement. Tab 6,
19 bundle C. Can you go to paragraph 31. It is page 75.
20 You say that you are discussing the question of ranking
21 as between subordinated debts; you understand the point
22 that we are talking about?
- 23 A. Yes.
- 24 Q. And you say in the paragraph that that was something
25 that was never addressed, simply not on your radar.

1 So can I just ask you to confirm, so this question,
2 are you saying was never discussed by anyone?

3 A. I don't remember anybody ever discussing the ranking of
4 subordinated debt with me or in any of the meetings that
5 I was part of with people from treasury or finance or
6 legal.

7 Q. Presumably that is because never -- no-one ever thought
8 it would become relevant. We can all laugh now, but at
9 the time, no-one thought Lehman would go bust and
10 presumably even if it did, no-one thought if you went
11 bust, you would be looking at subordinated debt. So
12 there are two reasons why you wouldn't discuss it,
13 aren't there?

14 A. Yes, the two reasons were at the time Lehman was
15 growing, it was profitable; we didn't expect it to ever
16 occur. And I think the other assumption would always
17 have been: well, if a company does actually get -- go
18 insolvent, sub-debt probably won't get paid out anyway,
19 because there won't be any money left to pay out the
20 sub-debt.

21 Q. Yes, so if someone ever had considered it relevant, they
22 would have discussed it, one assumes?

23 A. I think if it had been relevant, I -- I would have
24 expected to, and I have said that in my witness
25 statement a couple of times, it to have come up in

1 conversation, because it would be something which we
2 would have shared with the SFA when we were filing
3 waivers applications, and when we were explaining our
4 plans to them, based on the principle that you were open
5 and honest and trying to actually give them as much
6 background and explanation as possible.

7 Q. Yes, but if it is irrelevant, then nothing is said?

8 A. If it wasn't discussed, because if we never -- if we
9 never knew about it, then we wouldn't discuss it with
10 the FSA -- SFA, FSA.

11 Q. Still in your witness statement, the paragraph above,
12 you say that IPRU didn't expressly address that question
13 ranking between sub-debt. And it was the same for
14 GENPRU as well, it didn't discuss it either?

15 A. That's.

16 Q. So the regulation didn't deal with the point and it is
17 also the case, isn't it, that insofar as you were
18 concerned, this was not something that was ever of
19 concern to the regulator?

20 A. It is correct that the rules did not cover either IPRU
21 or GENPRU, the need to distinguish between the ranking
22 of different subordinated debts, whatever form that they
23 were in. From a capital adequacy objective point of
24 view, so what was the objective of having subordinated
25 debt and capital there under the capital adequacy rules,

1 it was intended to protect consumers, clients, ordinary
2 creditors in the event that a firm failed, so that there
3 could be -- there was enough capital for an orderly
4 wind-down.

5 The -- I -- the second part of your question, could
6 you repeat it please.

7 Q. My question was, at least I think my question was: the
8 issue of ranking between subordinated debt was not -- so
9 far as you were concerned was not something of any
10 concern to the regulator?

11 A. From a pure capital adequacy point of view, I don't
12 think it was necessarily the most important thing for
13 the regulator, or would be that important. However,
14 from a group supervision point of view, where the FSA
15 and their supervision team would be looking at: how did
16 the whole group fit together; what was the activity
17 going on in the different parts of the group, in the
18 different entities; how was the funding flow working
19 around the whole group; they may have been interested in
20 something like ranking, and so we would have -- if it
21 had been a question, if it had been a topic that came up
22 in conversation, I think we would have spoken about it.

23 Q. Well can I ask you to go back to your transcript on
24 tab 19. At page 247?

25 A. Page 2...?

1 Q. Page 247. And if you go -- line 26, you were asked
2 about this question of ranking, and you said you have
3 had a good look at the rule:

4 "... to confirm my long-held belief and
5 understanding that the regulator never focused on which
6 sub-debt would get paid off first. It wasn't really in
7 their interest. Their focus was on making absolutely
8 sure that subordinated debt did not get paid out until
9 last but one, the last being the shareholders."

10 So it looks, as I read it, a pretty unequivocal
11 observation on your part, that this was simply not
12 something of concern to the regulator?

13 A. I think -- can I clarify. When that interview was
14 actually made, that was a transcript of an interview
15 that I undertook. I do believe, and I still believe,
16 that the regulator, from a pure capital adequacy
17 perspective, was not focused on which sub-debt would be
18 paid off first. Partly because they -- it would be paid
19 off last, after all of the consumers, clients, people
20 I have said who were really the main focus of the
21 regulator to make sure that they were protected. GENPRU
22 and IPRU rules that we are referring to here are the
23 pure capital adequacy rules, but as I have said, the
24 more group supervision aspect of supervision by the FSA,
25 which went further than just pure capital adequacy, it

1 was -- I think there ranking would have been of
2 interest, it would have been something they would have
3 been interested to understand, even though it may not
4 have actually influenced the capital adequacy point.

5 Q. If you go to 250, you say the same thing again
6 specifically about what the regulator's purpose is. If
7 you go to line 28:

8 "From a regulator's point of view, they say, look,
9 we're here to protect investors, we're here to protect
10 the clients, we're here to make sure there's an orderly
11 wind-down, and, frankly, the people who ... being paid
12 a premium for providing subordinated debt get paid off
13 last. It is a fair question to ask but it never came
14 up."

15 It wasn't just the regulators weren't interested;
16 what they were concerned about was protecting creditors,
17 and this didn't come into that, did it?

18 A. As I have said, I think from a capital adequacy point of
19 view, that -- that is what the regulator was interested
20 in, making sure that all of that group of people were
21 actually protected, and then who -- who was paid off at
22 the end of the Waterfall who had been subordinated,
23 I think it is correct to say they were far less
24 interested in that.

25 Q. And there were two instances we have in the files,

1 Ms Hutcherson, where ranking changed, if I can put it
2 that way, in the subordinated world.

3 The first was on in respect of the ECAPS. Were you
4 involved with the ECAPS, do you remember those?

5 A. I was involved to differing extents depending on which
6 issuance I think it actually was.

7 Q. Can you be handed bundle E, please, and go to tab 10.
8 This is one of the ECAPS instruments, and if you turn,
9 please, to -- we can see it at page 152, the ECAPS
10 holders obtained the benefit of a guarantee from PLC.
11 So in addition to obtaining partnership interests in the
12 ECAPS, they obtained a guarantee from PLC. And the
13 guarantee, as you will see there in 152, under the
14 heading, "No limitation on senior debt", and please take
15 the time to read it, specified that that guarantee would
16 rank junior to all liabilities to creditors, including
17 without limitation depositors, general creditors and
18 subordinated debt holders.

19 Do you see?

20 So this was an instance where within the
21 Lehman funding structure, there was ranking between
22 subordinated debt because this guarantee debt ranked
23 below other subordinated debt, do you see?

24 A. I don't recollect ever actually reading this document.

25 Q. No?

1 A. So I don't really feel I can comment on it.

2 Q. All right. Because if you -- if you can be handed
3 bundle F3.

4 MR JUSTICE SMITH: Can we put E away?

5 MR BELTRAMI: We can put E away, I think.

6 At 1223, if you have it, is a letter from you to the
7 FSA, dated 5 October 2005. And this is in connection
8 with a waiver application for one of the sets of what we
9 have called the PLC notes.

10 A. Mmm mm.

11 Q. And the PLC notes, as you may remember, were the ones
12 that were funded by the ECAPS?

13 A. Yes.

14 Q. So this was your communication to the FSA asking for the
15 waiver because it wasn't in accordance with the form?

16 A. Mmm mm.

17 Q. And I picked it up because the only letter I could find
18 from you to the FSA about that transaction at least, but
19 there is nothing in here or anywhere else that I have
20 seen where you are saying to the FSA: by the way, the
21 ECAPS guarantees are subordinated to something else; so
22 can we infer from that that either you didn't know about
23 it, no-one told you about it, or you didn't tell the FSA
24 about it?

25 A. I don't remember ever knowing about it.

1 MR BELTRAMI: Ms Hutcherson, thank you very much. That is
2 all I have to ask.

3 A. Thank you.

4 MR BELTRAMI: My Lord, this may be a moment to break.
5 I don't know if that is convenient.

6 MR JUSTICE SMITH: Yes, that is a very good point. We will
7 rise for five minutes, and Ms Hutcherson, I am sure you
8 have been told this anyway, but please don't talk about
9 your evidence to anyone outside court. I am sure you
10 wouldn't want to anyway. There we are. We will rise
11 for five minutes.

12 (11.45 am)

13 (A short break)

14 (11.55 am)

15 Cross-examination by MS TOLANEY

16 MS TOLANEY: Good morning, Ms Hutcherson, still.

17 Ms Hutcherson, you made your statement on 18 April 2019,
18 I think; that is right, isn't it, 18 April 2019 --

19 A. Yes, that is correct.

20 Q. -- you gave your statement? And in your employment
21 history, you say you left Deutsche Bank
22 in September 2018, is that right?

23 A. I ceased to be employed in September 2018, yes.

24 Q. And you now describe yourself as an adviser and
25 consultant, is that correct?

- 1 A. That is correct.
- 2 Q. What exactly have you been doing since then as an
3 adviser and consultant?
- 4 A. I have been doing some work with the
5 Lehman administration. In the summer I had to stop
6 doing any advising and consulting because the last five
7 months, I have been caring for my mother.
- 8 Q. And does your consultancy work -- you mentioned the
9 Lehman Group, does your consultancy work include work on
10 this case?
- 11 A. That's what I am talking about.
- 12 Q. So you are being paid for your evidence, are you?
- 13 A. I am being paid to give my time to this case, yes.
- 14 Q. Thank you. You were not, I think, part of the deal
15 team, were you, at Lehman's Group?
- 16 A. The deal team for what particularly?
- 17 Q. The deal team for the ECAPS transaction, for example?
- 18 A. No that's correct.
- 19 Q. And you were not involved in structuring the ECAPS, were
20 you?
- 21 A. No, I was not involved in structuring the ECAP.
- 22 Q. Or the drafting of them.
- 23 A. Correct.
- 24 Q. And I think you said that you had not actually seen the
25 terms of the ECAPS that Mr Beltrami showed you this

- 1 morning?
- 2 A. I don't remember actually looking through them in any
3 detail.
- 4 Q. So it follows that you didn't discuss any of the
5 commercial issues about the ECAPS transactions with the
6 deal team?
- 7 A. I am not actually aware who the deal team was. I wasn't
8 at the time aware, let me clarify. I wasn't at the time
9 aware who the deal team was, other than it was a -- the
10 treasury, senior guy in treasury was Paulo Tonucci. Who
11 was working on it with him, I don't recollect.
- 12 Q. Mr Katz was in the deal team for the ECAPS transaction,
13 do you know Mr Katz?
- 14 A. No, I do not know Mr Katz.
- 15 Q. Mr Katz says that he and his team were involved in
16 structuring transactions, and doing so, they would
17 routinely consider and discuss priorities in an
18 insolvency situation, and they would also evaluate the
19 subordination provisions in a solvent situation within
20 the deal team. Now, you wouldn't have been party to any
21 of those discussions, would you?
- 22 A. No, I would not have been party to those discussions.
- 23 Q. And can I just take it from that finally that you were
24 not involved in any of the discussions therefore about
25 the commercial considerations going to the dividend

1 stopper?

2 A. In terms of when the ECAPS were issued, no, I would not
3 have been party to those discussions. The -- the
4 matters that I would have been party to would have been
5 when the waiver forms were being finalised for
6 submission to the FSA, making sure that all of the
7 necessary sections of the waiver forms were completed,
8 and the justifications for why FSA should give a waiver
9 had actually been covered in those applications.

10 So to the extent that any rankings or dividend
11 stoppers had any relevance to that, that would have
12 been -- should have been covered in -- in that piece of
13 work before we sent in waiver applications to the FSA.

14 Q. And so therefore, insofar as any of those matters had
15 any regulatory impact, you would have known about them
16 but otherwise not?

17 A. I should have been aware of them, I should have been
18 told about them as part of the -- part of the process of
19 considering whether a waiver was likely to be issued.

20 Q. In a regulatory context.

21 A. In a regulatory context, correct.

22 Q. And nobody has discussed with you any of the commercial
23 drivers for the ECAPS transaction?

24 A. I don't remember discussing the commercial drivers.

25 I may well have seen copies of PowerPoint presentations

1 that were presented to new products committees or
2 internal committees. But I don't -- I don't recollect
3 direct conversations around them.

4 Q. And I think you confirmed to Mr Beltrami, did you not,
5 that the regulator was concerned in a relative ranking
6 between unsubordinated debt and subordinated debt,
7 rather than the ranking as between subordinated debt?

8 A. My understanding is that the regulator was predominantly
9 focused on ensuring that subordinated debt met all of
10 the requirements as set out in the various rules,
11 whatever timing that was, as -- as separate from any
12 unsubordinated debt; and that when we applied for
13 waivers, that the documentation around the instruments
14 that were to be covered by that waiver met the same
15 level of subordination to clients, consumers, other
16 creditors, unsubordinated creditors.

17 Q. Exactly. And I think you accept in your statement,
18 therefore, that if there was a commercial reason,
19 hypothetically for subordinated debt to have a senior or
20 junior ranking to each other, that was possible from
21 a regulatory perspective?

22 A. Could you rephrase the question, please?

23 Q. You accept, I think in your statement, that if there was
24 a commercial reason, hypothetically speaking in any
25 scenario, that subordinated debt had a relative ranking

- 1 of senior or junior to each other, that was possible
2 from a regulatory perspective?
- 3 A. I am not sure whether I have actually said that in my
4 witness statement.
- 5 Q. Let's start with do you accept it, and we can look at
6 your statement in a minute.
- 7 A. I -- I am not quite sure what the question is that I am
8 being asked, sorry.
- 9 Q. Let me rephrase it. I think you have confirmed, there
10 is no regulatory rule that prevents subordinated debt
11 from ranking senior or junior to each other?
- 12 A. I think what I have confirmed is that the rules actually
13 don't go into that topic at all.
- 14 Q. Exactly, so there is no regulatory rule, is there?
- 15 A. There is no rule that says you cannot --
- 16 Q. Correct?
- 17 A. -- but the rule is silent, the rules were silent on the
18 ranking of subordinated debts, one against another.
- 19 Q. Correct. That is all I am asking, Ms Hutcherson; there
20 is no hidden question there.
- 21 A. Okay.
- 22 Q. The second point was if there had been a commercial
23 reason for it, hypothetically, then it might have done?
- 24 A. I think -- well, if there was, if -- there is lots of
25 ifs and hypotheticals in there. And I am a little

1 confused about how to actually answer that question.
2 You could, I suppose if, if you wanted to rank them
3 differently, the rules didn't prevent you from doing
4 that, and you might have wanted to do it for commercial
5 reasons or for other reasons. The rules don't prevent
6 you from doing it, and that was my understanding then
7 and is now.

8 MS TOLANEY: Thank you very much, Ms Hutcherson.

9 Cross-examination by MS HILLIARD

10 MS HILLIARD: Good afternoon, Ms Hutcherson. My name is
11 Lexa Hilliard and you might have heard I represent the
12 general partner of the partnerships, so the issue of
13 ECAPS securities, and I have just a few questions to ask
14 you. I am just waiting for my junior.

15 So the questions I want to ask you about are in
16 relation to the PLC sub-debt and the PLC sub-notes.
17 Yes? So you explain, if you just look at paragraph 16
18 of your witness statement, you explain at paragraph 16
19 of your witness statement that standard forms had to be
20 used at the period that we are talking about for loans
21 to count as part of regulatory capital. Yes?

22 A. Yes, that is correct.

23 Q. Can we look at J2, volume J2. I think somebody will
24 assist you with that. If we can just turn up page 517
25 of J2, perhaps just to refresh your memory, if you look

1 at page 495.

2 A. Yes.

3 Q. That's familiar to you?

4 A. Yes, it is.

5 Q. And then if you would turn to page 517, you have Rule
6 10.63(1):

7 "A firm may take into account subordinated loan
8 capital in its financial resources in accordance with
9 tables 10.62(2)(a), (b) and (c), subject to 2 to 12
10 below."

11 Then 10.63(2), the rule is:

12 "A firm may include a subordinated loan in its
13 financial resources only if it is drawn up in accordance
14 with the standard forms obtained by the FSA."

15 So that -- in those days that was an extremely
16 strict rule, yes?

17 A. Yes, it was.

18 Q. It would mean that you could only have a loan which
19 would count towards your regulatory capital if you
20 followed the standard forms?

21 A. Unless you went and got a waiver.

22 Q. Yes?

23 A. Yes.

24 Q. In relation to the PLC sub-debt, as far as you are
25 aware, there was no application for any waiver, was

- 1 there?
- 2 A. Not as far as I am aware, no.
- 3 Q. So if a form used a non-standard agreement or
4 non-standard terms, without obtaining a waiver, it
5 wouldn't count as regulatory capital?
- 6 A. As a -- as a general rule, yes, that would be the case.
- 7 Q. At paragraph 17 of your witness statement, and I think
8 you have referred to this already in your evidence, you
9 refer to the advantages of using a standard form. Yes?
- 10 A. Yes.
- 11 Q. "The requirement that firms use standard forms had
12 several benefits. Firstly, it saved a great deal of
13 time for the FSA in reviewing the documentation if it
14 was all based on standard precedent form with certain
15 limited variable terms. Secondly, it saved money and
16 time for firms which may not have had a legal department
17 large enough to draft their own loan documentation from
18 scratch, and finally, it ensured consistent treatment of
19 firms by the FSA."
- 20 Yes?
- 21 A. Yes, that is correct.
- 22 Q. So it was important that the standard forms were
23 completely consistent, I would assume, yes, so that the
24 regulator could effectively, I think these were your
25 words, sit there and go: well, we know that the only bit

1 of the agreement that the firm can fiddle about with is
2 the variable terms.

3 A. Yes, that is the -- that was the way it was intended to
4 work.

5 Q. Right. And then I think IPRU had some guidance notes to
6 assist in completing the forms. If you go back to J2
7 for a moment and look up at 795. This is Rule 10.8,
8 guidance notes on completion of the agreements. And you
9 can see they were quite detailed on what was required to
10 be done.

11 And I will draw your attention in particular to 4B,
12 on page 795:

13 "Rather than retype the standard terms, firms should
14 simply photocopy schedule T of the FSA precedent or
15 print it from the website and include it as part of the
16 original agreement. This avoids the need for the FSA to
17 have to proofread the standard terms in each case which
18 means that the FSA can process the agreement more
19 speedily and of course saves work for the firm in having
20 to retype the document."

21 Ms Hutcherson, in your experience, then, when these
22 forms were being used in the market, what firms would do
23 is that they would invariably, unless they got a waiver,
24 submit a request for approval of these loans to the FSA
25 and consistently with the guidance, they would follow

1 the precedent in schedule 2 to the letter?

2 A. In theory that is what firms should have done, yes; they
3 should have followed the guidance as it was set out
4 there, yes.

5 Q. In the case of Lehman Brothers, which obviously had
6 a lot of people working on compliance, I would assume
7 and I hope you will confirm that that is what
8 Lehman Brothers did?

9 A. The department that would have been responsible for
10 actually preparing the subordinated loan agreements, the
11 paperwork and getting them signed was the corporate
12 counsel department which was part of the legal
13 department. How exactly they did it, whether they did
14 follow this guidance and download it from a website or
15 print it off, I don't -- I cannot say one way or the
16 other.

17 I have vague recollections of seeing executed --
18 photocopied executed loans from the dim and distant past
19 which looked like, from the typeface and the formatting,
20 that they had just taken a standard agreement and just
21 photocopied it, and they were all wonky on the
22 photocopies. But whether they did that every single
23 time, I actually can't say.

24 Q. You say at paragraph 35 of your witness statement that
25 you had some involvement with the first two PLC sub-debt

- 1 issuances.
- 2 A. Yes.
- 3 Q. Do you want to just refresh your mind, or maybe you can
4 remember, what those two sub-debt issuances were; do you
5 want to just have a look at them? The first one is, if
6 you just go to volume E, tab 6, is this something that
7 you recognise?
- 8 A. It -- it looks, certainly looks like a standard sub-debt
9 form.
- 10 Q. Yes, and then tab 7, that is the 3 billion euro one.
- 11 A. Yes.
- 12 Q. You refreshed your mind?
- 13 A. Yes, thank you.
- 14 Q. Those two standard forms, can you just probably just put
15 those to one side but don't put them away. They were
16 based on Form 10.1 of the IPRU forms. That is at J2,
17 tab 10, page 729. I think you say that at paragraph 35
18 of your witness statement, you say at paragraph 35:
- 19 "The first two PLC sub-debt agreements which were
20 entered into in July 2004 were based on Form 10.1
21 long-term subordinated debt agreement."
- 22 Yes?
- 23 A. Yes.
- 24 Q. And that is the form, isn't it?
- 25 A. Yes.

1 Q. Yes. And the thing that we find a bit puzzling is that
2 the actual -- if one is taking, just as for the sake of
3 an example, the \$4.5 billion long-term subordinated loan
4 facility at tab 6 in volume E, let's just take that
5 because the one at tab 7 is -- we will come on to that,
6 but is broadly the same. There are differences between
7 the two, the mandatory Form 10.1 and the \$4.5 billion
8 subordinated loan facility.

9 MR JUSTICE SMITH: Do you want to take the witness to an
10 example perhaps?

11 MS HILLIARD: Yes, I will. I am just wondering, did you
12 know that there were differences between the two?

13 A. No. But the one thing that I would note is that the
14 executed loans have got on the bottom left-hand corner
15 something that says 30.10.98, which could well be they
16 were 1998 versions of the short and long-term
17 subordinated debt standard forms, which are actually
18 from SFA rule books, and the SFA rule book became
19 chapter 10 of the FSA rule book, and the version that
20 you have got of the generic ones in whatever bundle this
21 is, bundle J, may well be slightly later versions.

22 Q. Well, that may be an explanation, but I am going to take
23 you through some other oddities.

24 MR JUSTICE SMITH: Just pausing there one moment, it may not
25 matter, but I see in addition to the date, bottom left,

1 there is also an H file derivative.

2 MS HILLIARD: Yes.

3 MR JUSTICE SMITH: Are you going to ask about that?

4 MS HILLIARD: Yes.

5 MR JUSTICE SMITH: In that case I will hold my counsel.

6 MS HILLIARD: Just starting with the differences, you have
7 got -- so we are looking at J2 and looking at E. So
8 this is just probably too small to raise, but as it is
9 a difference, and so much emphasis is being placed on
10 the strictness of the rules, I will draw it to your
11 attention. So 10.1 at the top says "approved form of
12 long-term subordinated loan agreement", but then when
13 you look at page 82 on the \$4.5 billion long-term
14 subordinated loan agreement, there is no use of the term
15 "approved".

16 And then if you then go down to the big capitals,
17 "whereas", got that?

18 A. Yes.

19 Q. "Whereas the borrower wishes ..."

20 Now, if you have a look at J2, J2 says:

21 "Whereas the borrower wishes to use the loan, or
22 each advance under the facility (as those expressions
23 are defined in the standard terms) in accordance with
24 FSA rule IPRU-INV 10.63 and has fully disclosed to the
25 FSA the circumstances giving rise to the loan or

1 facility and the effective subordination of the loan and
2 each advance."

3 When one looks at the -- that has been truncated,
4 and the particular bit, obviously, that I am interested
5 in is (a) that it is not actually making any reference
6 to IPRU, and also there is no reference to having fully
7 disclosed to the FSA the circumstances giving rise to
8 the loan or the facility.

9 Are you able to assist in explaining why that would
10 have been left out on this form?

11 A. As I said just now, and this is literally working it out
12 right now, I think that these forms that were executed
13 are pre -- prior versions of sub-debt agreements. I do
14 recollect that in SFA days, so pre 2000, there were
15 standard forms, and there were standard forms for loan
16 agreements and separate ones for facilities. But -- and
17 to me it looks like it is a different version, and the
18 IPRU-INV generic ones don't have a date on them. And
19 that's presumably the last time that IPRU-INV rules were
20 actually published. I don't know.

21 Q. Actually they do have a date on them; I think they are
22 2001?

23 A. Right.

24 Q. They are 2001. If you go back to J2, tab 10, you can
25 see on page 497, June 2001. In fact, I mean we didn't

1 compile the index, but the index actually says that this
2 was the version that was in force as at 30 July 2004.

3 So when --

4 A. Yes.

5 Q. -- the first two of the agreements were -- the
6 subordinated loan agreements were entered into. Have
7 you got it?

8 A. Yes.

9 Q. Yes?

10 A. Yes. I offer that as a helpful explanation as to why
11 they may have used slightly different language.

12 Q. Well, and you can see, as his Lordship pointed out
13 a little bit earlier, although the printed date is
14 30 October 1998, then in italics just above that, this
15 is on page 83 of E, just above that, it has got
16 a reference: sub-debt 2004, dollar with holding, LBH PLC
17 2004 doc; yes?

18 A. Yes.

19 Q. So obviously people knew what the date was. Can I take
20 you -- I am sorry I am asking you to look at so many
21 different files, but can I take you now to F1, page 44.
22 So this is -- Lehman Brothers Holdings PLC borrowed 4.5
23 billion from Lehman Brothers UK Holdings Limited, and
24 this is the, if you like, partner agreement of Lehman
25 Brothers Holdings PLC lending to the operating company

1 in Europe, Lehman Brothers International Europe, the
2 same amount, yes?

3 A. Yes.

4 Q. This is the same, dated the same month and year; agreed?

5 A. Yes. July 2004, yes.

6 Q. Yes. Now, this one, this one if you see on page 45,
7 does say it is approved, approved form of long-term
8 subordinated loan agreement. Do you see that,
9 Ms Hutcherson?

10 A. Yes, I do.

11 Q. And this one also says, it tracks exactly, do you
12 remember, we were looking at the words in the standard
13 form used by IPRU, it tracks the words exactly:

14 "Whereas the borrower wishes to use the loan, or
15 each advance under the facility (as those expressions
16 are defined in the standard terms) in accordance with
17 FSA rule ... and has fully disclosed to the FSA the
18 circumstances giving rise to the loan or facility and
19 the effective subordination of the loan and each
20 advance."

21 So here we have a loan from Lehman Brothers PLC to
22 the operating company that does follow, we will come on
23 to some other parts of the loan agreement in a minute,
24 but on the first page, it does follow IPRU, and yet the
25 Lehman Brothers UK Holdings Limited to Lehman Brothers

1 Holdings doesn't; agreed?

2 A. My -- my reading of this is that, yes, they have used
3 different versions of subordinated loan standard terms.

4 Q. But it is the same money flowing through, you would
5 agree?

6 A. Yes, well, it is money flowing down the groups from
7 company to company.

8 Q. Can we -- can we now, sticking with volume F1, can we
9 now move forward to page 63. This again is
10 dated July 2004. It is for the same amount, 4.5
11 billion, but this time it is from Lehman Brothers
12 Luxembourg Investments SARL to Lehman Brothers UK
13 Holdings Limited, yes?

14 A. Yes.

15 Q. And this again, would you agree, is part of the flow of
16 money? So we won't talk about above Lehman Brothers
17 Luxembourg Investments SARL, but the flow of money goes
18 Lehman Brothers Luxembourg, Lehman Brothers UK Holdings,
19 Lehman Brothers PLC, LBIE; yes, would you agree with
20 that?

21 A. Yes, yes. And again, they appear to have used the 1998
22 versions here.

23 Q. Yes. And so it has not got any of -- really the quite
24 important wording that the borrower has fully disclosed
25 to the FSA the circumstances giving rise to the loan or

1 facility, and the effective subordination of the loan in
2 each advance?

3 A. No.

4 Q. No. So going back to J2 and IPRU, at page 735.

5 A. Yes.

6 Q. These are the standard terms that if you were going to
7 do a subordinated loan of this nature that was going to
8 constitute as regulatory capital, you had to include in
9 your agreement; that's correct, isn't it?

10 A. Yes. That's correct.

11 Q. And if you have a look at page 737, there is some
12 repayment provisions there, and they start:

13 "The provisions of this paragraph are subject in all
14 respects to the provisions of paragraph 5 ...
15 subordination ... the terms concerning repayment are set
16 out in the variable terms ..."

17 Pausing there for a minute. The variable terms were
18 the ones that the firm could, if you like, create
19 themselves within reason, yes?

20 A. Yes, yes.

21 Q. Because they would -- the amount might change, the term
22 of the loan might change, as long as it was more than
23 five years; yes?

24 A. Yes.

25 Q. Yes?

- 1 A. Yes.
- 2 Q. So subparagraph 2 sets out, the terms concerning
3 repayment are set out in the variable terms but are
4 subject to subparagraph 4.3; and subparagraph 4.3, do
5 you want to just read that to yourself to refresh your
6 mind? I assume that at one time you were relatively
7 familiar with these provisions, were you?
- 8 A. Yes, a long time ago. Yes.
- 9 Q. They don't exactly stick in the brain, do they?
- 10 MR JUSTICE SMITH: Is that subparagraph (a), (b) and (c).
- 11 MS HILLIARD: Yes, it is subparagraph (b), the entirety of
12 it.
- 13 MR JUSTICE SMITH: Yes. (Pause)
- 14 MS HILLIARD: You have read that?
- 15 A. Yes.
- 16 Q. Now, if we could go back to tab 6 of volume E, which is
17 the actual 4.5 billion subordinated loan facility issued
18 to Lehman Brothers PLC, and then if you go to page 87,
19 are you there?
- 20 A. Page 87, standard terms?
- 21 Q. Yes. Yes. So these are the scheduled standard terms
22 which were part of IPRU, yes? They would be the
23 standard terms that one would expect to see if one was
24 following Form 10.1?
- 25 A. Sorry, I am on bundle E.

1 Q. Bundle E?

2 A. Page 87?

3 Q. Page 87.

4 A. I think these are the ones that were actually executed.

5 Q. Yes, that is why -- so we were just looking at the

6 standard terms of the standard form agreement issued by

7 the FSA. That was in J2?

8 A. Yes.

9 Q. I know it is a bit confusing, and I apologise, so we

10 will take it as slow as you need to.

11 A. No, it's all right. Then you have got the -- yes.

12 Q. So we were just looking at J2, which is the standard

13 form issued by FSA; yes, under IPRU. And now I have

14 taken you to volume E, which contains the actual loan

15 agreement that was issued to Lehman Brothers PLC, \$4.5

16 billion, yes?

17 A. Yes.

18 Q. And what I did is I took you to page 87, which are the

19 standard terms which accompanied that loan agreement,

20 and just so that to reassure you that I am not

21 misleading you, if you go to page 81, you can see that

22 that is the loan agreement?

23 A. Yes, yes.

24 Q. Are you comfortable now?

25 A. Yes.

1 Q. So if we can then go to page 89 and keep the repayment
2 provision at paragraph 4 open in J2, so in the standard
3 FSA form open?

4 MR JUSTICE SMITH: Ms Hutcherson, you should have two
5 bundles open before you, bundle J, to page 737.

6 A. Yes.

7 MR JUSTICE SMITH: And bundle E, to page 89.

8 A. Yes. Thank you.

9 MS HILLIARD: And if you could just compare paragraph 4 in
10 bundle E and paragraph 4 in bundle J2, I think you only
11 need to get down to subparagraph 3 of bundle E. (Pause)

12 It is different.

13 A. They are different. They are different.

14 Q. Just to assist you, what is different is subparagraph 2
15 and subparagraph 3 in the FSA standard form has been
16 omitted. So instead of having that you can't make any
17 repayment, except where the FSA otherwise permits, so
18 you have to actually get a waiver from the FSA to get
19 a payment, to get a repayment; that is completely
20 omitted.

21 A. Yes.

22 Q. Yes?

23 A. Yes. It's peculiar.

24 Q. And so when one then goes -- because that is omitted
25 when one goes to the variable terms at page 85, it

1 starts:

2 "With reference to paragraph 4.2 of the standard
3 terms ..."

4 So paragraph 4.2, yes.

5 "... and subject always to paragraphs 4.3,
6 restrictions on repayment, and 5, subordination of the
7 standard terms, the terms for repayment are: the
8 borrower may at any time prepay in whole or in part
9 being an amount or integral multiple of \$25 million, any
10 advance made to it upon giving not less than two
11 business days' notice to the lender, having first
12 complied with the requirements of paragraph 4 of the
13 standard terms."

14 But if you look at paragraph 4 of the standard
15 terms, that is at page 89, it doesn't require the
16 borrower or anybody to get the permission of the FSA.

17 A. It is the wrong paragraphs.

18 Q. Right.

19 A. Yes.

20 Q. Can I also take you to F1, and the similar omission in
21 the Luxembourg to Lehman Brothers UK Holdings Limited
22 loan. That is at page 63. You have got, again, the
23 standard terms at page 88, which again, if you compare
24 with the form, the mandated form by the FSA, it omits
25 subparagraph 2 and subparagraph 3. Sorry. I have taken

1 you to the wrong place, actually.

2 MR PHILLIPS: You need to look at page 70.

3 MS HILLIARD: Yes, page 72. Thank you.

4 So do you agree it is missing again?

5 A. Yes, it is missing.

6 Q. Yes, and then you have the same issue, if you go back to
7 the repayment provisions in the variable terms, which
8 effectively permit LBUK Holdings Limited to repay the
9 Luxembourg entity without obtaining permission if it
10 just gives not less than two business days' notice to
11 the lender. Now, can I take you to the loan from PLC to
12 LBIE and that is at page 44 of F1. Sorry, I know --

13 A. Page, sorry?

14 Q. 44 of F1. Are you there?

15 A. Yes.

16 Q. You will remember I took you to this loan, it mirrored
17 the other loans and we agreed, it was part of the flow
18 of funds eventually down to LBIE.

19 And I showed you that unlike the two other loan
20 agreements that I have shown you, this actually adheres
21 strictly to the FSA regulated form; it actually says at
22 the top, "Approved form of long-term subordinated loan",
23 and it has the bit about having fully disclosed to the
24 FSA and so forth; yes?

25 A. Yes.

1 Q. Yes. And then if you go to page 53, you can look back
2 on page 51 and see that these are the standard terms
3 again. And now compare paragraph 4 with the paragraph 4
4 of the standard terms in the IPRU regulated document at
5 J2, you can see, can you not, that they don't -- these
6 paragraphs that apply to the loan between PLC and
7 LBIE --

8 A. Yes.

9 Q. -- they include the restriction and not being able to
10 prepay without the permission of the FSA?

11 A. Yes.

12 Q. Yes. So you have got this one loan that precludes
13 repayment without the permission of the FSA but then you
14 have the other loans further up the Waterfall, if you
15 like, that have no prohibition. Can you assist in
16 explaining -- because it seems too much of a coincidence
17 that you have it happening twice, can you assist in
18 explaining why that would be?

19 A. I -- I am not sure that I was involved with all of these
20 documentation. I mean, looking at the -- the e-mails
21 that is in this bundle F, page 60, which is an e-mail
22 between a lady called Susan Ehr, who was corporate
23 counsel, Clare Curtis, who was compliance,
24 Paul O'Callaghan who was treasury, and then there are
25 people here who were actually at the FSA, Rheda Donnelly

1 and John Hedges, that e-mail looks like it is to do with
2 some of the sub-debt facilities, and I -- I don't
3 recollect actually necessarily being involved with all
4 of this.

5 It looks like they have used the wrong standard
6 agreements and excluded terms that should have been
7 there for some of the facilities. And I can't --
8 I can't give you an explanation as to why.

9 MR JUSTICE SMITH: Ms Hutcherson, just pausing there because
10 I appreciate you are venturing into areas that you can't
11 give evidence about.

12 A. It is hypothetical, yes. I don't think I was involved
13 with that.

14 MR JUSTICE SMITH: But I think the essence of your evidence
15 is that the wrong agreement has been used, and you are
16 speculating that it may be the wrong standard agreement.

17 A. Yes.

18 MR JUSTICE SMITH: But I think you are agreeing that for
19 whatever reason, the standard agreement has not been
20 used, and that is not how things should have been?

21 A. That is correct, my Lord.

22 MR JUSTICE SMITH: Thank you.

23 MS HILLIARD: Is there another possibility, Ms Hutcherson,
24 that -- can you tell me, when did consolidation come in?

25 A. I think Lehman Brothers in the UK became subject to

1 consolidated supervision, I think it was towards the end
2 of 2005, so it predated this.

3 Q. Predated?

4 A. Sorry, sorry, it was after, after this was signed, yes,
5 sorry.

6 Q. So was -- what was the position pre consolidation? The
7 position pre consolidation is that not all entities
8 within a group needed to comply with the provisions for
9 regulated capital, did they; it was only the regulated
10 entity that needed to --

11 A. Yes, that was true, so perhaps at 2000 -- I mean,
12 you know, I am speculating again. 2004, the entities
13 further up the group wouldn't have been directly
14 regulated by the FSA.

15 Q. That would be a logical explanation, would it not, as to
16 why --

17 A. It could be. Well, again it could be.

18 Q. -- there was no restriction on repayment?

19 A. Possibly.

20 Q. Because I think your evidence is that if you didn't
21 comply with the standard forms, then it wouldn't
22 constitute regulatory capital?

23 A. Yes, but again, PLC and Holdings UK and Luxembourg SARL
24 were not actually required to comply with the regulatory
25 capital rules, so yes, maybe that is the reason.

1 Q. It took me a long time to get there, but that was really
2 what I was angling for, because actually that doesn't
3 seem to have come out in any of the evidence?

4 A. Yes, it could be.

5 Q. So at this time, it was LBIE that was the regulated
6 entity?

7 A. Yes.

8 Q. Well, that seems to be -- if we can look again at volume
9 E. You have the -- the first two loans were
10 in July 2004 at tab 6, that was the 4.5 billion
11 subordinated loan facility and then at tab 7, the
12 3 billion euro facility. And then in October 2005, you
13 have a short-term \$8 billion facility, and if you go
14 over the page, at page 108, apart from the fact that it
15 doesn't say "approved", you can see the "whereas" bit is
16 much fuller, and it states that --

17 A. Yes --

18 Q. -- the borrower has fully disclosed to the FSA the
19 circumstances giving rise to the loan, yes?

20 A. Yes.

21 Q. Then if you go to the standard terms on page 117, and in
22 particular 4.2 and 3, subparagraph 4.2 and subparagraph
23 3?

24 A. Yes.

25 Q. Take your time.

- 1 A. Yes. Yes, page 117, yes.
- 2 Q. Yes, 117.
- 3 A. Yes.
- 4 Q. So you have got the restrictions there on repayment.
- 5 A. Yes.
- 6 Q. Except where the FSA otherwise permits no repayment.
- 7 Please compare it to the IPRU mandated document on
- 8 page 737.
- 9 A. Well, is that the right one to compare it to?
- 10 Q. I think it is the only one we have.
- 11 A. This is the short term.
- 12 Q. Sorry, you are absolutely right, I do apologise, my
- 13 mistake.
- 14 A. And also -- also I think at that point we would have
- 15 been -- we were looking to put in place loans that would
- 16 meet the consolidated group capital adequacy
- 17 requirements. So this being between two of the entities
- 18 up the chain, I think it would have been 10 --
- 19 Q. 10.7?
- 20 A. 10.6, 10.7, which is ...
- 21 Q. It is at page 788. I am sorry, it is my mistake, I took
- 22 you to the wrong --
- 23 A. Yes.
- 24 Q. But the provisions are the same, but please look at
- 25 page 788 because that is the right form.

- 1 A. Yes. Yes.
- 2 Q. They are the same?
- 3 A. Yes, they are the same.
- 4 Q. So is it possibly the case that by the time that this
5 loan was entered into, October 2005, that
6 Lehman Brothers was being regulated on a consolidated
7 basis, and, therefore, even though there was the
8 \$8 billion loan went to LBIE, that it was necessary for
9 all the companies in the group to be regulated and
10 subject to the same rules?
- 11 A. Yes. And that does tally with my memory and with some
12 of the other correspondence that I have seen, which
13 indicated that it was around October time, 2005, that we
14 were becoming subject to consolidated supervision.
- 15 Q. So is it possible then that the agreements that I took
16 you to that didn't have that restriction on repayment,
17 so the ones between Lehman Brothers UK Holdings and PLC,
18 that is the ones that were at issue in this case, but
19 also the ones at the Luxembourg level, that actually
20 those agreements were never even submitted to the FSA
21 because they didn't need to be; why would you if you are
22 not a regulated entity?
- 23 A. Again, I don't remember, I don't know whether they were
24 submitted or not. I mean, there is only that one e-mail
25 with a bunch of people who don't include me. And

1 actually in 2004, I was still very much involved with
2 running the equities compliance team, so less so on the
3 reg cap side, and it was later in 2005, I was being
4 drawn back to support finance and treasury.

5 Q. The page that you referred to, I think it was page 60 of
6 F1, that actually referred to executed agreements. But
7 of course we know that in July 2004, there were two
8 executed agreements between PLC and LBIE?

9 A. So it may have been just those two, it may have been.
10 Again it's -- I mean, I shouldn't do it, but it is
11 speculation.

12 Q. Well, let me ask from your experience at the FSA and
13 your experience of working for the regulator and being
14 in compliance, if you are not a regulated entity, there
15 is no necessity, is there, for you to obtain any
16 approval from the FSA?

17 A. That's correct.

18 Q. So coming on to the PLC sub-notes now. I think you say
19 that you were involved in the waiver application for the
20 PLC sub-notes, yes? That is at -- maybe put everything
21 back. If we need to come back to it, we can; the
22 various bundles.

23 So let's just go to your witness statement, and if
24 we need to look at bundles again, we will start from
25 scratch. So paragraph 47. Yes?

- 1 A. Yes.
- 2 Q. I am not absolutely sure from reading your witness
3 statement what you did in relation to the waiver
4 application, I mean what your role was?
- 5 A. So from memory, my role was to support in this case it
6 was pal low for the first one it was Paolo Tonucci
7 and -- in treasury and his team and the regulatory
8 capital people in legal and just double checking that
9 they had got all the right bits of paper to send off and
10 file -- file the waiver application and send it to the
11 right person at the FSA.
- 12 Q. Can I just pause you there. When you say to make sure
13 they had all the right bits of paper, what bits of paper
14 are you talking about?
- 15 A. So basically, have you got the waiver form? Have you
16 got the legal opinion? Have you actually answered all
17 the questions on the waiver form? Have you attached the
18 relevant pieces of information? On the first
19 application, I don't think I was actually that heavily
20 involved in it.
- 21 Q. Right. So that is the first series of sub-notes?
- 22 A. Yes, that was the March. I think it was issued in March
23 and the waiver was sought some time after that.
- 24 Q. Yes.
- 25 A. And then once we had set that precedent of these are the

1 documentations and had been successful in gaining the
2 first waiver, the subsequent issuances followed the same
3 process and Paolo who, as head of treasury, would have
4 said: Okay, we have got a process now. Can you, say
5 for your compliance, actually work on making sure all
6 the right documents are in place for the next one round.
7 It was more of a, not a cut and paste, but a, you know,
8 repeat the same process because we have established that
9 with the regulator.

10 Q. Were you involved in reading the various documents that
11 were submitted to the regulator?

12 A. I would have read the waiver application form, but
13 I would not -- I don't remember reading all of the
14 detailed -- the prospectus documents. I can't remember
15 whether I -- whether I read the legal opinions.

16 Q. Did you read -- I mean for the purposes of considering
17 the position in relation to second and third issue of
18 sub-notes, did you look at the documents that were
19 submitted in relation to the application for waiver for
20 the first set of sub-notes? Would that be something
21 that you would have done?

22 A. Sorry, could you ask me the question again?

23 Q. Sorry. So you have told us that you were not really
24 involved in the first issue of the sub-notes. You were
25 involved in the second and third issue; that was to the

1 Limited Partnership 2, we have called it, and Limited
2 Partnership 3, so you weren't involved in the first
3 issue which was to the first Limited Partnership?

4 A. Yes, so let me clarify. When I say involved, I wasn't
5 involved in the actual documentation around the issuance
6 of the notes and filing the documents with whichever
7 exchange they went to. That was not my role.

8 My role would have been limited to checking that
9 when we were applying for a waiver, make sure that we
10 had followed the relevant requirements of that waiver,
11 answered all the questions adequately, sense checked
12 what had been written on the waiver form --

13 Q. Right.

14 A. -- to make sure it looked like it was answering the
15 questions and we weren't going to get more questions
16 back from the FSA.

17 Q. Well, could you turn up F2, 777. Have you got it?

18 A. Yes.

19 Q. So this was one of the ones that you were involved in,
20 is that right?

21 A. It looks like it. I don't know which one -- this looks
22 like it -- was this the first one?

23 Q. I think it is the second one. Let's just check. Just
24 bear with me a second. I thought you had been involved
25 in the first one, that's my... Well, let's start with

1 the first one at page 766 because I believe that they
2 all follow the same format. So that is at page 766.

3 This is the --

4 A. This is the first one.

5 Q. -- the letter that PLC would have received from Allen &
6 Overy. Is that a letter that you would have had --

7 MR JUSTICE SMITH: I think we are on 766.

8 MS HILLIARD: Yes.

9 A. Yes, 766.

10 Q. No, if we start at 766. This is a letter that was
11 written by Allen & Overy to Lehman Brothers PLC?

12 A. Yes, yes.

13 Q. Confirming that the terms and the conditions of the
14 issue by the issuer of 225 million fixed rate
15 subordinated debts are materially identical to the
16 corresponding standard terms in the Financial Services
17 Authority's Form 10.6, yes?

18 A. Yes.

19 Q. Would that be something that you would have read?

20 A. I don't know whether I would have read that exact letter
21 because this does refer to the first issuance. For the
22 subsequent issuances, I probably would have gone through
23 and just ticked it back to the waiver application to
24 make sure that we had answered all of the waiver
25 questions and the legal opinion covered everything that

1 it needed to. But I would not have been the only person
2 doing that.

3 Q. Just turn over the page. You have got the definition of
4 subordinated liabilities, which is the first definition,
5 and Allen & Overy is telling PLC that the definition of
6 subordinated liabilities means -- the definition in the
7 standard form is:

8 "All liabilities to the lender in respect of the
9 loan or each advance made under this agreement and all
10 the interest payable thereon."

11 And the definition used in the notes is:

12 "All liabilities to the noteholders in respect of
13 the notes and all liabilities of the issue which rank or
14 are expressed to rank pari passu with the notes."

15 What Allen & Overy say is that:

16 "We have used this definition which better reflects
17 borrowing in a bond rather than a loan format."

18 Can you assist with that? Can you assist with
19 explaining why that definition better reflects borrowing
20 in a bond?

21 A. No, I can't.

22 Q. No, that is not your --

23 A. It's not my daily work. The only thing that we would
24 have been keen to ensure was that the level of
25 subordination was as per this legal -- why you had to

1 have the legal opinion there was that it would make sure
2 that the subordination was as good as if you had used
3 a standard form for a loan agreement. So to the extent
4 that you are seeking an external legal opinion from
5 a qualified lawyer, I wouldn't have been second guessing
6 that.

7 Q. Well, what you would have been concerned of, wouldn't
8 you, is that the notes constituted and would be treated
9 by the FSA as regulatory capital?

10 A. Absolutely.

11 Q. In other words, that the notes would be repayable -- or
12 wouldn't be repayable until all unsubordinated
13 non-regulatory creditors, if I can put it that way, had
14 been paid in full?

15 A. Correct.

16 Q. Yes?

17 A. So that it was on the same footing as other subordinated
18 debt.

19 Q. You say so it was on the same footing. But I think this
20 is something that Mr Beltrami put to you?

21 A. Yes.

22 Q. I mean, as you said, it is not something that you ever
23 gave any thought about?

24 A. No, no.

25 Q. Yes. And you will be aware that within tier 2 at

1 least -- tier 1 at least, tier 1 capital, there is lots
2 of different layers. I mean, we start off with ordinary
3 shares, yes?

4 A. Mmm mm.

5 Q. And then we get preference shares, yes?

6 So preference shareholders would get paid when --

7 MR PHILLIPS: Is this for cross-examination?

8 MS HILLIARD: If I can finish.

9 MR JUSTICE SMITH: Do. Let us see what the witness says in
10 terms of the question.

11 MS HILLIARD: Then you have the interest that an investor
12 like the ECAPS would have; that was treated as tier 1
13 capital, yes?

14 A. I am not sure what it was treated as. I can't remember.

15 Q. Well, if it was treated as tier 2 capital then that
16 certainly ranked below everyone else, didn't it?

17 A. ECAPS, I honestly can't remember what tier -- what the
18 ECAPS were treated as.

19 MS HILLIARD: Is that a convenient moment? I haven't got
20 too many more questions.

21 MR JUSTICE SMITH: Yes. Thank you, Miss Hilliard. We will
22 resume then at 2 o'clock and, Ms Hutcherson, you will
23 bear in mind my warning to you earlier. We will resume
24 at 2 o'clock.

25 (1.04 pm)

1 (The short adjournment)

2 (1.59 pm)

3 MS HILLIARD: My Lord, I had realised, having looked at
4 things over lunch, that I have actually only got
5 a couple more questions, so we thought we would go back
6 to our original places.

7 MR JUSTICE SMITH: Yes, thank you.

8 MS HILLIARD: Good afternoon, Ms Hutcherson, again. The
9 problem was this morning, I had not appreciated it from
10 your witness statement that you actually had nothing to
11 do with the first set of sub-notes, so I was taking you
12 to documents that you had nothing to do with. It wasn't
13 entirely clear from your witness statement. I am quite
14 happy to put my hand up to that, but anyway I have now
15 found one of the ones that you were involved in.

16 And if you would go to volume 3 of F; is this
17 a letter that you recognise?

18 A. Sorry, which page?

19 Q. Volume 3, page 1223.

20 A. Yes.

21 Q. Yes?

22 A. Yes.

23 Q. So this is a letter that is written by you in relation
24 to the 2 billion euro notes, and you will see from your
25 letter, when you wrote the letter, that was dated

- 1 5 October 2005, and the actual -- second line, the
2 actual issue was made on 21 September 2005?
- 3 A. Yes.
- 4 Q. So you were actually writing this letter after the notes
5 had already been issued?
- 6 A. That is correct.
- 7 Q. So it was a sort of done deal really?
- 8 A. Well, my recollection was that the notes would get
9 issued and then after that, we filed the waiver
10 application. So until we got the confirmation back
11 that, yes, you are given the waiver, the notes couldn't
12 actually count as regulatory capital.
- 13 Q. Right, so if the FSA had come back and said: sorry, this
14 does not work; then it couldn't constitute as regulatory
15 capital?
- 16 A. That is my understanding, yes.
- 17 Q. Okay. And if I could just ask you to turn now to
18 page 1328. You see this is a letter dated
19 31 October 2005. Can you just confirm who Mr G Bowen
20 was?
- 21 A. So Gareth Bowen was the -- at the time he was head of
22 regulatory capital team, which was part of the finance
23 division.
- 24 Q. And vis-a-vis you, where did he sit?
- 25 A. So we were in different divisions. I sat in what was

1 called the European corporate advisory division, which
2 was legal, compliance, audit. He sat in a team which
3 was part of the finance division, so we were separate
4 divisions within the corporate structure.

5 Q. But he was called the regulatory officer, so was he
6 responsible for -- overall responsible for regulation
7 within Lehman Brothers?

8 A. No, I am not quite sure why they call him regulatory
9 officer. That would have been -- SFA have given him
10 that title but I think his title was something like the
11 head of the regulatory capital team. He was -- he was
12 responsible for the day-to-day performance of all the
13 regulatory capital calculations, ensuring that all the
14 ratios were met, and I think I gave a bit of an
15 explanation of that somewhere in my witness statement.

16 Q. But your letter was written to Henry Treitel?

17 A. Yes.

18 Q. But the response came back from a Mr Cave to Mr Bowen?

19 A. Yes.

20 Q. So was Mr Bowen the main contact for the FSA at this
21 time?

22 A. No. So when we applied for waivers, we would always
23 first of all go via the FSA supervision team who were
24 the team who were dedicated to looking after
25 Lehman Brothers, not just on capital matters but on

1 conduct of business, on everything. Henry Treitel was
2 part of that supervision team. And then that
3 supervision team would funnel the waiver applications
4 through to a waivers team and would involve anybody else
5 who needed to opine on the waiver application, so
6 potentially policy; and then I think actually on waiver
7 application form at 1225, we all name Gareth Bowen as
8 the person who is sort of responsible for the
9 application.

10 Q. Yes, I can see that.

11 A. And that is -- I think that is why the letter came back
12 to him.

13 Q. So just so that I can get clear in my own mind. Can you
14 just state precisely what your function was in relation
15 to the waiver application?

16 A. So in terms of the waiver applications, my function as
17 the compliance department was to consider any
18 correspondence, any meetings, any interaction with the
19 regulators to liaise with them on a day-by-day basis, to
20 let them know something was coming, to then make sure
21 that all the paperwork was in the right envelope, was
22 walked round, copies were kept in a central file, and
23 provide any liaison, any support that other departments
24 who were involved with, say, a waiver application might
25 require. I had a heap of other responsibilities as

1 well, but in terms of the waiver application, that was
2 my role.

3 Q. So am I right in understanding that you were responsible
4 for collating all the documents to make the application,
5 but once the application had been submitted, the contact
6 would be Mr Bowen?

7 A. To be honest, it would depend. It would depend on what
8 the questions were. If -- if it was the supervision
9 team, they might -- I mean, they did send a lot of
10 e-mails, so they would potentially e-mail both me and
11 Gareth Bowen at the same time.

12 Q. And then if you could just turn up page 1328, that, as
13 I say, is the letter dated 31 October 2005. And this is
14 the approval of that waiver application?

15 A. Yes.

16 Q. Yes.

17 A. Yes. So that is the formal -- the formal document that
18 granted us the direction waiver.

19 Q. As I say, by this time, the issue had already been made.
20 So in effect the -- Lehman was taking the risk that it
21 might or might not have been approved?

22 A. That is correct, yes.

23 Q. And you can see one of the conditions on page 1330,
24 subparagraph 2, was that the loan capital referred to in
25 paragraph 3 of this direction would meet the

1 requirements of lower tier subordinated loan capital
2 under IPRU?

3 A. Yes.

4 Q. Yes?

5 A. Yes.

6 MS HILLIARD: Thank you, Ms Hutcherson, I have no further
7 questions.

8 A. Thank you.

9 MR PHILLIPS: My Lord, I have no questions; I don't know if
10 your Lordship has any questions.

11 MR JUSTICE SMITH: No, I don't have any questions.
12 Thank you very much, Ms Hutcherson. You are released.

13 MR PHILLIPS: My Lord, may I call Thomas James Grant.

14 MR THOMAS GRANT (sworn)

15 Examination-in-chief by MR PHILLIPS

16 MR JUSTICE SMITH: Do sit down, make yourself comfortable,
17 Mr Grant. I hope you have got some water there.

18 MR PHILLIPS: Mr Grant, do you have a bundle, bundle C in
19 front of you?

20 A. I do, thank you.

21 Q. Have you got tab 2, divider 2?

22 A. I do thank you.

23 Q. As you can see, this is your witness statement dated
24 19 March, you see there is a witness statement, Thomas
25 James Grant, and if we just look at the last page, is

- 1 Q. And Geoff Fuller?
- 2 A. Was also a partner in the capital markets department.
- 3 Q. Right. And Mr Dehal, he was an associate in the
4 tax department, is that right?
- 5 A. Correct, he was a senior associate in the
6 tax department.
- 7 Q. And you have talked to him about your evidence. I think
8 you say in your statement, either you have shown him
9 your statement or you have discussed your evidence with
10 him, and he has confirmed it, is that right?
- 11 A. That is correct. He reviewed the witness statement.
- 12 Q. Any reason you are aware of whether he would be
13 available to give evidence or not?
- 14 A. I haven't asked him whether he is available to give
15 evidence, no.
- 16 Q. Now, let me ask you. You were not involved in the
17 initial drafting of the 2007 eurobond, were you?
- 18 A. I wasn't, no.
- 19 Q. But you were involved, as I understand your statement,
20 in the drafting of the fourth and fifth ECAPS by
21 Mr Miller?
- 22 A. Correct.
- 23 Q. Did they take a similar structure to the earlier ECAPS?
- 24 A. I believe so, although I haven't reminded myself about
25 the structure of the ECAPS IV and V because I understand

1 they are not the subject of my evidence.

2 Q. No, if you could be handed bundle F9, please, and go to
3 page 5290. You may or may not be familiar with this
4 e-mail and if not, please do read it. But just to
5 explain, in the bottom e-mail from Nigel Barnett, he is
6 a partner at Dentons acting on behalf of the
7 administrators of LBHI2, and he sent -- there are two
8 e-mails he sent, this is the second one to Mr Miller,
9 asking about the amendments in particular.

10 I will ask Mr Miller something about this in due
11 course, and the detail doesn't matter -- probably able
12 to ask you. But it is just if you look at Mr Miller's
13 answer to Mr Barnett, the second paragraph at the end,
14 he says:

15 "I think, but would need to spend some time
16 checking, that once ECAP I was established, numbers II
17 to V were copies."

18 Does that help you to remember whether that was in
19 fact the case, or not?

20 A. It doesn't. I believe the broad structure of all of the
21 five ECAPS transactions were similar.

22 Q. Okay.

23 A. However, I couldn't confirm whether the guarantor was
24 the same for each of them.

25 Q. No, okay, thank you. Can we put away bundle F9 and go

1 to bundle E; and because we don't have ECAPS IV and V
2 because they are not directly relevant to the bundle,
3 I am just going to ask you something about one of the
4 ECAPS, the earlier ECAPS, just as a matter of the
5 drafting technique, rather than the detail of it. So if
6 you go to bundle E and go to tab 10, please. This is
7 the first ECAP, ECAP I, and under ECAP I, and again,
8 this may or may not be equivalent to other ones, the
9 holder of the ECAP obtained a preferred shareholding in
10 the partnership and a guarantee from the holding
11 company. And if you go to the guarantee bit, this was
12 a claim that was deeply subordinated.

13 Go to page 154, you will see under the heading,
14 "Subordinated guarantee", at the top, and towards the
15 bottom of that sort of block of paragraph, it says:

16 "The subordinated guarantee will rank pari passu
17 with the non-cumulative perpetual preferred securities
18 or preference shares of the guarantor."

19 Yes?

20 A. Yes.

21 Q. That was the means by which that debt claim was
22 subordinated to other subordinated claims, was it?

23 A. Well, that explains the ranking, yes. This -- this page
24 you have referred me to is a summary of the terms, if it
25 isn't the actual terms of the guarantee, but it is

- 1 a summary of how the subordinated guarantee will have
2 ranked in accordance with its terms.
- 3 Q. Yes. What I want to ask you about it is that is, or can
4 you tell me, is it, or was it at the time a drafting
5 technique to ensure the deep subordination of, in this
6 case, a guarantee claim below other debt i.e. to rank it
7 equivalent to preference shares?
- 8 A. Yes, it was a -- the manner in which the guarantee has
9 been expressed to rank here is a description of a common
10 tool to rank subordinated claims by reference to
11 a preference share.
- 12 Q. And when you say by reference to a preference share,
13 that would be, certainly in this context, below other
14 debt, presumably, because a preference share would come
15 in below other debt?
- 16 A. Well, certainly you could have debt that was pari passu
17 with this subordinated guarantee. And without looking
18 at the terms of the subordinated guarantee, I can't tell
19 you whether they could in theory have been even lower
20 ranking debt.
- 21 Q. No, I am just asking for the technique. I mean, the
22 technique is, if you want to rank it below debt, to rank
23 it equivalent to preference shares, a technique of doing
24 that?
- 25 A. That is correct. Referencing a preference share would

1 be a commonly used tool to rank debt.

2 Q. We can put that bundle away now, please.

3 I want to ask you now about the instructions that
4 led to the amendments to the notes. It is right, isn't
5 it, that you were not yourself instructed directly by
6 Lehman in relation to the amendments?

7 A. I wasn't initially instructed by LBIE, that is right.

8 Q. They contacted Daniel Fletcher, did they not?

9 A. Correct.

10 Q. Can you go to bundle F5. At page 2575, Daniel Fletcher
11 was also an associate in the capital markets department,
12 wasn't he?

13 A. That is correct.

14 Q. And this is the first e-mail which begins the process of
15 the amendments. At the top of the page, it is
16 Ms McMorrow to Daniel Fletcher, and there is a question
17 about whether they can sign a waiver letter to achieve
18 the deferral. Now, we don't have the answer to that,
19 and the assumption is the answer was no, because if you
20 go to the next page, 2576, it is an internal e-mail from
21 Gareth Bowen to Jackie Dolby:

22 "If we get the lawyers to provide an opinion that
23 the sub-debt still qualifies as tier 2, I don't think it
24 will be a problem. This makes the note cumulative
25 rather than non-cumulative."

1 That is the response. Jackie Dolby's e-mail, which
2 is the bottom one, second paragraph:

3 "According to the lawyers, we are able to do this by
4 inserting a deferred payment clause in the terms of the
5 note."

6 So it looks as if the answer to the question on
7 page 2575 was: no, you are going to have to amend the
8 notes. It looks as if, we don't know for sure, yes, but
9 you were not at that stage involved. This was,
10 presumably, still Mr Fletcher?

11 A. That is correct.

12 Q. Yes. We don't actually have an e-mail of instructions
13 from Lehman to Mr Fletcher or to anybody else in fact.
14 That is the totality that starts the process, as it
15 were. There is no instruction to Allen & Overy to do
16 any drafting at all, and you say in your witness
17 statement, paragraph 13, that you have spoken to
18 Mr Fletcher, and he doesn't recall the request to
19 instruct -- to amend the e-mails either -- amend them
20 entirely.

21 If you go to paragraph 13, 13, you have spoken to
22 Mr Fletcher. He is asked about the possibility of
23 deferring interest. I think that's the e-mail we've
24 just looked at:

25 "Mr Fletcher didn't recall when we spoke how the

1 request was made. In any event, it was allocated to me.
2 I do not recall the circumstance of the allocation."

3 So Mr Fletcher doesn't actually recall the
4 instructions, and you don't recall, understandably
5 enough, how they got on to you. But -- they must have
6 done, but you don't recall the detail of that. But if
7 you go to paragraph 15 of the statement, you then say
8 the Lehman Group instruction was to amend the notes in
9 order to allow for interest to be deferred.

10 So my question is: if Mr Fletcher, who probably
11 received the instruction, didn't remember its detail,
12 and you didn't receive the instruction and you don't
13 remember how it was allocated to you, you were able to
14 say in paragraph 15 what the instruction was?

15 A. It is correct that I can't recall the initial request
16 from -- I believe it would have been Sarah McMorrow at
17 LBIE, and either how that was communicated or -- or what
18 was communicated.

19 However, I do recall working on the transaction, or
20 the amendment to the transaction, and I do recall that
21 the scope of work was to include a deferral condition
22 within the terms. I have seen the e-mail before that
23 was sent to Daniel Fletcher and I -- I can't recall how
24 the suggestion of an initial one-off deferral morphed
25 into including a specific deferral term within the

1 securities. It may have been that that was seen as
2 being the most efficient way to achieve what they wanted
3 to do, or potentially, it may have been that the
4 decision was that there may be future deferrals to be
5 made under the terms. But the effect of the amendment
6 was to make it a permanent option within the terms of
7 the instrument.

8 Q. I understand that; I am just trying to focus on the
9 evidence in paragraph 15. Just to be clear, you don't
10 know, you can't give any direct evidence on what the
11 instruction actually was, because you didn't receive it,
12 and you don't remember the detail of how it was
13 allocated to you?

14 A. There is nothing that isn't -- there is nothing I have
15 that isn't in the statements you have referred me to.

16 Q. Yes. But in any event, Mr Grant, and taking you to
17 paragraph 15 as it stands, you didn't see yourself as
18 constrained when amending the notes merely to permit the
19 deferral of interest, did you? You didn't -- you didn't
20 see your instructions as being solely to amend these
21 notes for the single purpose of deferring interest?

22 A. I saw my instructions as covering three key areas. The
23 most important one would be to make the changes that
24 I had been instructed to -- to make, specifically
25 relating to the deferral. Secondly, we were being asked

1 to confirm that as a matter of GENPRU, the notes
2 continued to be lower tier 2 capital, so I -- my
3 instructions extended to making sure that those changes
4 wouldn't prejudice that capital treatment, and, finally,
5 the changes would need to be done in a way which didn't
6 impair the tax treatment, by which I mean specifically
7 either the deductability or the withholding tax
8 treatment of the securities.

9 Q. Well, that is an interesting summary, Mr Grant, but you
10 did more than that as well, did you not, or you
11 considered your instructions to go further than that,
12 because you considered your instructions to include, as
13 it turned out, the removal of the solvency condition in
14 the notes?

15 A. The -- the end draft of the securities removed the
16 solvency condition from operating on a winding-up of the
17 issuer.

18 Q. Yes. Thank you for getting that one in. But that was
19 a direct and intentional piece of drafting on your part,
20 wasn't it, to remove the solvency condition?

21 A. That is correct.

22 Q. And even though that wasn't necessary to facilitate the
23 payment of interest, was it?

24 A. That -- that change wasn't directly related to the
25 amendment to allow the interest deferral provisions to

1 be included.

2 Q. No. It -- in relation to that change, you corrected
3 a problem, as you saw it, in the original form of notes?

4 A. That -- that's correct.

5 Q. To be clear, I am not suggesting that you in some way
6 exceeded your instructions or anything like that. I am
7 certainly not going down that route. But you must have
8 considered, when you received the instructions, that
9 they included that which you did, and therefore that you
10 must have considered they included reviewing the notes
11 and ensuring, as far as you were concerned, that they
12 were tax efficient and in good order?

13 A. Yes. I wouldn't have felt comfortable sending out
14 a revised version of the conditions which included that
15 deferral provision, but with which my tax department was
16 not comfortable.

17 Q. Yes. So when you said you had three -- the scope of
18 your instructions, and you give me the three things
19 which I did not memorise, I am afraid, but they are on
20 the transcript; but the fourth could be said to be to
21 correct anything in the note that you thought or you
22 understood created a tax problem; let us just make it
23 narrowly focused like that.

24 A. The -- I -- my intention was to make sure that the notes
25 were tax deductible.

1 Q. Yes, and that wouldn't be -- let me make it clear, I am
2 not saying you exceeded your instructions, but that
3 wouldn't be something especially unusual, would it, that
4 if you received the notes and given instructions to
5 amend the note, you would also make sure, as an expert
6 and good solicitor, that the notes that you were given
7 actually do what they are supposed to do, presumably?

8 A. Correct. We will come to, I expect, how I involved my
9 tax colleagues, but when I received advice as part of
10 their review that the operation of the solvency
11 condition on a winding-up in their view caused concern
12 around tax detectability, then I began work to address
13 that.

14 Q. Yes. So if you go back to your witness statement at
15 paragraph 10(a), where you say the instruction, it is
16 page 16:

17 "The instruction was to amend the notes in order to
18 permit the deferral of interest. The instruction did
19 not include a request to change or address the degree of
20 subordination of the notes."

21 We could equally, could we, replace in that second
22 sentence, "the instruction did not include a request to
23 change the solvency condition".

24 A. The initial instruction didn't, no. The amendments to
25 the solvency condition were made in light of the

1 feedback from my tax colleagues.

2 Q. Thank you. So you had the instructions, you proceed.
3 We can -- you still have bundle F5. We can just run
4 through the chronology. You proceed to produce a first
5 draft on 4 June. If you go to 2590, and the reason
6 I have gone to that, there are a number of different
7 versions in here, but the reason I have gone to this one
8 is it has got some timing markings on it which we can
9 see, but this is what I call version 1 that you
10 produced. There is a written resolution on 2590. There
11 is then an annex, terms and conditions of the notes, in
12 which there is a major amendment on page 2594 which is
13 paragraph 4F, and I will come back. If you just keep
14 your finger in that for a minute, but just to explain
15 why I have gone to this version. If you go on to 2601,
16 this is the record of when everything was done. We can
17 see that these amendments in 4F were done on 4 June.

18 So if you go back to 2594, what you did in this
19 paragraph was to facilitate the deferral of interest.

20 A. That is correct.

21 Q. And essentially there are two parts that you had to
22 cover in this paragraph: one, you had to make sure that
23 a deferral wouldn't be an event of default, so they were
24 permitted to defer without it being an event of default;
25 and secondly, you wanted to ensure that if there was

1 a deferral, interest wouldn't be lost if the note
2 otherwise matured; and that is the other bit of it,
3 isn't it?

4 A. Yes. We wouldn't be lost if the notes matured or in
5 certain other situations.

6 Q. Yes, because -- and you can go through 4F. You can see
7 the fourth line, not constitute an event of default; so
8 that is the first bit of it, the non-event of default
9 bit; and the second bit, any interest not so paid on the
10 interest date becomes arrears of interest, which is
11 a new concept; and then that may be paid essentially
12 with notice, over the page. And then five lines down:

13 "All arrears of interest in respect of the notes
14 outstanding shall become due in full on the earliest of
15 maturity date, redemption or commencement of winding up
16 or dissolution of the issuer."

17 And that is the nature of the not lost bit of it.

18 So that when, if principal became due, you made sure
19 that the arrears of interest would also become due?

20 A. Exactly right.

21 Q. So those are the events, if you like, major terminating
22 events at which the principal might become due, and you
23 wanted to make sure that for all of those events,
24 arrears wouldn't get lost?

25 A. That is correct.

1 Q. If you go back to page 2601, this, I think, suggests
2 that you inserted that paragraph at one moment. Do you
3 remember, was this a precedent that you took from
4 somewhere else, or was it something that you drafted out
5 specifically to deal with all the different bits that we
6 looked at?

7 A. I can't -- I can't recall where the language in
8 condition 4F came from, although it's likely I would
9 have taken it from a bank upper tier 2 instrument, which
10 would have contained a similar optional deferral
11 feature.

12 Q. Thank you. If you then move on to 2607, we trawl
13 through this to some extent, 2607 is the e-mail the
14 following day that you sent to Sarah McMorrow, attaching
15 those drafts. So you have sent the first draft to
16 Lehman on 5 June, and you refer in your letter to
17 Anne-Claude Mozel being your -- having overall
18 supervising responsibility, and the fifth paragraph, the
19 fact you are going to speak to Amrit. That is Mr Dehal,
20 is it?

21 A. That is right.

22 Q. So you had not been instructed to speak to Mr Dehal, had
23 you?

24 A. I had not been specifically instructed to speak to
25 a particular tax colleague, no. But as I indicate in

1 the e-mail, I would generally, in making, in doing a new
2 issue of an instrument of this nature or making
3 amendments to it, I would routinely seek the view of my
4 tax colleagues to make sure I wasn't doing anything that
5 caused problems from a UK tax perspective.

6 Q. Yes, of course. Can you go on to 2620. On the same
7 day, shortly after that, 5 June, you sent a message to
8 Mr Dehal, leave a message on this, whether that's a sort
9 of voicemail or something, I don't know what it's likely
10 to be, you sent it to him and presumably asked for his
11 comment?

12 A. Yes, I do not recall the situation. I imagine I could
13 see he wasn't at his desk, so I left him a voicemail,
14 and then followed up with the text, so he had it ready
15 for when he was able to have a look at it.

16 Q. Right. 2663.

17 A. Sorry, can you repeat that?

18 Q. 2663. This is the following day, 6 June, and reply from
19 Lehman:

20 "Thanks for these. Will review and send any
21 comments ..."

22 They have initial comment about the identity of the
23 holder of the notes on the certificate.

24 So -- then there is something about these regulatory
25 opinions, so your first response back from Lehman is

- 1 early the next day on 6 June?
- 2 A. That is right.
- 3 Q. And you reply to that, 2665, in the morning of 6 June.
- 4 You have had a few refinements from Amrit too:
- 5 "I will hold off on these and put them in when
- 6 I receive any comments from you."
- 7 So the suggestion here, and do you think this is
- 8 right, that by that stage, so you have sent it to
- 9 Mr Dehal on the 5th, and by 8.30 on the morning of the
- 10 6th, you have had his comments?
- 11 A. That will be right, yes.
- 12 Q. And you say in your witness statement that they were in
- 13 person or in telephone, so presumably he must have
- 14 spoken to you by that stage?
- 15 A. Yes. I -- I can't recall the way in which they were
- 16 communicated to me. It may have been in person, it may
- 17 have been over the telephone, or potentially, he left
- 18 a manuscript copy of a mark-up on my chair. I cannot
- 19 remember.
- 20 Q. If you go back to your witness statement at
- 21 paragraphs 28 to 32, you explain what Mr Dehal's tax
- 22 concern was. As I understand it, and maybe you can
- 23 confirm that this is right, that the concern was that
- 24 the payment on the notes was subject to a solvency
- 25 condition, which meant that if the issuer was insolvent,

1 nothing would be payable at all; that was the concern,
2 wasn't it?

3 A. It was slightly more nuanced than that, I believe,
4 although I am not a tax lawyer myself. But as
5 I understand it, it was that the operation of the
6 solvency condition on a winding-up would mean that
7 because the way in which it was expressed to work would
8 mean that potentially holders would be entitled to
9 receive less than the -- than par, he had a concern that
10 that placed the securities in -- in a results-dependent
11 category. So he was concerned that the payments on the
12 securities would be results dependent, and therefore,
13 from a tax perspective, treated as equity rather than as
14 debt.

15 Q. Well, that is helpful, but if you look at paragraph 31,
16 you explain what the tax concern was, that:

17 "... the amount the noteholders claim in the winding
18 up would be limited by the extent to which the solvency
19 condition was satisfied."

20 So the solvency condition couldn't be satisfied,
21 there couldn't be a payment, could there, wasn't that
22 his concern?

23 A. Yes. The -- a payment on a winding-up would only be
24 made to the extent that the solvency condition could be
25 satisfied.

1 Q. So you talk elsewhere in your statement about the status
2 quo; the status quo, as you understood it, was in a --
3 let's call it a winding-up moment, the notes weren't
4 payable at all?

5 A. It wasn't the -- it wasn't purely that they may not be
6 payable at all that was the concern. It was also that
7 they may only be payable in part, and in that respect,
8 it wasn't the consequence that particularly concerned
9 Amrit, because there are a number of ways of achieving
10 effective subordination under English law. But the
11 language that was used and the technique that was being
12 used caused him concern.

13 Q. But, as I suggest you know, I suggest that what you were
14 describing as the concern, which -- the concern that you
15 understood, was that because this solvency condition
16 precluded a payment in a winding-up, then there was no
17 payment to be made in a winding-up, and that gave rise
18 to tax consequences?

19 A. No payment or a reduced payment.

20 Q. But just humour me for the moment and assume that what
21 you mean is no payment, that would be as deeply
22 subordinated as you could get, would it not? If there
23 was going to be no payment on a winding-up, then you
24 were right at the bottom of the pile, were you not;
25 wasn't that the concern, wasn't that the status quo?

1 MR JUSTICE SMITH: Mr Beltrami, I am not sure that's quite
2 right, is it; it must depend on just how insolvent you
3 are?

4 MR BELTRAMI: Well, no, you are insolvent until you can
5 become solvent.

6 MR JUSTICE SMITH: Yes.

7 MR BELTRAMI: So whilst you are insolvent, you are at the
8 back of the queue.

9 MR JUSTICE SMITH: Yes, but there may be many people who are
10 not being paid, and so the back of the queue may be
11 a somewhat crowded conveyor belt.

12 MR BELTRAMI: It depends on what the terms were elsewhere,
13 I suppose, but for this instrument, however many were at
14 the back of the queue, this instrument was there, too,
15 because as I understand the tax concern, the solvency
16 condition precluded a payment being made whilst
17 insolvent. As I understand it -- it may not be the
18 concern, I don't know, that is what I understood the
19 concern to be.

20 A. The tax concern didn't arise from where on the layers of
21 creditors it ranked, but it arose from how in that layer
22 of creditors it has been expressed to rank.

23 Q. Maybe we can leave it at that point.

24 Now, to confirm, though, and I think you confirmed
25 this earlier, this was a concern arising under the

1 original drafting of the notes?

2 A. That's right.

3 Q. And Mr Dehal proposed a -- what appears to have been
4 a reasonably simple solution to the problem which you
5 discuss at paragraph 37, which was to remove the
6 solvency condition in a winding-up. And you intended,
7 did you not, to give effect to that discussion by making
8 a small change to paragraph (3)(a) to remove it?

9 MR PHILLIPS: My Lord, my learned friend really needs to
10 show him paragraph 37 rather than saying what it says
11 and getting it wrong.

12 MR BELTRAMI: "Mr Dehal suggested to optimise the drafting
13 form, amendments should be made adding the interest
14 deferral feature requested by Lehman ... to minimise the
15 potential argument ... notes were not tax deductible..."

16 You decided to amend it, paragraph 39, so that the
17 noteholders' claim in a winding-up would no longer be
18 conditional upon solvency. So clearly I have got it
19 completely wrong, but my understanding is that your
20 decision was to remove the solvency condition and
21 thereby solve the tax problem Mr Dehal had mentioned?

22 A. One way to solve the tax problem that Mr Dehal had
23 identified would have been to remove the solvency
24 condition from operating on a winding-up. And had that
25 been the form of words or the form of conditions that

1 had been sent over to LBIE, I think Mr Dehal would have
2 been comfortable from a tax perspective. However, in
3 doing that, it would have then left open the question of
4 how the securities are subordinated on a winding-up and
5 to what level.

6 Q. We will come on to that bit in a minute, if we may; I
7 don't want to jump ahead. I am just trying to follow
8 the chronology. So 6 June, Mr Dehal -- or by 6 June,
9 Mr Dehal has given you his tax concern, precisely what
10 that is, we had a discussion, and you have decided or it
11 has been decided that a way to resolve that is to remove
12 that concerning condition in a winding-up, and you can
13 see that because it appears in the drafts which I am
14 getting to.

15 If you can keep bundle 5 there, but can go also to
16 bundle F10, page 5876. Now, just to explain, this is
17 a document that we were given, and we understand that
18 the reference at the top, AC, is a reference to
19 Ms Mozel; is that right?

20 A. Yes, that is right.

21 Q. And the wording in the bottom on page 5876 is -- you are
22 writing to Ms Mozel saying: please could you have a look
23 at this.

24 A. That is correct.

25 Q. Is that right, yes. And the reason I took you to this

1 is that if you go on to page 5879, if you go on the
2 right-hand side, there is wording, "and interest
3 including interest as defined below", which we have been
4 told, I think that is Ms Mozel's writing?

5 A. That is right.

6 Q. But at the top of the page, you will see there is
7 a rider in respect of the solvency condition, which is
8 "other than if an order is made by a competent court or
9 a particular [something] for the winding up or
10 dissolution of the issuer", can you see?

11 A. I do.

12 Q. That is your writing?

13 A. That is my writing.

14 Q. Yes. It looks to us at least as if at this stage, when
15 you sent this to Ms Mozel, you had included essentially
16 words to solve Mr Dehal's tax problem?

17 A. I -- I can't recall the precise circumstances of showing
18 it to Anne-Claude. I actually don't remember any
19 conversations with her. I believe the pencil marks that
20 you were showing me in my handwriting will have come
21 after Anne-Claude saw the document. So this will have
22 been me -- I believe this is me starting to think about
23 how to tackle the concerns that Amrit had flagged, which
24 was intended for my -- my eyes only. Had I intended to
25 show it to Anne-Claude, I would have -- I believe

1 I would have given it to her in a more presentable
2 fashion.

3 Q. I understand, so you gave, if you like, the first
4 version, what I call the first version, the one you sent
5 to Lehman, to Anne-Claude, presumably because she was
6 the supervising partner, and therefore needed to have
7 a -- a good idea to have a look at it; would that be
8 right?

9 A. I believe so, yes.

10 Q. And she came back with some relatively minor amendments
11 to the draft, that we just looked at?

12 A. Yes, the one on 5871.

13 Q. And you subsequently worked on it to try to resolve the
14 tax problem?

15 A. I believe that's the case, yes.

16 Q. By removing the solvency -- by, as we see, wording which
17 removes the solvency condition?

18 MR JUSTICE SMITH: Just to understand the wording in your
19 handwriting at the top of the page, that says "other
20 than if an order is made by a competent court or
21 a resolution passed for the winding up"?

22 MR BELTRAMI: "or dissolution of the issuer".

23 MR JUSTICE SMITH: "or dissolution of the issuer".

24 A. That is correct.

25 MR JUSTICE SMITH: Thank you very much.

1 MR BELTRAMI: Don't put bundle 10 away, but if you go back
2 to bundle 5 and move on to 2676. We are now at 10 June,
3 and Ms McMorrow comes back to you and says:

4 "We don't have any comments other than the holder
5 point, so please send a revised version."

6 So they said earlier they were going to look at it,
7 they didn't have any further comments and he asked you
8 to update, if you like. And the next stage, just
9 following through the chronology, is you did some more
10 drafting in the morning of the 11th. If you go to 2722;
11 2722, it is an e-mail, 11 June, from you to
12 Sophie Tomlinson; I think that was a trainee at A&O,
13 would that be right?

14 A. That is correct, yes.

15 Q. I think you attach to that what is called version 2,
16 because if you look at version 2, on page 2726, you can
17 see that you have included in this version what was in
18 the manuscript that we have just looked at in the
19 earlier version, "other than if an order is made by
20 competent court or resolution passed for winding up ...
21 dissolution of the issuer".

22 So you have transposed that into a more, I think you
23 mentioned earlier, presentable form into the draft and
24 that is at that stage, is this right, the suggested
25 solution to the tax problem?

1 A. That is right. I believe that would have solved the tax
2 problem.

3 Q. And you sent the same -- 2733, you sent the same draft
4 or the same wording, in any event, to Amrit to show him
5 what you had done.

6 A. That is right. I imagine that e-mail was proceeded by
7 a phone call from me, but that is me sending the -- the
8 e-mail you flagged is me sending the revised version to
9 Amrit.

10 Q. And this draft, and let's call it draft 2, was then
11 spread out further within the firm, wasn't it, because
12 it was sent to Mr Fuller. Can you go to bundle F10.
13 5886. These are the -- this is the draft we have just
14 looked at. But we understand that the -- the manuscript
15 the top of 5886 is, I don't know what the middle initial
16 is, it is G something F, but that is Mr Fuller in any
17 event?

18 A. It is a W.

19 Q. GF, Mr Fuller review; why was it sent to Mr Fuller?

20 A. I -- I can't recall the exact circumstances. I believe
21 rather than it being sent to Mr Fuller, I went round to
22 visit him in his office, which I would periodically do
23 when I had questions on -- on drafting. I can see that
24 the text around the consensual reorganisation is
25 highlighted, and it may have been I was asking him

1 a question on that text.

2 Q. So, exactly, 5889, you seem to have highlighted the tax
3 solution, having called it that, and, what, you thought
4 that was sufficiently important to get a further view on
5 it?

6 A. Well, I have highlighted the carve-out from the -- what
7 you termed the tax solution, which is the "except for
8 the purposes of".

9 I can't recall, but given that I have highlighted
10 those precise words, it may have been I was asking him
11 a particular question on that -- on those precise words.

12 Q. Yes. And the manuscript there, is that Mr Fuller's
13 writing, do you know, it is a sort of redraft of it, if
14 you like --

15 A. Yes.

16 Q. -- putting it in slightly different words?

17 A. Moving the provision down into a different form, that is
18 right, that is Mr Fuller's language.

19 Q. Was that Mr Fuller's contribution to the drafting at
20 this stage?

21 A. I believe so at this stage, yes.

22 Q. Right. What seems to have happened then, I mean, we are
23 going to run out to some extent of documents, this is on
24 11 June, but at some point, I think on 11 June, is this
25 right, you identify, or someone identifies a problem

1 with the -- I call it the tax solution, you know what
2 I mean?

3 A. Yes.

4 Q. Someone identifies a knock-on problem with that, is that
5 right?

6 A. That is right. Either I twigged and identified that
7 there was a gap in this co-ordination with that
8 solution, or potentially Mr Fuller did, or potentially
9 it was a joint venture between the two of us. I can't
10 recall but you are right, somebody identified that the
11 consequence of that language, whilst solving the tax
12 problem that Amrit had identified, then left open the
13 question around how were these notes co-ordinated on
14 a winding-up.

15 Q. Yes, if you go back to bundle F5, and we can put away
16 bundle F10, you will be glad to hear. At bundle F5,
17 2762, this is your e-mail to Anne-Claude Mozel on the
18 afternoon of the 11th, and you are discussing a call
19 that they might have. I don't think it actually
20 happened, but you say:

21 "I have been having a lot of trouble with the notes
22 since this morning because the tax comments are contrary
23 to what we need for ranking."

24 That was, wasn't it, the point that you have just
25 mentioned, and the point that you have just mentioned is

1 this, isn't it: that someone realised, and maybe you or
2 joint venture realised, that if you remove the solvency
3 condition, you might also be removing the subordination
4 provision, and that was the problem, wasn't it? So by
5 solving one problem, you were creating a new problem by
6 unsubordinating the subordinated notes?

7 A. That is right. If the language had stayed in the form
8 that we last saw, it would have said that the notes were
9 subordinated senior creditors, but wouldn't have
10 included a mechanism for that subordination to be
11 effective.

12 Q. Yes, and that ran the risk of -- well, flouting the
13 rules, I suppose, and turning out that you might have
14 unsubordinated debt -- sorry, unsubordinated debt
15 instead of subordinated.

16 A. It certainly wouldn't have been a typical way to achieve
17 subordination. Simply saying that something is
18 subordinated, senior creditors, wouldn't be commonly
19 used for, or wouldn't at that time or now be commonly
20 used for subordinated debt by UK institutions, and it
21 would be another -- another effective tool to achieve
22 it, and having removed the solvency condition tool, by
23 that time, I had realised we needed to find another way
24 of achieving effective subordination of these
25 securities.

1 Q. Yes, just to pick up that. The solvency trigger, the
2 solvency condition was, I think you just said, quite
3 a common way of implementing subordination in these sort
4 of instruments.

5 A. Yes. It wasn't unusual. It wouldn't have been the most
6 common way to subordinate either lower tier 2 or upper
7 tier 2 securities. Different methods might have been
8 used, depending on the facts.

9 Q. And the other one we will look at in a minute is the
10 preference share ranking, that is another way?

11 A. That is another way, and there are other, other
12 techniques as well, which would have been used for
13 different types of securities.

14 Q. So just going back to the chronology, having identified
15 the problem, you then, if you go to F5/2785, you then
16 come up with -- 2785, 2786 and 2787; versions, the first
17 version, then new one, then newest one of a provision
18 to -- if I can put it this way, to resubordinate the
19 notes, or at least to subordinate notes absent
20 a solvency condition?

21 A. Yes, that's right. I -- this was -- this was an
22 iterative set of drafts that I prepared for the purposes
23 of me rather than to send to anybody else, to come up
24 with some language which was intended to subordinate the
25 securities, and also intended to retain the same level

1 of subordination.

2 Q. All of the versions, and the actual version that went
3 into the notes, adopt the technique of ranking one way
4 or another at a preference share level, is that right?

5 A. Yes, or a notional preference share level, certainly --
6 it uses a preference share as a core construct, that is
7 right.

8 Q. I mean, I don't want to trip over words, but I am not
9 saying they were preference shares, but that was the
10 benchmark, if you like, at which they were going to be
11 ranked?

12 A. It was a reference point.

13 Q. Yes. And that notional preference share concept,
14 I think you describe it in your witness statement as
15 something tried and tested, especially for upper tier 2
16 people, upper tier 2 debt; is that right?

17 A. That is correct.

18 Q. And you wanted to make sure when you did this, and if
19 you go to 2787, the newest one, I think the newest one
20 is the one that is actually being used -- I am not sure
21 it matters for the purpose of the question -- that even
22 though you were using this technique, the benchmark was
23 going to be higher than a notional share, as you
24 described it? And the notional share, is this right,
25 the notional share you had in mind, or the potential

1 notional share you had in mind, was an upper tier 2 debt
2 that had itself been benchmarked at preference share
3 level?

4 A. Yes, so I had in mind -- as a drafting tool, I had in
5 mind how this would be done for an upper tier 2
6 security, which would commonly have expressed the
7 securities to rank on a winding-up above all issue
8 preference shares and pari passu with a notional
9 preference share, which itself ranked above all issued
10 preference shares.

11 Q. Yes.

12 A. That was the tool I had in mind. But as I knew that
13 these securities were not upper tier 2, I made a change
14 to the language that you would see in upper tier 2, in
15 order to reflect that difference.

16 Q. Yes. The only change you made to the normal upper tier
17 2 preference share language was to introduce this
18 business about the notional share, wasn't it?

19 A. Yes. The -- the definition of a notional holder and
20 a notional share, that is correct.

21 Q. Did you or were you concerned about whether there was
22 such a thing or not?

23 A. I did not -- I do not believe I thought there was an
24 upper tier 2, but I was keen to make sure, if there were
25 to be one issued in the future, that these securities

1 were not inadvertently ranked pari passu with any upper
2 tier 2 securities.

3 Q. Yes, I understand. And this drafting, did you discuss
4 this drafting with, I don't know, Mr Dehal, Mr Fuller,
5 Ms Mozel or anyone else at A&O?

6 A. Yes. One of the few -- well, I think the only actual
7 conversation on this topic, whether internal or external
8 I remember, is one with Mr Fuller and Mr Dehal on
9 a telephone call. I do not recall what was said, but
10 I believe it was around the 11th or the 12th, and I --
11 I believe we were talking about this language and how it
12 would work. But also having looked through and
13 refreshed my memory from the e-mails, I can see an
14 e-mail from me to Amrit saying that Geoff, which would
15 be Mr Fuller, is happy with it, and asking him to
16 confirm that he was also happy with it from a tax
17 perspective.

18 Q. Yes, we are going to come to that in a minute. But in
19 any event, so would it be fair to call this
20 a collaborative exercise, not just you, as it were,
21 producing this, it is a collaborative exercise with the
22 assistance of Mr Fuller and Mr Dehal, so that everyone
23 is happy with it as achieving the right result?

24 A. Ultimately, yes. But if we are looking at this at the
25 time I was preparing it, I believe I was drafting this

1 on my own, and then subsequently sought the feedback of
2 the two colleagues we have spoken about.

3 Q. Thank you. If you go on now to 2819, we get on to
4 12 June. And the first thing you send to Jackie Dolby
5 are, as you will see, draft board minutes for the
6 transaction. The draft terms come later. But in
7 addition to the draft terms, you have drafted some board
8 minutes. In fact, I mean you had drafted those -- I am
9 not sure the attachment is here, but if you go back to
10 the -- the attachment is at 2826, is what you actually
11 sent through. But if you go back to 2788, we can see
12 how you produced those. Is this another one of those
13 documents that has the drafting changes on it, but it
14 also has the track changes, 2788; and what you did for
15 the board minutes is you, or at least, is this what you
16 did: you took the original board minute when the notes
17 were issued, being board minutes from some time
18 in April 2007, and essentially amended that so as to
19 make it relevant for the amendments in 2008?

20 A. That would appear to be the case, yes.

21 Q. Because you can see the April stuff at the top is
22 crossed out, and the various other bits and pieces are
23 changed, so when you get to paragraph 1, the original
24 minutes of the board for the 2007 issue, had a statement
25 about purpose. Can you see that has been crossed out,

1 so initially, they were issued for the purpose of
2 strengthening regulatory capital base of the group and
3 paying off existing loans of the company. And you have
4 crossed that out and put a different purpose in for the
5 amendments, and the purpose you have put into the
6 amendments is the purpose of those amendments was to
7 allow the issuer to defer payment of interest on the
8 notes, and this was done on 11 June.

9 But that was a reference, wasn't it, to the initial
10 driver of the notes, rather than being an exclusive
11 statement of all the purposes of the amendment?

12 A. Yes. That was a reference to the core commercial change
13 that was being made at the time.

14 Q. Yes, the core commercial change, the 4F change that we
15 looked at in draft 1, but it wasn't a comprehensive
16 statement because you knew at that stage that there were
17 also going to be changes to solve the -- I keep using
18 this word and I hope it is not unclear -- the tax
19 problem?

20 A. That's right. I mean, I am sure we will come to it
21 shortly. It wasn't specifically mentioned here, because
22 my intention at the time was that the -- whilst
23 the method of subordination changed, the intention was
24 that the level of subordination didn't change.

25 Q. No, I wasn't asking about subordination per se. Forget

1 about subordination for the moment.

2 By this stage, you knew there was a tax problem
3 identified by Mr Dehal, which required, as you
4 understood it, the removal of the solvency condition.
5 Now, the subordination bit is the consequence of all
6 that, we have looked at that to some extent, but let's
7 just focus on the solvency condition bit. That was
8 being changed to solve the tax problem.

9 A. Correct.

10 Q. Yes. So all I am asking you is when you say the purpose
11 of the amendments was to allow the issuer to defer
12 payment, when you drafted that, you knew, did you not,
13 that was just one of the purposes?

14 A. It was -- I can't recall what I was thinking at the
15 time. But looking at it now, I was describing what
16 I would have seen as the key commercial change, and the
17 other changes which were made, either in relation to the
18 subordination or subsequently in relation to some of the
19 technical points around regulatory notice, were not
20 points that were intended to change the core commercial
21 rights of either the issuer or the holder.

22 Q. 2896, please.

23 MR BELTRAMI: My Lord, would that be a moment -- we can stop
24 at this moment, that would be helpful.

25 MR JUSTICE SMITH: Yes Mr Beltrami, if that is a convenient

1 moment, we will rise for five minutes.

2 (3.10 pm)

3 (A short break)

4 (3.18 pm)

5 MR BELTRAMI: Where we left off was 12 June, we've just done
6 the board minutes. If you go to 2896, it is your e-mail
7 to Ms Mozel, and you say at the top of the page:

8 "I have had to involve Geoff Fuller in the meantime
9 to help me fix the conflict between tax and the
10 subordination."

11 And that is the conflict we have just talked about,
12 the consequence of the solution being a new problem,
13 yes?

14 A. That is right.

15 Q. And that rather suggests that Geoff Fuller did come in
16 to help specifically on that point?

17 A. Yes, it suggests that I spoke to him to seek his advice
18 on -- on the solution.

19 Q. Yes. And if you go next to 2903, an e-mail I think you
20 mentioned earlier, which I said I'd come on to, which is
21 that you then sent, you will see the newest one, so the
22 newest formulation of the three we looked at, to

23 Mr Dehal:

24 "Geoff is happy with this. Please could you tell me
25 you are."

1 That seems to be the way you brought him into the
2 discussion to make sure he signed off on it too?

3 A. That's right, yes.

4 Q. There isn't a confirmation, I assume he must have done
5 it orally or however. Then you went about producing
6 version 3 to accommodate that new drafting. So if you
7 go down to 2904, you can see 2906 as all -- if you look
8 at (3) (a), that is the revised Geoff Fuller
9 conditionality wording, and then the rest of it are the
10 additional amendments that you included to deal with the
11 subordination problem consequential upon the tax
12 problem?

13 A. That is correct.

14 Q. And that is what you then sent to Lehman. If you go
15 back, 2839, on 12 June, 11.30, you sent to Ms Dolby the
16 amended conditions with a comparison version showing the
17 changes since the last draft. Is that -- it is the
18 amended version we just looked at, and then you say:

19 "Deferral provisions introduce tax sensitivities.
20 The amendments are designed to ensure these
21 sensitivities difficulties are met."

22 What was that a reference to?

23 A. That will have been a reference to if they were
24 wondering what the purpose behind (3) (b) was, it was
25 a reference to the -- to the driver being tax.

- 1 Q. So what, you were alerting them to the amendments you
2 had made to (3) (b) and telling them why you had put them
3 in there, would that be fair?
- 4 A. I believe so.
- 5 Q. Did anyone ever suggest to you that you shouldn't have
6 done that because it was beyond your instructions?
- 7 A. They didn't.
- 8 Q. Did anyone come back and ask you for any more detail
9 about precisely why you had done this or what the
10 rationale was?
- 11 A. I do not believe so, no.
- 12 Q. Did that -- do you remember if that surprised you at the
13 time?
- 14 A. I do not recall. But I would -- at the time, whilst
15 I could see that the changes were significant and needed
16 to be flagged, the intention wasn't to change the
17 ranking, and it has the language in italics underneath
18 (3) (b), the new -- new text. So that was quite clear as
19 to the expected prudential treatment, so it wouldn't
20 necessarily have surprised me that there was no response
21 to it, no.
- 22 Q. But more generally, Mr Grant, it must be a commonplace
23 in your practice, certainly when you are an associate,
24 maybe too grand now for a partner, for you to be
25 drafting documents for clients, sending them to clients,

1 and the clients accepting the drafting without always
2 coming back and asking you about it; that is
3 a commonplace, presumably?

4 A. It is.

5 Q. And the most you can do is to flag for the client that
6 you have done it and they can decide whether or not to
7 question it, agree it or disagree with it, presumably?

8 A. That is right.

9 Q. And that is what you considered you did?

10 A. That is right.

11 Q. And these amendments that represented in totality a --
12 would you agree with this, a piece of careful drafting
13 by you assisted by other senior persons within A&O, yes?

14 A. Yes.

15 Q. After considerable thought, trying to find what you
16 thought was the right solution?

17 A. I would agree with that.

18 Q. You were aware, were you not, that when you rank at
19 preference share level, subject -- leave aside the
20 notional holder for the moment, but the preference share
21 level comes below debt level?

22 A. I wouldn't have described it in those terms, no.

23 Q. Why wouldn't you describe it in those terms?

24 A. Because at that time and now, a lot of my work would
25 have been helping banks to issue debt that ranked

1 equally with preference shares.

2 Q. No-one is disputing the fact that you can have
3 a contract which says that. I'm sure that's right, I'm
4 sure you draft many of them where the contract says:
5 this is a debt, it is preference share level, it's a
6 preference share, it's -- whatever it is, I am sure that
7 you can put that in a contract.

8 But, unless there is an express clause to that
9 effect, a preference share level falls below a debt
10 level in the Waterfall as you knew, didn't it?

11 A. I would certainly have said a preference share would
12 fall below an unsubordinated creditor, and then in terms
13 of where the preference share ranked when you are
14 comparing it with a subordinated creditor, I would say
15 that depends upon the terms of the particular debt
16 instrument in question.

17 Q. Well, we will have to carry on with this; yes, no doubt
18 if the terms of the debt agreement say something
19 different, then one looks to the debt agreement. But
20 aside from something express, you knew, did you not,
21 that a preference share level claim falls below a debt
22 share, a debt level claim?

23 A. I think I just go back to my last answer; I certainly
24 knew that a preference share would rank below an
25 unsubordinated creditor, but I wouldn't have expressed

1 it in those terms in relation to the different layers of
2 subordinated creditors the bank has.

3 Q. Right, it may be that I can't take that any further.
4 You didn't know, did you, whether there was any other
5 subordinated debt owed by LBHI2?

6 A. I do not believe I did, no.

7 Q. So when you say, and you have said several times in your
8 evidence, you say it in your witness statements, you
9 wanted to preserve the status quo or you didn't want to
10 change the ranking, you didn't actually know what the
11 ranking was, did you?

12 A. My understanding at that time was that the notes were
13 lower tier 2, which doesn't of itself necessarily tell
14 us where these rank. I could see that there was
15 a concept of senior creditors, and, therefore, could see
16 that there were certainly unsubordinated creditors that
17 ranked above, and the potential for classes of
18 subordinated creditors to rank above. I did not know
19 whether or not there were any subordinated creditors
20 that did in fact rank above.

21 Q. Yes, so how could you preserve the status quo if you
22 didn't know what the status quo was?

23 A. That reference to preserving the status quo was
24 two-fold. One, by retaining the reference to the notes
25 being subordinated to senior creditors, that reference

1 was kept and also the definition of senior creditors was
2 retained, unchanged. But also then when coming up with
3 the language in (3)(b), looking at and considering the
4 categories of debt instruments that may have been issued
5 in the future, and which, based upon typical bank
6 practice at the time, would have been expected to rank
7 below these securities.

8 Q. That is for the future, though, the notional holders was
9 for the future. You didn't know what the current
10 position was when you drafted these notes?

11 A. I do not believe -- no. I believe I did not think there
12 were any upper tier 2 creditors. So this language round
13 the notional holder and the notional share was intended
14 to deal with the prospect of there potentially being
15 upper tier 2 creditors in the future.

16 Q. Yes, and what about lower tier 2 creditors, you had no
17 idea whether there were or were not any?

18 A. That is true. I did not know. And the -- for the
19 purposes of the amendments I was making, I did not see
20 that the drafting would have been influenced one way or
21 another if there had been other lower tier 2 creditors.
22 My -- my intention in coming up with the language which
23 we have been speaking about was to preserve the ranking
24 of these securities, and be faithful to where these
25 securities ranked on a capital structure of a bank as it

1 may have evolved potentially in the future.

2 Q. Can you go to paragraph 40 of your witness statement,
3 please. At paragraph 40, you make a point of saying,
4 and again you said this also several times in your
5 evidence, that the clause 8 specifically referred to
6 winding up or dissolution, and your new drafting
7 similarly addressed winding up or dissolution to
8 dovetail. Are you saying in that paragraph, and are you
9 saying in the various times you mentioned winding up
10 orally, that you made a conscious decision that the
11 solvency condition would be removed on an insolvency at
12 winding up, as opposed to any other insolvency process?

13 A. I -- I do not believe at the time I was -- I had an
14 administration in mind. I removed the solvency
15 condition which was expressed to operate on
16 a winding-up. But in doing so, and in replacing it,
17 I was mindful of the existing language in condition 8.

18 Q. Did you even know about the concept of a distributing
19 administration when you made these amendments?

20 A. I -- I can't recall. I think these were done a little
21 while after administration was a concept, so I --
22 I would imagine that I did. But I also knew that the
23 existing notes or the notes pre amendment referred to
24 a winding-up or dissolution.

25 Q. So you transposed the wording into your amended wording,

- 1 is that where we get to?
- 2 A. I stuck -- I stuck to the language used in condition 8
3 without expansion.
- 4 Q. Thank you. Now, there was a further final amendment to
5 the notes, wasn't there, made in August 2008 which was
6 also nothing to do with the deferral of interest but was
7 concerned with FSA consent. Do you remember that?
- 8 A. I do -- well, I do having refreshed my memory from the
9 e-mails.
- 10 Q. If you go -- put away bundle F5 and go to F6, please.
11 At 3173, the background to this, and you can maybe
12 confirm if it is right or not, is that the amendments
13 were drafted up, and there was a question whether the
14 FSA should have to consent -- should consent to them.
15 It was given to the FSA, and they said: well, we don't
16 normally -- we don't have to consent any more; but it
17 was spotted that the terms of the note said: if there is
18 going to be a change, the FSA have to consent.
- 19 A. That is right.
- 20 Q. Yes, and you proposed an amendment, if you go to 3174,
21 on 10 July, an amendment to clause 12 so as to remove
22 the need for FSA consent. And then you drafted that
23 amendment, if you go to 3300, it is an e-mail from you
24 of 28 August, setting out a revised black line version,
25 and in 3313, there is that further amendment that you

1 made about clause 12, dealing with the FSA consent
2 point.

3 A. That is correct, yes.

4 Q. And maybe an obvious question to some extent, that
5 wasn't anything to do with a deferral of interest
6 either, was it?

7 A. No. That -- that change was aimed at future-proofing
8 the securities in light of the feedback from the
9 regulator at the time of the amendment.

10 Q. Thank you. Just to finish off, Mr Grant. Are you aware
11 of the nature of the allegations that have been made by
12 LBHI about the amendments? And in particular, your role
13 in the amendments?

14 A. I have read the skeletons, yes.

15 Q. Yes. Can you go back, sorry to go back -- to bundle F5.
16 You said you have read the skeletons, have you?

17 A. I have read large chunks of them, not in their entirety.

18 Q. 2849. And the reason I have taken you here is just it
19 is a version of the amendments, 12 June amendments that
20 you sent to Lehman, which then became essentially, or at
21 least the main parts of the amendments in due course.

22 In 2849 is, as set out, all the amendments to
23 clause 3(a) of the notes, and you will have realised,
24 having read so much of the skeletons, that the -- that
25 the contention of LBHI is looking at the amendments from

1 clause 3 onwards, the first amendment says "and interest
2 (including arrears of interest as defined below)", that
3 bit stays if you like. But the rest of it, beginning
4 "subject as provided below", then the conditionality
5 referred, then all the rest, the -- that large chunk in
6 the middle and the bit at the end, should be rectified.
7 If they are wrong on construction, so it is conditional,
8 if they are wrong on construction, it should all be
9 rectified, so essentially, as you can no doubt see, not
10 just all the stuff about ranking, but also the removal
11 of the solvency condition, because that has to go too,
12 apparently. And the contention therefore is that all of
13 that was a mistake.

14 It wasn't what they wanted. It wasn't what they
15 intended. Their first case is, as a matter of
16 construction, it doesn't change anything. The second
17 case is that if it does, none of it is what was
18 intended. Is that what you think is fair? Did you do
19 something, did you think you were acting beyond what
20 they intended?

21 A. I think in response to that, I would have two comments.
22 The first one is that it was my intention to preserve
23 the ranking, and we haven't -- I haven't really spoken
24 a great deal about how I intended to do that. Maybe we
25 will come to that later on. But the intention was that

1 by using the technique in (3) (b), securities continued
2 to rank at the same level as where they ranked
3 beforehand, so that was -- I think that answers the --
4 the first part of the argument.

5 And in terms of whether or not this was the
6 intention, I can confirm that these, this language was
7 reviewed by my client LBIE and appeared in a number of
8 versions, including the version that went to the
9 regulator, without comment.

10 I had no knowledge or understanding that I -- that
11 these were not agreed by the two parties to the
12 securities, being the issuer and the holder. And
13 I didn't see that my actions were as a result of
14 a mistake.

15 MR BELTRAMI: Thank you, Mr Grant. That is all I have to
16 ask you. Thank you very much.

17 A. Thank you.

18 MR JUSTICE SMITH: No questions from any other?

19 Re-examination by MR PHILLIPS

20 MR PHILLIPS: Mr Grant, you said several times in your
21 evidence that you were hoping that you were going to be
22 asked about how the draft you produced worked. Could
23 I ask you to turn up, and if you could be given bundle
24 E. If you could turn to tab 5, please. Just so you can
25 see what this is, this is the resolution passing the

1 amendments, and if I could ask you to turn on to
2 page 73.

3 Do you recognise that this is clause 3(a) after your
4 amendments?

5 A. Yes, I do.

6 Q. Now, the amendments start at the words,
7 "the conditionality", and run to the end of the page.
8 Yes? You said that you wanted to explain to my learned
9 friend Mr Beltrami, or you were hoping that you were
10 going to be asked to explain how you understood this to
11 operate.

12 Would you like to do that?

13 A. Yes, my Lord, I will try.

14 Before the change was made, I could see we had
15 a definition of senior creditors which was
16 unsubordinated creditors, and potentially one or more
17 classes of subordinated creditors that ranked below
18 unsubordinated creditors, and then I knew once you had
19 gone through those layers of creditors, these securities
20 sat at that level, below those two.

21 In making the change to remove the solvency
22 condition, I had to come up with a way of trying to
23 explain that ranked at the same level, but using
24 a different formulation, and rather than looking from
25 the top down, I was exploring using another form of

1 subordination which referred to a preference share. And
2 in my mind, that's looking from the bottom up. But the
3 intention was, whether you are looking from the top down
4 or the bottom up, we were pointing to the same place.

5 I had in my mind a typical, relatively sophisticated
6 capital structure of a bank whereby we have ordinary
7 shares at the bottom, and then potentially one or more
8 series of preference shares which could rank at
9 different levels, or have different rights; and then
10 typically, you may have innovative tier 1 ranking at the
11 level of the most senior preference share. And then
12 above that, if there had been upper tier 2 securities in
13 existence or in the future, they would normally be
14 expressed to rank by reference to a notional preference
15 share which ranks above all issued preference shares.

16 So it would float up. In the event you had more and
17 more series of preference shares with different
18 rankings, it would float up to always sit above those
19 preference shares, and that upper tier 2 security would
20 typically rank below a lower tier 2 security, and my
21 intention here was to make it clear that in the
22 winding-up, these securities conditioned to rank above
23 an upper tier 2 security, whilst continuing to rank
24 below senior creditors, which is why the definition
25 remained unchanged, and the description at the front

1 remained unchanged as well.

2 Q. Thank you. And you were asked by my learned friend
3 whether or not you had made a mistake, and you said that
4 there had been no mistake. Can I ask you this: if the
5 amendments did change the ranking and did not do what
6 you have just described, was that a mistake? Would that
7 have been a mistake?

8 A. If I had thought that the amendment did change the
9 ranking, I would have expected to have a discussion with
10 Sarah McMorrow at LBIE and seek her instructions on
11 that.

12 MR PHILLIPS: My Lord, I don't know if your Lordship has any
13 further questions.

14 MR JUSTICE SMITH: I don't have any further questions, no.
15 Thank you very much, Mr Grant. You are released.

16 MR PHILLIPS: My Lord, may I now call Mr Miller, please.
17 Steve.

18 MR STEPHEN MILLER (sworn)

19 MR JUSTICE SMITH: Mr Miller, good afternoon. Do sit down.
20 I hope you will be given some fresh water, and make
21 yourself comfortable.

22 Examination-in-chief by MR PHILLIPS

23 MR PHILLIPS: Mr Miller, good afternoon. Could I ask you to
24 look at divider 1 in bundle C, please. Do you see
25 a witness statement of Stephen Matthew Miller?

1 A. Yes.

2 Q. And if you could turn to the last page, which is
3 page 13, is that your signature?

4 A. Yes, it is.

5 Q. And is this your evidence?

6 A. Yes, it is.

7 Q. If you wouldn't mind staying there, there will be some
8 questions.

9 Cross-examination by MR BELTRAMI

10 MR BELTRAMI: Mr Miller, good afternoon. You were the
11 partner, capital market department, involved in the
12 drafting of, is this right, the PLC sub-notes, as they
13 have been called, and the corresponding ECAPS.

14 A. Yes.

15 Q. And certainly for the later ones, you were assisted by
16 Mr Grant, and let me just ask you, because I did ask
17 Mr Grant, if you go to F9, if you are given bundle F9,
18 please, at page 5290, this is an e-mail. I think you
19 may have been in court, you may have heard, I asked
20 Mr Grant that, maybe I should have asked you that; an
21 e-mail you sent to Mr Barnett on 16 December 2016,
22 talking about the sets of ECAPS, and where you, in the
23 second paragraph -- the last paragraph, you think that
24 the five sets of ECAPS were all essentially copies of
25 each other. Do you recollect it?

1 A. That is what I said at that time, yes.

2 Q. Okay, thank you. We can put that away. If you go back
3 to your witness statement, paragraph 19. You say that
4 the ECAPS were the functional equivalent of non-voting
5 preference shares, and at paragraph 20, let us find it,
6 you make reference to the offering circular which refers
7 to rights on liquidation equivalent to non-cumulative
8 preference shares of the guarantor.

9 And again, you may have heard in court, under the
10 ECAPS, ECAPS holders had two sets of rights, did they
11 not? They had a -- it may not even be called officially
12 a share right, but an equity right in the partnership,
13 and a claim under the guarantee given by PLC. And the
14 claims under the guarantees were deeply subordinated
15 claims, weren't they, below all other debt?

16 A. Yes.

17 Q. And the drafting technique was to -- as you say in your
18 paragraph, was to rank that deep subordination at
19 a preference share level; that is right, isn't it?

20 A. Can you take me to where I say that?

21 Q. If you see 20, you refer to the fact that the rights on
22 liquidation equivalent to non-cumulative preference
23 shares of the guarantor, so you are referring to the
24 fact that the claim under the guarantees, which of
25 course is a debt claim, is ranked equivalent in

1 a liquidation to non-cumulative preference shareholders'
2 claims?

3 A. Rights and liquidation equivalent.

4 Q. Yes. So when you get into a liquidation, and there is
5 a Waterfall situation, and some -- there is a priority,
6 the priority of the deeply subordinated guarantee claims
7 is put at the preference share level?

8 A. As to quantum, yes, I would say so.

9 Q. And that was a deliberate -- or let me ask you this;
10 that was a technique to ensure that level of
11 subordination, was it not?

12 A. Yes.

13 Q. And it was deliberately done in the case of these
14 ECAPS -- in which -- it was deliberately done in the
15 case of these ECAPS, wasn't it, to subordinate them to
16 that level through that technique?

17 A. Yes.

18 Q. And if you can go, please, to bundle F1/176. Just to
19 explain what this is, it is an e-mail chain. The top
20 one is 23 February 2005, if you have that, and as
21 I understand it, this is in the context of discussion
22 within Lehman, and involving yourself, about what became
23 the first issue of the ECAPS, which was, I think, at the
24 end of April or the end of March. This
25 is February 2005, and one of the things you have to --

1 or one of the things you were discussing is can we list
2 the ECAPS partnership, even though it is a newly formed
3 partnership with no accounts.

4 And if you see at the bottom of 176, it is an e-mail
5 from you to Mr Tomala. You say, second sentence:

6 "One of the basic general preconditions to listing
7 is that an entity must have a business track record of
8 at least a couple of years."

9 So there is going to be a problem listing the ECAPS
10 partnership, and the way to -- I think you explain
11 later, the way to get over that problem is to put in the
12 guarantee by a company which does have a track record,
13 but that is what you were -- if you follow your e-mail
14 through?

15 A. Okay.

16 Q. Over the page, you say, if you go to the
17 "alternatively":

18 "A newly formed SPF ... can be listed as the holders
19 of the security at a tier 1 preferential benefit from
20 a guarantee from an entity with more than two years'
21 audited financial statements. This is our usual
22 position. The guarantee can take the form of ..."

23 What is it, "keep well"?

24 A. Something which is not a claim for a liquidated sum, but
25 rather an obligation of a creditworthy entity to ensure

1 that the entity is keeping well, is able to pay all its
2 debts.

3 Q. All right. Unfortunately, we don't have one of these
4 because the alternative is a regular guarantee which is
5 much cleaner. So that is the discussion you are having.
6 Two paragraphs down, you then discuss the guarantee
7 which we know then became the guarantee you just talked
8 about. In the tier 1 situation, the guarantee is
9 invariably provided by the parent -- PLC, I think it is.
10 What is ELP?

11 A. I think that is what the Lehmans' team are referring to
12 as English Limited Partnership.

13 Q. Thank you:

14 "... is consolidated on ... balance sheet tier 1 is
15 created. Hence the guarantee is ultra subordinated ...
16 the guarantee provider's own preference shares as the
17 benchmark for dividends and on liquidation."

18 So the suggestion here, is this right, is that the
19 way to get ultra subordination on the guarantee is, as
20 we just see, the preference share route, which provides
21 the benchmark and liquidation, and that would be
22 a regular technique to ensure ultra subordination?

23 A. That is a technique that was developed in relation to
24 what was known as innovative tier 1 capital, where the
25 objective was to layer oneself at the -- as if one were

1 a non-cumulative perpetual preference share, which was
2 one of the limbs of what tier 1 capital could be in the
3 directive.

4 Q. Right. And another way of achieving what we might call
5 ultra subordination is to put in place a solvency
6 condition that has that effect, would that be right? A
7 solvency condition that is so all embracing --

8 A. Yes, one could do that.

9 Q. One could do that. How prevalent was that as a means of
10 achieving ultra subordination?

11 A. Not prevalent in the case of these minority
12 interest-based transactions where you had a subsidiary
13 that was consolidating in, but subsequently became
14 commonplace in relation to directly issued tier 1
15 transactions.

16 Q. Right. Can you go, please, to page 271 in the same
17 file.

18 A. I am sorry, 27...?

19 Q. 271.

20 A. Thank you.

21 Q. And this is an e-mail from Sharon Smith to which you are
22 copied. You may or may not remember here. I don't
23 know; an associate there at Allen & Overy in any event.

24 A. I do remember.

25 Q. She worked with you at the time?

1 A. She did.

2 Q. As you see, she is returning comments on the
3 subordinated notes term sheet which you, Ms Tomala on
4 behalf of Lehman, sent through yesterday evening. Just
5 before we look at that, just to explain, as I understand
6 it anyway, this looks to have been a suggested structure
7 that wasn't in fact followed through, it doesn't accord
8 with the PLC notes as they were issued?

9 A. That is right.

10 Q. But it seems that in the lead up to the issue there were
11 various alternatives being put forward and discussed.
12 But that is not the detail I want to look at in any
13 event. So over the page, 272, there is if you like
14 a base document, I suppose, summary terms and conditions
15 with comments. I assume these are the A&O comments in
16 red, I am not sure that matters.

17 But in any event what is being contemplated in, and
18 please take time to read this, what is being
19 contemplated I think in this transaction, as you will
20 see in the first page, is the issue of dated
21 subordinated notes by something called funding LPs, so
22 it is not quite the same as the partnerships as they
23 were. They are sort of evolving into that, but at that
24 stage they are contemplating dated subordinated notes.

25 Pausing there. A dated subordinated note wouldn't

1 be an upper tier 2, would it, that would be lower tier 2
2 if it is dated?

3 A. If it is dated, it can't be upper tier 2.

4 Q. So it has to be lower tier 2?

5 A. Yes.

6 Q. Or 3, I suppose but --

7 A. Yes.

8 Q. Now, if you go over the page to 273. As I say, this
9 didn't happen but I am looking at what was being
10 contemplated at the time. Under the heading "Status and
11 Subordination", the second paragraph:

12 "The rights of the holders in respect of the
13 subordinated notes are subordinated to the senior
14 liabilities and the existing tier 2 and tier 3
15 co-ordinated debt of the issuer."

16 So at that stage it appears to have been at least
17 for discussion between the parties that these dated
18 notes were going to be ultra subordinated as well. Do
19 you see that?

20 A. Yes, I would agree.

21 Q. The way that seems to be achieved in this document, if
22 you go back to 273, a few paragraphs down, still under
23 "Status and Subordination":

24 "The issuer shall be solvent..."

25 There is a solvency condition:

1 "... if it is able to pay its capital liabilities
2 other than the subordinated notes."

3 So that seems to be the -- that is why I was asking
4 about the technique. The alternative drafting
5 technique, if you want to achieve ultra subordination,
6 is to put in a solvency condition at the level of
7 liabilities because that puts the ultra subordinated
8 note behind everything else, would that be fair?

9 A. It puts it behind the layer that you want to put it
10 behind.

11 Q. Yes.

12 A. Is that --

13 Q. Well, we know what the layer is because it is expressed
14 above behind all tier 2 and tier 3?

15 A. Yes.

16 Q. And the way they have done that is by a solvency
17 condition to pay its liabilities.

18 I am just trying to explore the different
19 techniques.

20 You have the preference share technique and you can
21 do it by solvency condition technique. Both of them
22 would be sufficient, wouldn't they, to achieve ultra
23 subordination if that is what is wanted?

24 A. Correct.

25 Q. Thank you.

- 1 A. Can I just clarify, my Lord?
- 2 MR JUSTICE SMITH: Yes, of course.
- 3 A. By ultra subordination you mean below layers of
- 4 subordinated debt, but I think you could still create --
- 5 use different techniques to land them at different
- 6 points on the ladder.
- 7 Q. Yes. I am using the term because it was the term you
- 8 used and I thought it was a convenient one to use.
- 9 A. Okay.
- 10 Q. What I mean is: is below other subordinated debt. There
- 11 could be ranking between the ultra, I suppose --
- 12 A. Yes.
- 13 Q. You could have 100 ranks, I suppose?
- 14 A. Yes, yes, I agree.
- 15 Q. So we can put that away, please, and we will move on to
- 16 the drafting of, first of all, the PLC notes which you
- 17 explain at paragraph 23 of your witness statement.
- 18 These were drafted -- these were issued, the PLC
- 19 notes, in 2005 and 2006 at a time when the applicable
- 20 rules were IPRU?
- 21 A. Yes.
- 22 Q. And therefore there needed to be, subject to some
- 23 detailed points we heard this morning, standard forms in
- 24 broad terms. But here because the partnerships were not
- 25 approved under rule 10.63.3 and because they were notes

1 not loans there had to be waiver applications from the
2 FSA.

3 A. Yes, the notes that were issued by PLC to the
4 partnerships.

5 Q. Yes.

6 A. Yes.

7 Q. Because there had to be waiver applications in respect
8 of them?

9 A. Yes.

10 Q. And in the waiver applications -- we don't have to go to
11 them, you will probably no doubt remember -- what tended
12 to happen is you would include an annotated version of
13 the standard form and say it has only changed to this
14 extent?

15 A. Yes.

16 Q. So what you had then was a process by which you were
17 required to stick as closely as possible to the standard
18 form in the expectation that if you did, you would get
19 the approval, the waiver and therefore the approval?

20 A. Yes.

21 Q. At the end of 2006 the rules were changed to GENPRU,
22 which did away with the standard forms but maintained
23 the obligation to ensure subordination.

24 A. Yes.

25 Q. If you still have bundle C, can you go to tab 19.

1 At tab 19 if you go to page 245, this is
2 a transcript of an interview of Ms Hutcherson, who gave
3 evidence earlier today -- you may have been here,
4 I don't know.

5 She is talking, and she talked about it this
6 morning, about the movement from IPRU to GENPRU. And as
7 you see there she said: All the industry were appalled
8 by this because it was very easy to stick to the forms,
9 you knew where you were, and in fact, she says over the
10 page: A lot of the industry just carried on using the
11 old agreements because everyone knew that they
12 qualified. Was that your experience as well?

13 A. My experience was that there were very few companies
14 with a trading book sufficiently large to need to access
15 supplementary capital in the capital markets. So, you
16 know, for smaller stockbrokers, investment managers, the
17 loan thing worked exactly as Ms Hutcherson said; that
18 makes complete sense. So one thinks of larger entities,
19 Casanov, Collins Stewart, Mann Group, these sorts of
20 people -- Lehman, a good example -- who had a capital
21 need that was larger than that. So it doesn't surprise
22 me that the smaller firms and those that were sticking
23 with IPRU, et cetera, would keep going with this.

24 Q. So for the larger firms, you could be bespoke at that
25 stage?

1 A. The larger firms will be the ones that will be going to
2 the capital markets to raise this sort of supplementary
3 capital much as more capital-intensive regulatory
4 entities, particularly banks, would do that.

5 Q. Okay. Thank you. Can you go back to your statement,
6 please, tab 1. I want to you ask you a few questions
7 about the circumstance in which the LBHI2 eurobond came
8 to be drafted. It starts at paragraph 34 of your
9 statement.

10 You were first instructed by e-mail. Can you go to
11 bundle F4, please, 1895. You were instructed by
12 Ms McMorrow, on 30 March, intercompany listed notes to.
13 Jackie has summarised it below.

14 You see the summary from Ms Dolby below which
15 explains, about six lines from the bottom:

16 "The holder will be SLP3. Therefore bond needs to
17 be transferable."

18 Going back to your instructions:

19 "The issue will be listed at Channel Islands,
20 I assume physical form as well. I am assuming by
21 "transferable" Jackie just means it can be transferred
22 between the Lehman entities. It should be possible that
23 a physical registered note to cross between the UK Re
24 issues and the Holdings Plc issues?"

25 And then asks you to get on with the offering

1 circular, if you could. Just to explain here. Is this
2 right, that you could have a note issuance, or something
3 no doubt at least, but two main forms anyway; a bearer
4 form under a single global note put in a depository, in
5 the clearing system, or definitive registered notes.
6 Those are two different ways of creating these
7 instruments, yes?

8 A. And also global registered as well.

9 Q. I knew it would get more complicated than that. But you
10 could have global unregistered and global registered?

11 A. I would say in the clearing system or not in the
12 clearing system.

13 Q. Right. And you say, in paragraph 37, that these were
14 going to be definitive registered to keep things simple
15 rather than held in the clearing system; that is at the
16 bottom of 37. And, is this right, what you mean by that
17 is given your instructions to make them easily
18 transferable between those entities?

19 A. I think the real point is we look back to the PLC notes;
20 those were modelled very closely on the Collins Stewart
21 Tullett transaction, which was a genuine public market
22 transaction, which went into the clearing system.
23 I understand that the investor has to pay custody fees
24 to the clearing system. So in order to save that
25 expense, having it in definitive registered form was

1 fine, and I think Jackie asked for -- she asked if we
2 could have a pack of certificates so they could transfer
3 them up this chain.

4 Q. So it is easy to effect the transfer if you have got the
5 definitive notes, you just -- theoretically you pass
6 them over from one hand to the other, I suppose?

7 A. Yes. They will keep them somewhere safe in the company,
8 secretarial department or something.

9 Q. Yes. So the PLC notes as you mentioned were in bearer
10 form with a global note in the clearing system?

11 A. Yes.

12 Q. And you were going to change that to make them physical
13 notes. What were the UK Re issues that are referred to?

14 A. UK Re was another intragroup transaction. We have:
15 intragroup listed note to do, and that was one where we
16 moved to definitive registered form.

17 Q. They were definitive?

18 A. Correct.

19 Q. So what you were being told I think, is this right, in
20 the instruction is: well, it is a combination of the PLC
21 and the UK Re, the combination being the PLC has all I
22 suppose the subordinated stuff and the UK Re has the
23 definitive bit, would that be fair?

24 A. That is what -- yes. So I think the bit -- she asks if
25 I have questions. There was questions around the

1 subordination and how that -- how that worked for
2 regulatory purposes because the bit that was changing
3 which I think they, as mentioned by Ms Dolby at the
4 bottom, lower tier 2 we need a reg opinion and then she
5 subsequently confirms it is GENPRU because Lehman had
6 moved that year from the old INPRU to the GENPRU, which
7 made it look more like a bank model.

8 Q. If you go to paragraph 43 of your statement, you refer
9 to an exchange you had, the earlier exchange in fact you
10 had with Mr Barnett and your reference to the PLC
11 sub-notes. Can I ask you to turn that up F9. Put away
12 F4. F9/5246.

13 A. Sorry, I didn't catch the page.

14 Q. F9/5246.

15 A. Yes.

16 Q. This is again just to put this in context. If you go on
17 to -- if you go to 5248, Mr Barnett, acting on behalf of
18 the LBHI2 administrators, is asking initially
19 Mr Fletcher essentially what he remembers about the
20 notes; and in any event, you take it over, which is the
21 e-mail at 5246 and explain, 22 November 2016, you
22 checked the file, it is pretty straightforward and you
23 then answer the questions that you -- he put.

24 The one I want to ask you about by reference to your
25 witness statement, if you go to the bottom of 5246, you

1 say:

2 "We modelled the terms on a previous deal for
3 Lehman Holdings plc, see attached a comparison ..."

4 And then something about anachronistic regulatory
5 capital rules.

6 Unfortunately the attachment isn't in this file.
7 Actually, no, it is in this file, I am glad to say.
8 5250 is the attachment which you sent then.

9 A. Yes.

10 Q. And which you explain in paragraph 43 of your witness
11 statement, where you refer to this, as you say, the base
12 document was the PLC sub-notes issued to LP1, and you
13 made certain adjustments to it.

14 A. Yes.

15 Q. So long way round to some extent of trying to get to
16 what 5250 is. One can see that the underlying, if you
17 like, before the -- before the document is amended
18 represents one of the initial PLC notes on which there
19 are a number of changes marked in track?

20 A. Yes.

21 Q. And looking at the top of that page, where it says draft
22 10 April 2007, is it correct that this is therefore
23 a contemporaneous document?

24 A. I believe so.

25 Q. So going about the exercise of instruction that we have

1 looked at, or someone dug out the PLC draft, and then
2 amended it for the new purpose. And one can see at the
3 beginning, for example, the company name is changed?

4 A. Yes.

5 Q. The amount is changed?

6 A. I agree that this is the way it looks like we put the
7 thing together, yes.

8 Q. And you don't have to go to the detail, but on this
9 first page, this is how the global registered -- global
10 note is all crossed out, and it is replaced with
11 references to definitive. So it is being updated but it
12 is being amended so as to --

13 A. Those passages there at the bottom on the definitive --
14 will have come from the LB Re -- the transaction that
15 Sarah mentioned.

16 Q. I see. I see. So a number of the changes are obvious.
17 One can see why they were put in there. If you go to
18 5258, there is a clause in the PLC note, clause 4, about
19 FSA consent being required for things. So you can cross
20 that out. So we can see the evolution of the document,
21 if you like. But what we also see in this document, if
22 you go to 5257 are that there are very substantial
23 changes to the provisions of the PLC notes dealing with
24 status and subordination. Essentially, you crossed out
25 everything that was in the PLC paragraph and replaced it

1 with a new set of paragraphs so as to reflect -- well,
2 a set of terms which are not the same, certainly in
3 terms of words, as the PLC one.

4 So my question is, if you can remember -- first of
5 all, the question is where did this drafting come from?

6 A. My Lord, I don't know. We have hunted for it. There
7 are several contemporaneous transactions which use this
8 formula for a date at lower tier 2, but we haven't been
9 able to pinpoint the provenance of this provision.

10 Q. Well, can I ask that, when you say there are several,
11 when you say several contemporaneous --

12 A. Roughly --

13 Q. -- are you saying there are several contemporaneous
14 versions which use exactly the same words?

15 A. There are some that do, yes.

16 Q. There are some other versions that use exactly the same
17 words as these?

18 A. Yes.

19 MR JUSTICE SMITH: But you don't have the origin of those
20 contemporaneous documents.

21 A. My Lord, I cannot tell you which one.

22 MR BELTRAMI: Well, there it is.

23 MR JUSTICE SMITH: So what you are saying, Mr Miller, is
24 that you have various documents containing identical
25 wording; you are -- and I think you are speculating, but

1 you assume that one of those was the lead draft and the
2 others were copied?

3 A. That is a fair summary. I am trying to --

4 MR JUSTICE SMITH: I entirely appreciate the difficulties.

5 A. -- be truthful with the court.

6 There is a reference in Ms McMorrow or Ms Dolby's
7 initial instructions that if there are any questions
8 about subordination, speak to Mr Gofur(?); because they
9 were conscious we were moving from -- we are moving
10 certainly from IPRU-INV to GENPRU, and the challenge of
11 IPRU-INV is although it allowed layers, it really
12 allowed only one layer to work. And even, question mark
13 even allowed one agreement to work, because we get into
14 this kind of ping-pong business with if you have several
15 identical loans.

16 So when you were moving to an environment where it
17 is going to be GENPRU, and although it is to be lower
18 tier 2, one would also allow, you know, a situation
19 where one could have upper tier 2, but the nomenclature
20 and the way in which one does the layering, sort of the
21 set-up may come to the same thing, but the way in which
22 one deals with it has changed.

23 So what I cannot tell the court is that I recall
24 having the conversation in the period during that week,
25 when we were away with Mr Gofur, or anyone really spoke

1 to him all the time on these topics. I just don't
2 remember the specifics why we ended up with this formula
3 as opposed to another.

4 MR JUSTICE SMITH: Indeed, and to be clear, you have tried
5 to find a paper trail, but that too has proved
6 fruitless.

7 A. I have ransacked the file.

8 MR BELTRAMI: I am grateful for that, but can I just
9 clarify -- sorry, if your Lordship ...

10 MR JUSTICE SMITH: Yes.

11 MR BELTRAMI: Just to clarify one thing, I think you said
12 there were other drafts with this identical wording in
13 it.

14 A. Not drafts.

15 Q. There were other versions, other?

16 A. Other companies had used this type of formula.

17 Q. Hang on, other companies used this type of formula?

18 A. This formula.

19 Q. Are you saying that there are other companies that have
20 used this exact formula, because I can tell you now,
21 there is not a single document in all these files that
22 has used this exact formula. So if there is a document
23 out there with the exact formula, do you know where it
24 is?

25 A. I could find that, but as I say, I don't know if that

1 was what I was looking at at the time, or for something
2 that Mr Gofur gave us or ...

3 Q. Well. At least we can confirm you didn't use FSA10 or
4 FSA5?

5 A. I am pretty sure I did not look specifically at the
6 forms.

7 MR BELTRAMI: My Lord, that may be a point to stop, I think,
8 at the moment. I am slightly troubled about this
9 because we have not had the same document. Apparently
10 it is quite an important point. There are other drafts
11 in the same -- supposed to be similar.

12 MR JUSTICE SMITH: Mr Beltrami, I agree now is a good time
13 to rise. But do you want Mr Miller to seek to produce
14 these other versions, will it assist you, or do you want
15 to let matters rest?

16 MR BELTRAMI: I think I will let matters rest, frankly,
17 because we have what we have on that. So be it.

18 MR JUSTICE SMITH: I am in your hands.

19 MR BELTRAMI: My Lord, I think I can live with that.

20 MR JUSTICE SMITH: You are happy to let things stand,
21 because I would be happy if it assisted you to give
22 Mr Phillips' team permission to assist Mr Miller to
23 locate these things.

24 MR BELTRAMI: My Lord, I don't think that the case is going
25 to turn on that.

1 MR JUSTICE SMITH: I don't know how far it will help.

2 MR BELTRAMI: The trouble is, of course, saying it is like
3 another document, and they raise the question: what does
4 the other document mean? You end up going -- so I don't
5 think it is going to help, it's just a slight curiosity,
6 but there are many curiosities.

7 MR JUSTICE SMITH: If it is at the level of a slight
8 curiosity, we will leave it unsatisfied, but if it was
9 more, then I would have been willing to assist you.

10 Can I express my gratitude for the flow Word
11 document and make another request for as it were the --
12 an organogram of the companies that are in play here.
13 I am not sure how far it assists in terms of a legal
14 analysis, but it certainly will assist me in terms of
15 describing the factual background. I anticipate it will
16 have changed over time. So if there are documents which
17 simply describe it over time, the relationship between
18 the various protagonists here, that would assist.

19 MR BELTRAMI: My Lord, can we just have two minutes on the
20 housekeeping matter we discussed yesterday.

21 MR JUSTICE SMITH: Yes.

22 MR BELTRAMI: Going forward next week, I don't want to speak
23 out of turn, and if I do speak out of turn, no doubt
24 I will be shot down. I think, on this side of the
25 bench, as it were, there is a preference, and indeed

1 I think a fairly strong preference, but we are in
2 your Lordship's hands, to manage the -- these are always
3 a problem in a trial when you get to the end, to manage
4 that problem, if your Lordship is happy to do it this
5 way, on the basis that we clearly have oral submissions;
6 each party can produce, if it wants to, a document,
7 whether you call it a speaking note or whatever at that
8 time. Your Lordship won't be expected to have read it
9 beforehand. It may be gone through orally if that is
10 what somebody wants. It may just be put to
11 your Lordship, so if you find it helpful later worth
12 looking at, but that will be done at the time, as it
13 were, rather than hung over until two or three weeks
14 later, which, for various reasons, nobody here is all
15 that keen to agree to.

16 But if your Lordship wants something different, then
17 of course we must discuss it. But having discussed it
18 with all my learned friends, I think that is how we
19 think it would be -- well, most convenient for us.

20 MR JUSTICE SMITH: Well, it seems to me that we will proceed
21 on that basis. So I am happy to receive what you
22 produce over the weekend and Monday, and I will read, or
23 read along as you read out, depending on how you do it.

24 MR BELTRAMI: Yes.

25 MR JUSTICE SMITH: And I will park the question of after the

1 event notes --

2 MR BELTRAMI: My Lord, yes.

3 MR JUSTICE SMITH: -- taking your indication clearly in
4 mind. So you can consider the proposal dead, unless
5 I think there is a strong reason for the court to be
6 benefitted by that sort of thing, but it seems to me
7 there comes to a point where there is just too much
8 paper.

9 MR BELTRAMI: I think that is what we all would --

10 MR JUSTICE SMITH: Indeed. Mr Phillips.

11 MR PHILLIPS: Yes, my Lord. In relation to that matter, we
12 were all very conscious of the fact that we have so far
13 produced a great deal of paper. Whilst there are going
14 to be further and developed points, bombarding
15 your Lordship with hundreds of pages of submissions is
16 probably going to be counterproductive. So that is all
17 agreed.

18 MR JUSTICE SMITH: If I can give an indication, it seems to
19 me that the battle lines have been very clearly drawn on
20 points, on the pure legal matters, very clearly
21 articulated. And it is really honing down on the
22 essential differences rather than, as it were, the
23 nuances that really will assist me. That -- again,
24 I will -- you invited me yesterday to consider whether
25 there were any particular points that I would be

1 particularly assisted on. There may be one, but I will
2 define it in due course in the course of this week.

3 MR PHILLIPS: That will be very helpful, my Lord, but of
4 course it is a matter for your Lordship. My Lord, the
5 only other thing I just wanted to touch on is the
6 timetable. It will not be lost on your Lordship that we
7 have been making extremely good progress.

8 MR JUSTICE SMITH: Yes.

9 MR PHILLIPS: I say that because on the timetable that I am
10 looking at, Mr Grant was to continue giving his evidence
11 for an hour and 15 minutes tomorrow morning, and
12 Mr Miller was then to give his evidence. We are of
13 course in Mr Miller's evidence. I do not know, and I am
14 not asking for a firm estimate, but I don't know how
15 much longer my learned friend intends to be with
16 Mr Miller, but we will then be moving on to Mr O'Grady.

17 Your Lordship has heard exchanges in relation to
18 Mr O'Grady, and the position is that it is likely, and
19 I don't put it any higher, because I don't want to say
20 something too tendentious, it is likely that Mr O'Grady
21 will take less time than the one hour and 15 minutes.
22 We then have Mr O'Meara, who we do not then have. So
23 the position at the moment, looking at this --

24 MR JUSTICE SMITH: Over half a day ahead at least.

25 MR PHILLIPS: Precisely. So one of the reasons for raising

1 this was that we then move on to Ms Dolby, and it seems
2 to me to be highly likely that we will come to her
3 evidence around lunchtime tomorrow, if not shortly
4 before. That therefore means that there must be
5 a prospect of Mr Katz coming on tomorrow, and he is not
6 due to come on until Thursday. I don't know whether
7 that is possible or not, which is my main reason for
8 raising it.

9 MS TOLANEY: Mr Katz cannot attend before Thursday morning
10 when he was scheduled, my Lord, with apologies.

11 MR JUSTICE SMITH: I see.

12 MR PHILLIPS: My Lord, I don't think apologies are required.

13 MR JUSTICE SMITH: No.

14 MR PHILLIPS: So that is understood. I just thought I would
15 touch on that because ...

16 MR JUSTICE SMITH: It looks like you were raising the
17 concern that you might need longer with Ms Dolby, and
18 you will clearly have that.

19 MR PHILLIPS: I think that is not going to be an issue,
20 my Lord.

21 MR JUSTICE SMITH: Equally, there must be a good chance,
22 even if you are longer, of Ms Dolby not being required
23 on the Thursday. So chances are we will be straight
24 into Mr Katz on Thursday.

25 MR PHILLIPS: Yes.

1 MR JUSTICE SMITH: And we have the unallocated 45 minutes at
2 the end of the day anyway. So it seems to me that there
3 is enough room for those who require additional time to
4 have the benefit of it.

5 MR PHILLIPS: Yes, my Lord, it looks like that and I wanted
6 to raise the Mr Katz question, but that is perfectly
7 clear, and I am grateful to my learned friend for
8 clarifying that. My Lord, that was the only matter
9 I wished to raise.

10 MR JUSTICE SMITH: Thank you all very much. We will resume
11 then at 10.30 tomorrow morning.

12 (4.27 pm)

13 (The hearing was adjourned
14 until Wednesday, 13 November 2019 at 10.30 am)

15

16

17

18

19

20

21

22

23

24

25

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Submissions by MS TOLANEY1

(continued)

MS SOPHIE HUTCHERSON (affirmed)20

 Examination-in-chief by MR PHILLIPS20

 Cross-examination by MR BELTRAMI21

 Cross-examination by MS TOLANEY45

 Cross-examination by MS HILLIARD51

MR THOMAS GRANT (sworn)88

 Examination-in-chief by MR PHILLIPS88

 Cross-examination by MR BELTRAMI89

 Re-examination by MR PHILLIPS136

MR STEPHEN MILLER (sworn)139

 Examination-in-chief by MR PHILLIPS139

 Cross-examination by MR BELTRAMI140

1

2