Thursday, 21 November 2019

(10.00 am)

Closing submissions by MR BELTRAMI (continued)

MR JUSTICE MARCUS SMITH: Mr Beltrami, good morning.

MR BELTRAMI: Good morning, my Lord. Can I hand up our promised document.

MR JUSTICE MARCUS SMITH: Yes please.

(Handed).

MR BELTRAMI: Which is a record I hope of what I said yesterday and intend to say today and is intended also to be of assistance by recording the references and the various passages that we referred to. It is not verbatim but I hope the two coincide sufficiently closely to be of help to the court.

MS HILLIARD: Thank you very much, that's helpful.

MR BELTRAMI: My Lord, just to show where we are, if you go to page 36 that gets to the beginning of the 2008 amendments argument which is where we now are and whilst the document does run to 79 pages, which is in itself I accept a little bit daunting, the good news is we are almost exactly halfway through, so there will be no difficulty in finishing, as I see it, by lunchtime.

MR JUSTICE MARCUS SMITH: Thank you.

MR BELTRAMI: My Lord, so that takes us to issue 10 which is concerned with the ranking following the 2008 amendments

and specifically by reference to the different wording in clause 3(a) of the notes.

We submit that what was achieved by the amendments can be properly understood when the subordination mechanisms which we discussed yesterday are understood. This was a commonly used tool to rank debt at preference share level. It's not necessary to have Mr Grant's explanation for it. Relevant for rectification perhaps but that's what it is. But that explanation is consistent with what plainly happened, we say, objectively on its terms, which is to rank debt at that level.

Prior to the amendments, subordination was effected by the solvency condition. Post amendments and in an insolvency process, which is what we are concerned with, the amount payable is set at the preference share level, which we say must come below the debt level and in particular the level of the subdebts in terms of ranking and therefore the amounts payable at the preference share level come after amounts payable at the debt level. Your Lordship has that point.

It is very clear, we say, that as a general proposition at least -- and I use the term preference share level which I will come back to in a minute -- the preference share level falls below the debt level in the

waterfall and that as a general proposition appears to be common ground. Can I just show you my learned friend's opening submission bundle B/256. So it is page 86. 256, (iv). This is in connection with the ECAPS guarantees but the point for the present purposes, the way it was described by my learned friend, this is discussing the ranking of the ECAPS holders:

"... nonsensical for the ECAPS holders' rights ...(Reading to the words)... with the non-cumulative preference shares."

So that's a recognition -- and I use the word "levels" that when you are at the preference share level you are, to quote, "so deeply subordinated in the insolvency". So it appears to be common ground in any event from that that the share level will, other things being equal, fall below the debt level.

That has always been the way in which the administrations have been operated.

If you go please to bundle F10 -- you can put away bundle B -- 5462. This is one of the LBIE progress reports as regards the distribution of that estate and you will see in 5462 under the heading of "Summary" the way in which the payments out from the estate are being made consistently with the waterfall description we know from the cases, starting with interest, going down the

waterfall, non-proveable claims number 2; 3,~subordinated debt, post administration interest; 4, preferred equity and equity. So there is no doubt that in terms of the overall distribution, other things being equal, the preferred equity and the equity comes at the bottom of the chain below subordinated debt.

My learned friend's case is in effect we submit to ignore the preference share wording from the amendments in order to reach the conclusion that the notes should be ranked at a debt level equivalent to the other subordinated debts and we submit that is simply an impossible approach as a matter of construction.

A number of points are taken which I shall now I hope run through. Some of them, indeed I think most of them, we would characterise as straw men because really there is no sensible argument on this point, but I will deal with them anyway as far as I followed them.

The first point -- in no particular order -- it was said many times in closing by my learned friend and has been said before that the wording does not turn the debt into preference shares and that this is what he called the hypothetical construct. To be clear, if it were not otherwise, we do not say that it turns the debt into preference shares so that which he says it doesn't is something with which we agree. We say it is a deeming

provision which seems, as far as I can make out, the same as what my learned friend calls a hypothetical provision; it deems the level at preference share level. And we say it is an unremarkable drafting technique which produces that outcome. And that is an outcome also which is contemplated expressly in the notional holder concept, as your Lordship may recollect.

If you go back to bundle E tab 5, page 73. And there is of course a lot of talk about the notional holder concept and I will come on to that in a minute. But what is envisaged expressly on the face of clause 3(a) -- I know the category didn't exist in fact but what is envisaged is the principle, is that there is such a thing as a notional holder which is a creditor but whose rights are themselves ranked at preference share level. Because the notional holder under the definition is:

"Any creditor of the issuer whose claims are quantified as though they held a notional share."

And a notional share is:

"Any notional unissued shares which have a preferential right to the winding up over other classes of shares."

So, leaving aside what it says about the notes, expressly within clause 3(a) there is an acceptance of

a drafting technique which relegates a creditor who is called a notional holder to preference share level, because that's what that envisages. That is the concept buried within that definition, ie a movement from debt to preference share level for the purposes of ranking.

So it is not just in relation to the notes that there is this deeming provision, the notes assume or at least provide for a similar deeming provision in respect of a notional holder. So it's the same drafting technique for both.

That's the first what we say is a straw man. The second straw man is -- and to be clear my learned friend said several times the notes are not at the same level as preference shares and again if they were unclear, we do not say they are the same level as ordinary preference shares. Clearly it is above the level of ordinary preference shares because that's what the amendments say, but just as you can have layers at debt level, no doubt about that, you can have -- it's not a single slab of debt, you can have layers at preference share level and that again is the very thing that's contemplated for notional holders. On the face of the notional holders definition there are already two layers at preference share level. There's an ordinary preference share and there's a notional holder who is

put in at the preference share level above the ordinary preference share level. So on the face of it it contemplates two layers, we say the amendments create three layers; all at preference share level, at different preference share level, but fundamentally at that level. It is just a subdivision within the same level in the same way as you can have it as debt.

So again my learned friend is right to say the notes are not at the same level of preference shares if he means at the same precise level of ordinary preference shares, but that does not answer the point we make which is that they are within the preference share level.

The third point -- and this was repeated a number of times -- is that it is what was called a payability term and that's because within the second paragraph the technique describes the amount as would have been payable and I think that the use of that word is being adopted to make it seem as if it is not a term about ranking and that there's some distinction between payability -- I think this is where the argument goes -- and ranking.

Your Lordship will note in 3(a) that payability technique is exactly the same technique that was used in the original form of notes, amount to be payable on a winding up, and we say that the use of the word

"payable", or "payability" does not detract from the obvious conclusion that this is a ranking amendment, or a ranking term. The significance of "payability" is that it defines what can be paid to the creditor concerned in the same way as the original condition said that you cannot be paid until the solvency condition is being met, therefore you are paid after other creditors who are not subject to that condition. By saying "payable" at the preference share -- in a hypothetical preference share level, you are saying you will not be paid until people within that level are entitled to be paid. That is we say the only possible meaning of the words.

This is undoubtedly a -- not a ranking term but it is a term which is addressed to ranking. If you go to paragraph 2, after the "payability" words:

"One of the class of preference shares ...(Reading to the words)... in the winding up of the issuer over ..."

On the express wording of the clause it is concerned with ranking. The word "over" can only mean within the waterfall above. Therefore the fact that the word "payability" or "payable" is used does not detract from the obvious interpretation of this as a clause which addresses ranking. There is no other way of looking at

a clause which expressly says these are rights over rights of other parties.

And this technique is something which is in fact relied upon by SLP3 in support of their analysis. If you go please to bundle I, Day 6, page 111, line 14:

"When one considers the mechanism, it becomes clear as a matter of ordinary language that the amended LBHI2 subnotes ranked below the same senior creditors. They ranked above another class of creditors, the so-called notional holders, and they were not intended to rank pari passu with the actual preference shares ..."

Well, that's the preference share point. But as part of his analysis he acknowledges that the effect of this clause was at the very least to rank the noteholders above the notional holders. It's obviously right. But given his acceptance that that is the effect of the clause it becomes meaningless to say it wasn't a ranking clause because it has to be a ranking clause if it does at least that. So the fact that it is through a "payability" word doesn't change the content of the clause, which is to effect ranking.

That is why we say there is a parallel to the extent your Lordship thinks it relevant with the ECAPS guarantees. Yes, there were more words in the ECAPS guarantees to describe the circumstances and I think the

level was actually at ordinary preference shares, but the technique was exactly the same. It was the same technique to rank at preference share level. So the "payability" term point we say doesn't affect the content of the clause.

Fourth, it is said that the notional holders are themselves creditors, your Lordship will recollect. They are holders of debt and in the definition that's clearly right. But it was then said that because preference share holders can never be above debt therefore these can't be preference shares, I think that was the way it was put.

Two answers to that. First we don't say they are preference shares. But second -- all this is a bit of a nonsense -- the fact that the notional holders are debt is irrelevant to the analysis because what is expressly posited in the clause is that that debt is itself ranked at a preference share level. So on the face of the clause the notional holders have been or will be pushed down to preference share level. There's nothing to stop an agreement to that effect, no one suggests that is illegal or wouldn't be given effect to.

So whilst they started off as debt -- indeed they still are debt -- in terms of ranking they are expressly pushed down to preference share level. So to turn

around and say "Well, ah-ha, they are debt therefore these things can't be preference shares because they are above them" is kind of irrelevant, because while we are debt they are at a different level expressly in terms of the clause.

So that argument is true in terms of the fact that they are debt but uninteresting in terms of the analysis because they are ranked at a different level.

So the notional holders point I think, the first of two points, doesn't really count.

The second point, I think which is my fifth response to my learned friend and still by reference to notional holders, it was said -- and this may be the same point but I think it is slightly different -- that notional holders are creditors -- true so far -- and noteholders are above notional holders -- true so far -- therefore it is said noteholders must be pari passu with other subordinated debt and that's the jump which we say can't possible follow.

As submitted, the fact that the notional holders are debt is uninteresting because they are pushed to a different level. But whatever the position of the notional holders, there is no explanation for the conclusion which is reached that just because the noteholders are above notional holders, therefore they

are pari passu with subordinated debt. It's not what the agreement says, it says nothing of that sort. It is inconsistent with the concept of ranking at preference share level and what it means in fact is that there's a layer of preference share level.

Can I show you -- if you go to my document at paragraph 83 what we have set out there is what we understand the waterfall would look like when properly analysed by reference to these provisions. And I don't think there is anything especially sophisticated here, but you start off with the unsubordinated creditors, you then start off with the subordinated creditors for these purposes the subdebt, the only ones we know exist, and you then have various preference share levels: you have the LBHI2 subnotes, the notional holders and ordinary preference shares and you then have ordinary shares.

So looking at that diagram, the subnotes are above the notional holders puts them at the top layer the preference shares, it does not bounce them into the debt level and there's no explanation as to why that should be so.

If you go back to the transcripts, Day 6, page 121, line 13 I think it starts, this is my learned friend:

"Whatever the mechanism is doing, it is not putting these notes in at what one might describe as

a preference share level."

Just stopping at that point; why on earth not? Next sentence:

"As we have described, or as your Lordship knows, they are clearly at a creditor level."

Well, I mean I think we know some of the arguments that get to that conclusion but one can see immediately there that the inconsistency with what is being suggested with the actual terms of the agreement. The actual terms of the agreement do put this at a preference share level and don't put it at a creditor level; it's just the wrong way round.

In fact I'm reminded if you go back to bundle E5, page 73, the other thing that the amendment the contemplates in express terms is that very point about different layering of preference shares because second paragraph, the three lines on the bottom:

"The hypothetical or the deeming provision ...(Reading to the words)... return over different classes."

As it turned out. So the agreement itself contemplates classes of preference shares, which is consistent, we say, with the layering analysis.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: Now, I had a discussion with your Lordship in

opening about whether the positioning of the noteholders above the notional holders was or should be viewed as them being pushed down or pushed up, because we had that discussion about the difference. Nothing has been said about that difference any more and I don't think it matters any more and I think at that stage -- I think I was tempted to think they were being pushed up above the notional holders and therefore the question of consent but it obviously doesn't arise.

Having thought it through again we think -- if it matters, which it doesn't -- that the probability is they are actually being pushed down because at all that's happened is that the notional holders have already been pushed down, so they have been pushed down to preference share level and what's happening is this is debt which is being pushed down but not as far as the notional holders. So it's not being pushed up at all because it is debt to start with. It is being pushed down but not being pushed down as much. So interesting no doubt to get into that if it mattered, but I think just to correct our discussion earlier on, the proper analysis is they're not being pushed up at all they're just being pushed down a bit rather than a bit more for the notional holders.

MR JUSTICE MARCUS SMITH: Yes, I don't think the distinction

was intended to suggest that someone was being prioritised rather than subordinated, it was more trying to get some insight into the draftsman's thinking, in that what you can do is you can determine a layer by reference to something sitting below something else, or you can determine a layer by reference to something sitting above something that is lower down and that's I think what I meant by the sort of bottom-up or top-down reasoning. It was not to differentiate between the objective, the objective is always to push down, but to articulate the way in which the draftsman was thinking and it seemed to me -- whether it makes any difference I really don't know, but it seems to me that the draftsman here was looking at something at the bottom of the pile and using that established ranking to position this particular debt.

MR BELTRAMI: Well, yes. I mean I will come on to that bottom-up bit -- I'm going to come back to that bottom-up point I think because yes, that was in a sense something that was being used but it wasn't just putting it above that debt, he was putting it at preference share level above that debt.

MR JUSTICE MARCUS SMITH: Yes, I can --

MR BELTRAMI: He didn't say "By the way this debt is above notional holders" instead of the preference share level.

So I will come on to that, but the bottom-up point --

MR JUSTICE MARCUS SMITH: It may be that there is a further tool in the draftsman's tool box which is not to do it bottom-up or top-down but to analogise it to a particular strata of instrument that has a characteristic which places it at X position in the waterfall.

MR BELTRAMI: My Lord, yes, that's what we say.

MR JUSTICE MARCUS SMITH: So it may be a combination -- I suppose you could use a combination of all three, but it may be a combination of those two.

MR BELTRAMI: It is probably likely to be a combination of certainly those two because certainly we say the position within the strata is the right way of looking at it because the concept of the preference share has a floor, it is above ordinary shares, and a ceiling, it is below debt. So inherently within that it has floor and ceiling into it but nevertheless because the contemplation is different classes of preference share, he was positioning it within that class.

MR JUSTICE MARCUS SMITH: Yes, I see.

MR BELTRAMI: So just going back to where I was, that's the fifth point in relation to the notional holders.

Now, the sixth point from my learned friend I think is in broad terms -- and this mirrors to some extent

something said on the pre-amendment stuff -- is that the amendments can be ignored in terms of drafting or ranking because the definition of senior creditors stays the same and this goes back to the point they are the key provisions. But this in a sense -- I think we dealt with this yesterday and it is the same point as above, that the clause has to be read as a whole. The reference share ranking clause fills the space previously occupied by the solvency condition clause and it is unsurprising that the words "senior creditor" are unchanged. That doesn't mean that the composition of the class is unchanged because as I said yesterday, the words don't themselves define the class, the words simply take you to the definition of the class and therefore the fact that the words haven't changed doesn't get you very far because you then still have to do the work to see what the definition means and we say that the definition is the same definition but it may produce a different class. We say in fact of course it produces the same class, that's a different question, but it may produce a different class because now the right is as a preference shareholder equivalent as opposed to a debt equivalent.

So the fact that the words "by reference to senior creditors" remain unchanged does not answer the question

of who the senior creditors are.

Now, it may be in fact -- we don't know, I don't want to take this too far but it may be that even on the face of the documents the class has changed undoubtedly, but even on the face of the document the class may have changed in any event because of course this clause has this whole business about notional holders and there was nothing in the original drafting about notional holders.

What the ranking position would have been had there been a notional holder is not known, we have never looked into that, but on the face of it this clause introduces a new concept which is intended to affect ranking. Whether that does or doesn't, it doesn't really matter in a sense, but it illustrates why the fact that the words "senior creditor" have not changed does not mean that the composition of senior creditors have not changed, because even on the face of it something here is said about notional holders which wasn't said before.

I don't know how far that goes because I haven't considered whether that would or wouldn't have made a difference on the wording previously, but the point still remains the same for both of it, one has to do the exercise of working through the terms of this clause in order to define the category of senior creditors and it

means nothing to say the term "senior creditors" has not changed.

The seventh point from my learned friend is the similar point that we just discussed with your Lordship that this was a bottom-up exercise. Just a sort of starting point that even calling it a bottom-up exercise carries with it the acknowledgment that it is a ranking exercise. So he can't get out of that I'm afraid. But then it is just a characterisation of what sort of ranking exercise and we say that's just a sort of self-fulfilling conclusion because, as I said earlier, the preference share concept is a benchmark which carries a floor and a ceiling and therefore there are two things going on subject to your Lordship's question before which is putting it within the slab of preference share claims but also putting it above lower ranking preference share hypothetical claims and that is the drafting technique of using this ranking provision akin to preference share rights.

And if that weren't the case it would be hopeless as a subordination provision. If it were simply bottom-up it wouldn't give you a definition as to where the ranking actually sat because you wouldn't know what the ceiling was. It wouldn't actually define the ranking at all, it would simply define one piece of the ranking.

So whilst it might be a tool for a bottom-up exercise, it won't be a useful tool for a ranking exercise because it won't actually give you the answer of what the ranking was. The only way the preference share tool can work is if it is both floor and ceiling. It slots it into the appropriate place.

So bottom-up is just the subject of self-fulfilling conclusion which is inconsistent with what's being done.

The eighth point is the relevance on what was called the confirmatory note which is the bit in italics at the bottom of page 73 which your Lordship did discuss with Mr Phillips before.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: We submit it is very difficult to see how this could assist your Lordship's task. At best it seems a sort of descriptive term rather than an operative term and it doesn't, or it doesn't purport to qualify the operative terms. So one has the answer we submit before one gets to that and that can't change what the answer is.

It may be something equivalent to a recital, it is difficult really to know, but whatever it is, it is not a term which we say affects the interpretation which arises from the preference share right clause.

As to what it actually means or as to what was meant

by Mr Grant when he drafted it, we must say it is not entirely clear because the wording uses concepts which aren't then replicated in the operative parts so he talks about the rights of the holders of any securities. Now, quite what that means -- I mean there is -- I think Mr Phillips took you to something in one of the rule books about what that might mean or might not mean. It is not a concept used before, so it is a little bit peculiar. And he then talks about upper tier 2 capital or tier 1 capital which again isn't a concept used before. So it is quite difficult to match what's actually being said here with what his operative terms are and it looks to me there is a mismatch. So giving that any real credibility is quite hard when the terminology doesn't actually match what the operative terms say.

Now, what we it might have been intended to say -- and this is just, if you like, one of those doing the best we can positions, is that it may have been intended in Mr Grant's mind to confirm that these subnotes ranked above the notional holders. He sets out in terms that's what they are supposed to do and it may be that this -- it may have been boiler plate wording, it doesn't quite fit, but it may well be he was really saying: by the way, don't forget above notional holders. That would

possibly fit with the entire notional holders might be upper tier 2 capital.

That's the best we can make of what was being put down there, but if that's what it means, in a sense so what? The operative terms tell you that. So the recital tells you something the operative terms say, it doesn't take you any further. You still don't get over the point that it is at a preference share level.

So we say you can't -- really you can't get anything out of the confirmatory note. If you can get anything it simply confirms a part of the previous paragraph but doesn't tell you what it actually means.

MR JUSTICE MARCUS SMITH: I mean there are two questions regarding the confirmatory note. The easy one, if you like, is what does it mean and if, as you submit, it doesn't add anything to the text above it, then I don't have to worry about what I think is the slightly harder question of what exactly the point of this note is and one probably is better off testing its contractual significance by assuming it is an absolutely clear cut articulation of Mr Phillips' case and then asking oneself what difference does it make, if it were notionally so clear, to the wording and what I'm getting at is on that hypothesis can I permissibly use a confirmatory note, or whatever we call it, to adjust

what is let us assume the clear contrary wording in clause 3?

MR BELTRAMI: Well, yes. Well, we would say -- you are assuming in Mr Phillips' favour for the wording, in my favour for the otherwise interpretation of --

MR JUSTICE MARCUS SMITH: Exactly. So one has a clear cut tension and then one asks oneself what exactly does one do in those circumstances.

MR BELTRAMI: Yes. What I would say I think to that is first of all you can't because if the premise is the wording is clear as to what is actually the right answer then in the operative terms then it would be wrong essentially to conclude that's a mistake which I think we would have to get to because of something in a non-operative term. So as a matter of structure it's the wrong way round. It's giving pre-eminence to something that's of less significance.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: But in any event, even the content of this wouldn't take you there because on Mr Phillips' best case all it does is indicate -- if this is what it does indicate -- that these instruments rank above the notional holders. It does not indicate: and that's all this is ever going to do. It doesn't say there's no other changes intended to this document other than this

one change, it simply confirms part of clause 3. And we accept part of clause 3 does put these notes above the notional holders, but it does so through the preference share technique.

What this confirmatory note doesn't say is "and by the way even though we used the words 'preference rights' we actually mean debt" or something like that.

So as a matter of structure it wouldn't work, just it is the wrong way round, but as a matter of content it doesn't work because it is only giving you on its face at best half the story and there is no therefore inconsistency so as to justify a different interpretation.

The last point I think that's put against me is a suggestion that no one intended to change the ranking by these amendments. But that sort of point is where we would stray into inadmissible subjective intention evidence which wouldn't be relevant on construction even if it were correct.

But also -- and this will then become particularly relevant when we go into rectification. It also, we submit -- or putting it as was put several times, changing the ranks et cetera, is itself quite a conflation of concepts here.

Just viewing the matter objectively for the moment,

what we say is, number one, objectively this clause intends to address the ranking of this debt. So that's its object on the face of the documents: to address the ranking of debt. Objectively it does so in a different way to the way it was ranked before. Nothing about subjective intent; simply on the face of the document.

Now, if the objective answer is that that amounts to a change then objectively this document does signal a change of ranking. It doesn't matter what you intended subjectively. If that's the effect of the wording, that is the objective consequence. So talking about did you intend to change et cetera is we would say not really to the point when considering what this was doing. It is not surprising, if it did change the ranking, that it did in fact do so because it sets out an entirely different scheme. The old scheme was the solvency condition, the new scheme is by reference to preference shares.

So it certainly changes the scheme. Whether it changes the effect is a matter of fact in some sense but we would say objectively that's what is apparent on the face of this document: the addressing ranking, changing the scheme. And that's all that is actually relevant.

So that's all we wish to say about what this actually means because we do say the answer is genuinely

clear.

That takes us to topic 11 which I can hopefully deal with briefly, which is about the meaning of winding up or dissolution as applied in that clause.

Now, if you go to the transcripts, tab 7, page 30, from line 14 down and you probably remember this from yesterday. Mr Phillips -- he referred to his skeleton, he didn't make any further or any submissions on this point but did indicate that whatever conclusion you reach you should be careful not to extend it to a general administration as opposed to a distributing administration.

Now, having -- I thought but having read the transcript I don't think the point is abandoned but I think it is rather soft-pedalled. So I'm not going to spend a lot of time going through the ins and outs of that point. To be very clear, our case is confined -- or it only needs to be confined to the fact that this is a distributing administration and we say therefore the terms apply and I'm not asking the court to make any broader pronouncement about what might happen on a different sort of administration in a rescue scenario. That's not anything to do with my case.

MR JUSTICE MARCUS SMITH: Yes, I see.

MR BELTRAMI: So the only context is a distributing

administration. It is all in our written document and because of where we are I don't want to take a lot of time on it.

The only thing we do mention, just to have it there anyway, in our note are the three additional bits from the evidence about that, although I have to say probably all inadmissible in fact, but they are noted anyway, which is Mr Grant's evidence that clause 4(f), which is where the winding up wording actually first comes -- paragraph 90 of our note. So where the wording actually first comes from was intended to deal with the situation where, your Lordship remembers, arrears of interest could be accrued but wouldn't be lost if the principal became due and the principal might become due on redemption or winding up or whatever, so that purpose is exactly the same for distributing administration so that's not a problem.

The second piece of evidence, he transposed the wording from 8(b). We're not actually sure about that. The wording is not the same from 8(b) but there we are, it doesn't really matter, but it shows there was no conscious distinction between the concepts.

Third, your Lordship will recollect the evidence from Mr Miller about the regulatory opinion and therefore his understanding of the breadth of GENPRU

which feeds into a rather technical point about the narrowness of the term "winding up" in GENPRU which certainly was not his understanding.

As I say, I'm struggling to see how any of that would be admissible on that question, but there it is, it was traversed. But I don't think really -- I think your Lordship has enough difficult questions to consider, you don't have to worry about that one. But it is at all there in writing if your Lordship needs it.

MR JUSTICE MARCUS SMITH: Thank you.

MR BELTRAMI: So we can then move on to rectification, which is page 44 of our note.

Now, we say by way of introduction, my Lord -- because there are overlapping points, if you like -- we have an abundance, but there we are. It fails on three bases which we have tried to identify, or principal bases.

The first is that there is no or no sufficient evidence of the actual intentions or the mistake of the decision-makers. And in a sense before we get into anything else this is a road block which can't be circumvented. The actual decision-makers, we say -- and I will have to come on to this in a minute -- were the authorised decision-makers who were Mr Rush and Mr Jameson on behalf of LBHI2 and Mr Triolo and it seems

Ms Upton on behalf of SLP3.

Can I just show -- I'm not sure you have been taken to that -- F6/3325. These are the board minutes pursuant to which the amendment was approved on behalf of LBHI2 by Mr Rush and Mr Jameson. They are signed by Mr Rush as the chairman but the decision was taken, on the face of the document, by both of the directors.

Just to complete the set, your Lordship, 3327 is the resolution which is signed by Mr Rush and that is the one signed by Ms Upton on behalf of SLP3.

I'm jumping ahead of myself. If you go back to 3325, a point which I will advert to in a minute, in addition to approving the amendments through the board minutes your Lordship will also see, if you go to paragraph 4, that the authorisation to countersign as subject to amendments was given to the directors or to Ms McMorrow, the company secretary --

MR JUSTICE MARCUS SMITH: Where do I see that?

MR BELTRAMI: Sorry, it is 4(c).

The authorisation to sign subject to amendments to approve was to the directors or Ms McMorrow, company secretary, and equally at (e) those parties were authorised to countersign the documents.

And (f) to do anything necessary to approve and sign the materials.

So those are the board minutes. 3327, the written resolution, and I think there are various versions of this in the documents but the one I picked up was 3502. Which is the SLP3 side of the approvals which, as your Lordship will recollect, is signed by Mr Triolo. That's why we say the authorised decision-makers in fact were Mr Rush, Mr Jameson, Mr Triolo and it seems Ms Upton because she signed the resolution. None of them have given evidence and -- in a sense there are interesting points floating around in rectification but this is a sort of starting point. We say there is just no evidence therefore for the court and certainly no "convincing proof" that those authorised decision-makers made a mistake.

On the contrary -- and we go into a bit of this it -- doing the best one can and if it is appropriate to speculate, we would suggest the documents actually suggest an intention to implement the ranking at the preference share level, because that's what the documents say. But there's so much speculation as to what those parties did or didn't think or didn't know and didn't say to each other, there's just simply an evidential vacuum as to the critical persons on a rectification claim and we say there's no answer to that because of where we are.

So that's the first point.

The second point is that if, as is suggested, albeit we say wholly unsupported, the actual decision-makers weren't the authorised decision-makers, then the only alternative candidates, at least until yesterday, were Ms Dolby and Ms McMorrow and as I said in opening when I started, it has always been SLP3's case that it was both of them and there is no evidential reason -- nothing has changed in the evidence before the court as to why that analysis, if it were right, should have changed.

To confirm, if your Lordship goes back to bundle B, tab 5, paragraph 437, so this is the opening statement where they set out their case. 437:

"SLP3's intention was that of Ms Dolby and/or Ms McMorrow. They were the relevant decision-makers in reality and their knowledge is to be attributed."

Then equally 4838:

"LBHI2's intention ... Ms Dolby or Ms McMorrow ..."

For apparently the same reasons.

So that has always been the case, that it was both of them, or one or other of them I suppose -- well both of them, they were the decision-makers. And of course there's no evidence before the court, because she didn't give evidence, of the intentions of Ms McMorrow or any

mistake by Ms McMorrow. So certainly on the case that was being advanced on the documents that's another significant evidential gap before we even start.

As far as Ms Dolby's intentions are concerned we submit that the draft achieved at least three positive intentions which she had on the evidence; first of all to defer interest, secondly to preserve lower tier 2 status, and third to approve such drafting as Allen & Overy considered necessary and we say she made no mistake.

Now, there's a lot of discussion about a specific issue as to whether she knew or intended that ranking would be changed. It is unrealistic we say to -- even if you are looking at Ms Dolby to begin with -- to separate that out from her positive intentions, but even on that separate unrealistic question, the best she can show, the highest the case goes, is the absence of intention about subordination. And that we say would never be enough to support a rectification case even on the hypothesis that that were the right question.

MS HILLIARD: Yes. I think Mr Phillips' -- I'm sure you will be coming to this, but Mr Phillips' answer to that absence is to fill the gap by saying that this was an amendment and that there was a positive intention not to change the anterior version save in the specific regard

of interest.

MR BELTRAMI: Yes. No, I will come on to that point of course.

MR JUSTICE MARCUS SMITH: Indeed.

MR BELTRAMI: But to be clear, in preface to that point, as we understood the argument being put, it was that there's some special law in relation to an amendment case, which we say is simply wrong. The test will always be is there a positive intention which is a mistake. It may well be in some cases the absence of intention might be evidence towards that and we will look at some of that, but it is not the test and that's the distinction as we will submit.

Anyway, this is just by way of introduction.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: I said there were three points, I think there are four points.

The third point is that my learned friend's case is that everything after the first draft sent on 5 June should be crossed out. And that has always been, we submit, a wholly unrealistic case which highlights the inadequacy of the reasoning that takes them there.

When further amendments were made to the intermediate and then second draft, they were made deliberately after careful thought for specific

purposes, were clearly shown in tracked changes, were flagged for Lehman as going specifically to tax-sensitivity issues and were intended objectively we say to subordinate the debt to preference share level. They were agreed and implemented by Lehman on that basis. And none of that we say responds to a rectification case at all. In fact it is really an authorisation case.

So the breadth of the case illuminates the unreality of it.

The fourth introductory point is there was no outward manifestation of accord. We do submit that's a requirement on this contract and I will explain why. We accept it could be tacit. It could only here be tacit because there is no express statement but the circumstances are so far removed from are, for example, Four Seasons, where what was not said was commercially absurd, that there's no room for the tacit outward expression that we say on the evidence.

So those are the introductory points.

As far as what we say the change in case are concerned, the amendment rule I will come back to in a minute. But as far as -- go back to Ms McMorrow, her apparent excision from the analysis is not because of a change in the evidence but because of a recognition

that they don't have her either, so there's a problem, so it is better not to focus on her involvement. But it does create an obvious, we say, evidential hole.

If in fact the actual decision-makers weren't the authorised decision-makers then it would appear that Ms McMorrow was more of a decision-maker than Ms Dolby, at least as far as material, because she was the primary contact with Allen & Overy on the drafting and she was ultimately authorised in respect of their dealings with Allen & Overy.

We say that particularly as Ms Dolby wasn't concerned with the issue of subordination, as she accepts, and if you have to look beyond the actual decision-makers, it is quite difficult to look beyond Ms McMorrow. So it is not just something one can ignore.

The further point -- again we talked about this briefly yesterday -- is the scope of the remedy and I note the discussion we had about whether or not a smaller version of the amendment could be achieved and not compelling that, as you know, but just to confirm that whatever the other problems in this case, we will submit there is a real difficulty with the scope of the rectification sought, which does much more than just reinstate pari passu ranking because it removes the

entire new machinery around solvency and we would be resistant to any change at this stage, particularly when we know that the change is driven by tax concerns. That is what led to the removal of the solvency condition which they now want to change.

There is nothing to suggest on the evidence that Mr Dehal wasn't right about his concerns and there is nothing to suggest the solvency condition didn't need to be moved, so the endeavour to change everything now has always been we say -- an overused word but we say genuinely here misconceived because it doesn't respond to the mistake which even they say -- or their best case of mistake. And it isn't just a matter of remedy to be sorted out after the event because a rectification requires both the excision of the offending words and the replacement with alternative wording which reflects the true intention of the parties.

So the court can't take it in stages and say "There ought to be rectification and I will work out later what that should be", it is a composite exercise. And the only exercise that your Lordship is being asked to undertake is to cross out all of that and replace it with something -- replace it with nothing. And that's were we say if there were a change -- we have to look at it, but the case in its broad form simply doesn't

respond to the evidence at all.

It also goes, we say -- the way the case is put goes to the fundamentals of my learned friend's case theory, which we say has never really been based on mistake, because it is not focused on mistake or any particular mistake by reference to the remedy, it is really a case on authority. The case that's really being put carries the theory that Mr Grant had no authority to do anything other than draft for interest deferral and that is why -- or that's as far as we can see the only possible theoretical justification for saying why everything after the first draft should be excised, because the theory is: well, he was told to draft to defer interest, he did that in the first draft, therefore everything else is beyond what he was told to do.

Now, that's not made out in the evidence, as we will see, as we know, but it was never, we say, a valid basis for rectification because rectification doesn't respond to authority, it is a different legal concept. So if they were to change the scope of the rectification sought it would require a change in the scope of the case theory, which we would have to look at again.

So the point your Lordship raised with my learned friend is not just a theoretical point to be considered at the end it is a rather fundamental point as to what

is the basis on which he was being asked to act. But in any event, we are proceeding on the basis that the court is being asked to respond to the case which is the only case which has been put.

So that moves on to topic 12 which is the question whose intention is relevant for the purpose of the rectification claim and we submit, as your Lordship knows, the starting point in any properly run corporate organisation -- there is no suggestion this wasn't -- is that the authorised decision-makers will be the persons whose intentions will be attributed to the company.

Now, that's the starting point. It may be possible to displace that starting point and to attribute the intention of a negotiator either because that negotiator stands as the actual decision-maker, or through a legal process of adoption, but, as we always said, that appears to be the same concept, but only in narrow circumstances and especially where on the evidence the authorised decision-makers made no actual decision for themselves. And one can best see that distinction on the facts of Murray. So can I ask your Lordship to turn up authorities bundle 6, tab 142.

I think my learned friend explained very briefly the background and the background doesn't matter very much but just to explain the overall context, there was

an agreement called a framework agreement for a profit share of an interest in the Somerfield supermarket chain. It had been purchased by Isis, which was a Kaupthing vehicle, for £44 million, but it was perceived to be worth 88 million. One of those curious coincidences of numbers. So it was purchased for 44, perceived to be worth 88. Oscatello which was a vehicle for Mr Tchenguiz advanced £44 million to Isis and there was an agreement as to who was going to get the rest when it was sold.

On the terms of the agreement it seems to give all the benefits to Oscatello and the question was whether there should be a further payment of 44 million to Isis or whether in effect Oscatello should get the entire benefit of the 88 having paid 44. In short, there was an obvious mistake in the document because the 44 million was lost, and it was genuinely a position of commercial absurdity.

However, the court, Mr Justice Mann, concluded that as a matter of construction he couldn't get there because as a matter of construction the 44 million went to Oscatello even though it was absurd. But that raised the question of rectification and the judge noted as a starting point, to be fair about this, at 192, that there was no oral evidence from the participants. There

was a witness statement from Ms McHarrie who was I think a director of the corporate service provider who dealt with one of the parties which was heavily relied upon, which was a form of evidence:

No reason was given ...(Reading to the words)... without calling witnesses."

Well, there we are. So we can reverse that. And if you go to 201:

"... not helpful to the claimant's ...(Reading to the words)... but the witness statement was in evidence."

So that's the evidential background and there were lots of documents.

178, there were two negotiators who did the deal, Mr Brown on behalf of Oscatello and Mr Gunnarsson on behalf of Isis, who was on behalf of Kaupthing. They were the negotiators and the judge found as a common intention that they had a contrary common intention. So that was set-up for the sole question of attribution. So the persons dealing with -- so the transaction couldn't be sorted out through construction, but the negotiators themselves agreed at the time, or intended at the time that there should be a different answer.

So that went to the issue of attribution and my learned friend has taken to you 198 where

Mr Justice Mann summarised the law. If one now goes to the facts -- so there were two sides, there was Isis on behalf of Kaupthing and Oscatello on behalf of Mr Tchenguiz. If you go to 67 -- this is all of course in the context of the objective text. So the documents were formally signed by the corporate parties. So at 67:

"The directors of Isis ..."

That's the one side of the transaction:

" ... were provided by a Manx company ...(Reading to the words)... not seen the investment strategy."

Then a few lines down:

"It is apparent from what she says ...(Reading to the words)... providing some basic administration."

So that's, if you like, on that side and if you then go on to 202, this is the evidence on which the judge based his findings by reference to the witness statement, which is Ms McHarrie's witness statement. Certain points are made emerging:

"Simcox provide a corporate services to Isis ...(Reading to the words)... standard administration services."

We all know what those are.

205, having gone through -- or then interpreted that material, 205:

"All that evidence points to Mr Gunnarsson being the decision-maker ...(Reading to the words)... wished them to enter into it."

So that was the basis on which the court found that the actual decision-maker was Mr Gunnarsson, the negotiator, as opposed to the authorised decision-maker which was the corporate services company.

Now, on the other side of the transaction there was Oscatello and Oscatello was a company in a trust. The court then considered whether the same analysis worked for the trust and if you go to paragraph 213, Mr Strong -- sorry, before we go on to that, on the facts the judge found that the director of Oscatello had the relevant intention as well so it wasn't necessary to attribute, if you like, because she actually had it so this is in the alternative case, can it be attributed.

213:

"I do not consider Mr Strong ...(Reading to the words)... without inquiry or explanation."

215:

"The documents demonstrate that Ms Peck wanted to understand ...(Reading to the words)... come up with commercial arrangements."

We can interpolate Ms Dolby into so much of this:

"It is likely that Mr Tchenguiz himself ...(Reading

to the words)... even though it was always likely she would."

So one can see we submit the difference -- obviously it is a different set of facts and therefore we're not asking you to translate facts from one case to another case, but one can see where the lines should be drawn.

That's why we said in opening and repeat, this legal attribution, or this replacement of the authorised decision-maker has a very high threshold because the normal and we would say overwhelming majority of cases it will be the case that the authorised decision-maker is the actual decision-maker. However there is an exception and in that case the exception was when the authorised decision-maker was simply a corporate services vehicle and one knows that they have no actual role in it.

Nevertheless and perhaps more significantly, on the other side, even though there was a driving force in the transaction, even though it was likely that whatever was put before the trustee was agreed, that wasn't enough, because the trustee was significantly engaged to be both the authorised and the actual decision-maker.

So that's what your Lordship should be looking for when asking who is the actual decision-makers here: is this a case on the evidence where the court can conclude

it is an Isis situation, or the court can conclude it is an Oscatello situation, or the court can't make any conclusion at all because there isn't any evidence.

Now, just to be clear on one thing, this is the legal answer in that it is possible as a matter of law -- mixed law in fact obviously but as a matter of law to attribute the intentions of a negotiator to the company and these are the circumstances in which the court will do that.

It always remains a further question, at least in theory, assuming they don't get over that -- the party doesn't successfully go down to the negotiator and is stuck with the authorised decision-maker, the court still has to determine what the intentions of the authorised decision-maker were and that's a factual question and that's the question which now that we know it is a subjective test the court would expect to hear evidence on.

Now, it may be as a matter of evidence that a negotiator discusses things with the authorised decision-maker and to that extent passes on to the authorised decision-maker what the negotiator thinks or doesn't think about any particular point and that may be some evidence of what the authorised decision-maker thinks but it is a pretty low-level of evidence of that,

because the negotiator in that scenario is unable to give evidence before the court of what's actually in the authorised decision-maker's head. There could be all shorts of things in his head that haven't been discussed.

The limit that the negotiator can give by way of evidence is what he or she told the authorised decision-maker. I'm not saying it is of no evidential value but it is of very limited evidential value for the purposes of answering the question: did the authorised decision-maker make a mistake? That needs, we submit, direct evidence, or a good reason why there isn't direct evidence because otherwise the court is speculating.

My Lord, is that a convenient moment for the shorthand writers.

MR JUSTICE MARCUS SMITH: Yes. Thank you very much, Mr Beltrami. I will rise for five minutes.

(11.18 am)

(Short Break)

(11.28 am)

MR BELTRAMI: My Lord, the next topic is the question -- or we say the submission that the absence of intention is not enough. Now, preface this with the observations that we also say this is all a bit of a red herring, even though it might give rise to an interest legal

point, because of what we're going to say about authorised decision-makers and in any event we say there is more than enough evidence of positive intention to the extent required. And we say the instruments did what they were in fact intended to do and there wasn't a mistake. Nevertheless, the importance of it is this is as high, as we understand it, as the SLP3 case goes. It seeks to construct a case on rectification on the suggestion that Ms Dolby was the authorised decision-maker and she had no positive intention as regards ranking.

Now, the fact that she had no positive intention to change ranking or indeed about ranking generally may or may not be right; I mean one doesn't exactly know through the passage of time. But importantly we say no case was put to her that she had a positive intention not to change the ranking, as opposed to that she had no intention about ranking and we say this case generally doesn't arise but even on its own terms they have shot at the wrong target and therefore even at its highest the case fails.

Now, Mr Phillips said yesterday that the test was -- or I paraphrase -- the test was intention to do X and no more. We don't accept that that is a test for rectification. The cases don't say it is. We do accept

that such a conclusion on the facts may support a case of rectification, but that depends on what the case actually means. There is a difference between an intention to do X and not to do Y and an intention to do X with no intention Y. Both may be said loosely to fit under the general rubric: intention to do X and no more. But we say only an intention to do X and not to do Y would support a case in rectification subject of course to all the other issues about positive intentions.

Now, in my learned friend's written opening he suggested a general proposition that the absence of intention was sufficient for rectification. That was a passage I took your Lordship to by reference to Mr Justice Henry Carr's judgment in Four Seasons. As we understand it that case is not pursued anyway as a general proposition, but it is said there is a special rule, which we take to be a special legal rule, for amendment cases where we think the argument is it is not necessary to show that the offending text and amendment is contrary to a positive mutual understanding, but it is enough that there was an absence of understanding about it.

Now, we think that the case has moved, because the law is explicit -- I will show your Lordship some of the cases -- about the need for a positive contrary

intention. Rectification we say is clear that it responds to a clear inconsistency between the documented terms of the agreement and the parties' actual mutual intention. It doesn't remedy the agreement merely the recording of the agreement against those actual intentions.

What is fundamental however is that it responds to the positive intention not the absence of intention, otherwise that would undermine the sanctity of contract and create a whole new area for rectification where parties didn't address their minds to specific points and therefore the general proposition as put in opening is clearly wrong.

But the idea that there's some legal exception in the case of amendments, the way it was put, is without any foundation at all. No case articulates any exception in the case of amendments. If ever there were a case to say there is an exception in the case of amendments it would be Four Seasons, which was a case about amendments -- it wasn't a case about amendments to be fair, it was accession, but anyway it doesn't say -- it says in fact the contrary.

In any event it is generally heretical we would submit to have a special contractual rule in relation to amendments. As far as we are aware no other area of the

law has such a special rule for amendments and it is entirely impractical because of course amendments can take 100 different forms. Amendments can involve the replacement of a single word or the replacement of an entire contract. To characterise them as a class and to say there is a special legal rule is simply impossible.

Now, to be clear, there is a difference between the legal rule and what the evidence might show. We accept that in any rectification case the fact that the parties didn't discuss something may have an evidential significance. It may evidence the fact the point was just overlooked, or not thought about, or it may evidence the fact they had a subjective intention not to agree the term. So it has an evidential value and we can see that in the case of amendments, not as a rule of law but as a sort of practical reality of evidence, the fact that the parties didn't discuss a particular amendment might be evidence of a subjective intention not to make the amendment. So it has evidential value and one can see in an amendment context the evidential value may be stronger than an non-amendment context. I say no more than that just as a general proposition.

But the fact that it might have an evidential value doesn't mean that it becomes the test. The test has to be and must remain a contrary actual intention. How you

get there is a different question, but that is the set at which any rectification claim must be put. And the problem for my learned friend, amongst other things, is that there is simply no scope for that evidential value here. When Ms Dolby gave evidence, she was never even asked whether she had an actual intention not to make the amendments. She wasn't asked because the answer would have been obvious: "I didn't think about it". But where the witness gives evidence, isn't asked the question, we say it is an impossible position to say as a matter of evidence the court can infer from an absence that she had a presence. Had that case been advanced she should have been asked it.

Just to make good some of these points on the law, as you will recollect, at 413 of my learned friend's written opening it was alleged that Mr Justice Henry Carr concluded that the absence of a positive intention suffices for the necessary common intention and we said that isn't what he says, he didn't and in any event the relevant paragraph was in connection with the objective test, so it is difficult to see how it would count.

What was actually found in that case we submit was indeed that which needed to be found, namely a positive intention not to assume the additional liabilities. If

you go please to the Court of Appeal as summarised at bundle 7, tab 154, paragraph 177, this is where the Court of Appeal summarise the relevant factual finding below and put in these terms:

"The parent and Barclays each intended to execute a document which satisfied the parent's obligation to grant security and did no more than this."

And we say certainly in the context of the analysis which we are looking at at the moment, that is a recognition that the factual finding was intention to do X and not to do Y. So it was intended to execute the document and did no more than this. It is not in fact a finding about absence at all. And one can see that because of the way the Court of Appeal's judgment is constructed. If you go back please to paragraph 52, the whole thesis of the analysis is the subjective test requires a conflict between the written terms and what a party actually, ie positively, intends. So 52:

"There is no doubt that where in these and other cases ...(Reading to the words)... referring to what the parties actually intended."

A few lines down:

"The court was concerned ...(Reading to the words)... to the execution."

The conflict has to be in the mind, not out of the

mind.

Go on to 73 please. At the bottom of the page the reference to Mr Justice -- middle of that paragraph:

"At the same time the judgment in ...(Reading to the words)... effect to be."

There is then a reference in 74 to the case of Lloyd v Stanbury which I will show your Lordship in a minute, but important because it reflects we say what the Court of Appeal was clearly saying.

"An illustration of how a claim for rectification ...(Reading to the words)... from the land had been established."

Yes, that wasn't an amendment case, but the test and, the test that the Court of Appeal is proceeding on, is there must be a positive intention to either include or exclude as opposed to an absence of intention either way.

In fact can we now go to -- it is even clearer in Lloyd itself. It is bundle T1, tab 21. The facts of this case very briefly it was a sale of land by reference to ordnance survey plots and the contract included a plot which the vendor claimed he intended to retain and was put in there by mistake. Now, there was a claim for rectification. It was withdrawn but there was an issue as to whether it was a defence so the

rectification claim was still live, but if you go to 543, just before (f), Mr Justice Brightman:

"If the defence of rectification is to succeed ...(Reading to the words)... plot should be excluded."

So one can see there the difference which Mr Justice Brightman is drawing which is the difference I sought to draw five minutes ago as between an absence of intention and a positive intention to exclude in that case. And on the facts there, if your Lordship goes over the page, just from the top dealing with the purchaser:

"I think it was highly unlikely he was interested in the question ...(Reading to the words)... result of the proposed sale."

Just above that:

"I find as a fact there was no positive intention ...(Reading to the words)... to be excluded from the sale."

And then similarly with the vendor.

Then just below that at D:

"I find the evidence before the court falls short ...(Reading to the words)... 1428."

So in terms of the rectification claim in this case and as cited with approval in FSHC, what the court is looking for is a positive intention either way and translated into an amendment context is a positive

intention to include or exclude an amendment which is wrongly included or excluded.

Now, the other case if I can just briefly deal with that, still in that bundle, 37. This was a dispute between owners and charterers. There was a dispute about deductions and in addition there was another dispute -- you can see in the second paragraph -- about a $74,000 balance which was separate from the dispute about deductions. The parties settled the case. I can't remember which party but whichever party it was said "Well what about my $74,000?" and the first party said "That was always included in the contract" and the other party said "I didn't intend to include that in the contract". And that unsurprisingly failed.

Mr Justice Bingham, if you go to page 370 under the heading "Common mistake":

"The first task of a party trying to rectify an instrument ...(Reading to the words)... or, more probable, they did ..."

So that's an example we say similar to Lloyd. If it is not in the party's mind either way then you are not in the scope of a rectification claim. And these are we say -- we say Four Seasons, Lloyd and Halcoussi are general statements as to what the court is looking for for the purpose of a rectification claim and they are

clear, we say, that what is necessary is a positive intention which is inconsistent with the written document. Translated into an amendment context -- there's no difference in the law. The test is still the same. The court still has to be satisfied of a positive intention either that an amendment which is wanted is not included, or an amendment which wasn't wanted is included, but either way that is the requirement and that has to be the requirement otherwise rectification becomes a free-for-all.

As I say, in an amendment context the evidential balance may differ, but the test does not.

Can I also show you a case my learned friend took you to, Lansing Linde, which is bundle B2, tab 54. Now, this -- as I say, there is no difference in the law. As it happens this is a case on amendments but there's no difference in the approach. And the facts are a little bit complicated. I am not sure your Lordship was taken to all of them but I'm not sure your Lordship needs to know all of them. But as far as material, there was an existing pension scheme which gave rise to entitlements at the normal retirement date of 65 for men and 60 for women, but with a provision allowing those employees to retire up to ten years early with consent on an actuarially reduced basis.

There were two categories of pensioner. The current pensioners, who were current employees, and what were called deferred pensioners who had already left and had slightly different rights.

Now, there was a European Court decision called Barber which required equality in pension schemes. So they had to change the 65/60 rule to make that equal and they passed a resolution, if you go to paragraph 42, and the resolution they passed at 42, the relevant bit is 2(c):

"The equalisation of normal retirement age at 65 ...(Reading to the words)... no loss of accrued pension."

So whereas before it was 65/60 but you could retire with consent, what they agreed was 65 but you can retire five years early and there was no mention of consent. And that was the problem. And that created, as you can imagine, actuarial difficulties.

It was said and it may well have been true, that they never intended to do that. If you go to 63, five lines down:

"Lansing's case was that everyone involved ...(Reading to the words)... regarded as a hope."

Ie which required still consent.

Solicitors were instructed, at 75, I think

my learned friend took you to that, and they ended up producing a much larger set of amendments than merely reflected -- sorry, the amendments reflected the terms of that minute but they did a lot more. If you go to 76, the instructions were also to consolidate and update the documentation since 1983 and they ended up being a lot more extensive than would have been necessary just to deal with those amendments. And 101:

"Mr Allenby ... some fairly simple amendments ...(Reading to the words)... 160 pages."

So the actual amendments were considerably broader than the very narrow point about the change in the pension dates.

Now, it was of course claimed that there was no intention to remove the consent requirement. 126, you might see a description of the intention and no more point:

"The trustees intended result ...(Reading to the words)... change the position of the deferreds."

So the intention to change but no intention to change the position and certainly not for the deferreds -- the deferreds had never really come into any of the analysis at all.

135, there was no discussion about any of this, either in relation to the actives or the deferreds.

Moving on, the court then said "Well, I can't really tell about the actives but the best evidence is the minute". But the focus for this purpose is the deferreds. So if you go to 147 -- Mr Phillips took you to some of this. At the bottom of 147:

"I therefore find that Lansing and the trustees ...(Reading to the words)... change the position of the deferreds."

So there was no actual intention in that respect.

148, I think my learned friend took you to that and made reference to the fact the document went beyond the 160 pages. And then 149, four lines down:

"The evidence showed that when they executed the deed ...(Reading to the words)... trustees intended."

Now, this isn't a case, and to be absolutely clear about this we are not saying, we have never said, that Ms Dolby if she authorised this, authorised it blindly. That's never been our case. The fact that we refer to this case does not mean that we say the facts are exactly the same in our case.

So that's not a distinction. But what this case shows -- because in particular it is an amendment case as well so you are still asking the same question. There was no intention in respect of the deferreds. They never came into the arrangement at all but

nevertheless that wasn't enough and the reason it wasn't enough we submit is the reason consistent with the other cases: they were unable to show a positive intention either way. So it is consistent we say with our analysis, as would be expected, in the case of an amendment in a situation where there was plainly no intention to change the position for the deferreds, yet there was no rectification.

Now, the reason the evidence didn't work in that case was they didn't read anything and therefore the court got rather annoyed with them, but that goes back to the evidential question. Silence might be evidence, it might get you there, but it is an evidential question whether it does or it doesn't. In that case it didn't, for the reasons given by Mr Justice Rimer. In our case we say it doesn't as well. But what is critical at this point of the analysis is the test is the same.

Now, with that analysis can we also go back to FSHC, because insofar as it is said -- and I think it is said -- "Well we're the same as FSHC because they got rectification and we would like rectification too", the reality is that there were very significant factual differences in which the absence of a discussion did have evidential relevance and did enable the court to

come to the conclusion which I say it did come to of a positive decision not to include the amendments. So it is an indication of a case where it does work, that the evidential chain can stack up, but by way of illustration the facts were so different that we say the evidential chain does not stack up in our case.

Just to run through the numerous differences or relevant differences between that case and this.

First, that was a case where all the relevant individuals gave evidence. If you go to Mr Justice Henry Carr's judgment, which is at volume 6, 117 I think of the note. Mr Justice Henry Carr, 82 --

MR JUSTICE MARCUS SMITH: Which tab are we in?

MR BELTRAMI: Sorry, tab 137. So the evidence before Mr Justice Henry Carr which enabled him to come subjectively and objectively to the same answer was that he had those eight witnesses on behalf of the parent, starting with Mr Stokes who had signed the deeds, various representatives of the solicitor and various other parties involved who gave evidence, so eight of those plus, if you go to 133, evidence of two witness from Barclays.

Bundle 6, authorities 6, 137.

MR JUSTICE MARCUS SMITH: I'm there now. Yes, thank you.

MR BELTRAMI: Paragraph 82. You have the list of the eight

witnesses on behalf the parent who gave evidence and 133 are the two witnesses on behalf of Barclays who gave evidence and that enabled the judge as was referred to by Lord Justice Leggatt in the Court of Appeal, to have the matter -- I can't remember the exact words -- fully thrashed out or words to that effect. I think it is paragraph 38. Was fully thrashed out at trial.

Here, in contrast, we have none of the authorise the decision-makers. So the evidential platform is very different.

Second, the additional obligations in FSHC were a fundamental change to the existing arrangements. That is at paragraph 158 of Mr Justice Henry Carr, halfway through:

"The additional obligations resulted in a fundamental change to that structure."

And the change of course was to assume massive new liabilities which had never been contemplated before.

Here, in contrast, we're talking about the layering of subordinated debt, which was so irrelevant to these parties that it was never discussed by anybody. We know in the evidence that the prospect of the Lehman collapse was considered to be unthinkable and even then no one thought that the subdebt would ever come to be relevant in that unlikely event. We know it was irrelevant from

a tax point of view. It was irrelevant from a regulatory point of view. There had been other instances, as your Lordship may recollect, where what was subordinated debt was changed into preference shares with a consequential change of ranking that would have happened as a matter of course in the waterfall. Your Lordship will remember in November 2006 $2 billion of subordinated debt owed to LBIE was changed to preference shares and in May 2007 the remaining $5 billion of LBIE's subordinated debt was changed to preference shares.

There is no evidence in the files that anyone gave the matter a second thought, not even discussed. I mean plainly it did change the ranking because it is an actual preference share ranking not even a notional one, but no one discussed it, no one thought about it, no one told the regulator about it, it just happened because it was so irrelevant it wasn't worth thinking about. It may have assumed a significance now, but as regards the parties' intentions then, there's no significance.

So that's the second significant difference.

The third was that the mistaken transaction in Four Seasons was of a very different nature to what is said to be the mistaken transaction here. Your Lordship will recollect from the facts the parties were seeking

to fill a gap in security which had already been committed. They ended up assuming hugely more onerous obligations in circumstances where it would on the judge's findings have been commercially absurd to do so and where the parent would never have acceded to them had it known.

So if you go to 166, it is recorded:

"Had the parent or Allen & Overy known of the additional obligations it would never have executed the accession deeds."

And if you go to 172:

"It would have been commercially absurd for the parent in the absence of an agreed restructuring to do so."

So the mistaken transaction was very different and again no real contrast with this case because the layering didn't matter. So it is neither absurd or not absurd for this piece of irrelevant debt to be subordinated over another.

Equally, on that question we just looked at, 166, whether the parent would ever have acceded to the obligations had it known about it, the most that Ms Dolby was willing to say is that it is difficult to know what she would have done. She would likely have discussed it, that's what she says in her witness

statement, 68, and no doubt that's right. Her evidence on that is very different to the evidence in Four Seasons.

The fourth difference is that the possibility of using the Santander assets in Four Seasons had already been considered as a bargaining chip. If you still have paragraph 172 you can see at (i):

"At the time of the accession deeds ...(Reading to the words)... secured parties."

So there was at the time a consciousness that those further assets were part of an overall discussion as a bargaining chip and therefore that in itself is good evidence -- it is all an evidential point -- to explain why if you don't talk about them, there's a positive intention not to include them. When it is consciously aware of them as a bargaining chip and you don't mention them then evidentially that's quite persuasive evidence that you don't intend to include them.

But again in contrast to this case this was never on anyone's radar.

The final difference is that there was in that case both a clear evidence of a mistake by admission and the adoption of that mistake by the parties. So the mistake -- if you go to 114, the witnesses were clear they had had made a serious error, no question there was

a mistake and the mistake was, by admission, they didn't read the documents and if you go to 161, on the facts of that case, the last two sentences:

"Within Allen & Overy the relevant individuals ...(Reading to the words)... relied on the advice of Allen & Overy."

The mistake was adopted on the facts of that case by the parent and as I said in opening and this case has not changed, I think it was confirmed by Mr Phillips, they don't rely on any mistake by Mr Grant. There is no allegation of any adoption of any mistake by him.

In contrast to that case, in our situation we know the drafting was the result of a careful process within Allen & Overy, reviewed by several persons within Lehman and no allegation of adoption.

So we say -- again, there is always a danger in trying to compare different cases on the facts because the facts are always different, but we say it is unsurprising in Four Seasons that the court was able to find a positive intention not to assume the additional obligations. The witness or the witnesses said, but in any event one can see on the facts of that case why an absence of discussion about the point was good evidence of a presence of intention not to include the points in a situation where it would have been wholly absurd to do

so. But that's just an example we submit of how the evidential piece fits into the legal piece. But the facts of that case were so extreme there's no real parallel to that extent.

Can I also on a similar point go back to bundle T2, is tab 56, you which is the AMP v Barker case which my learned friend showed to you and just to show on that and whether the reasoning was fully set out in that judgment you will see on the facts -- if you go to 45, as to the question of what would have happened if they known in that case, four lines down:

"... Mr Martin's evidence was that he would not have agreed to the Resolution without the fullest provision of actuarial advice as to its implications and with a clear advance indication ..."

As to what was intended. And it clearly wasn't. And 47, halfway down, another I think it was a trustee:

"He had no recollection of what was actually discussed ...(Reading to the words)... could not have been non-material."

And similarly at 55:

"The reality of the matter is the trustees did not appreciate ...(Reading to the words)... would meet the cost."

So one can see the parallels in that case between

the FSHC case as well. It is something done which is absurd which no one would do had they known about it and in those sorts of circumstances silence can take you into presence. But that's what would be required.

So ultimately, to try to pull that together, we are still focused we submit on SLP3's best case, ie that Ms Dolby was the relevant person and it was relevant to ask whether she had a relevant intention as regards subordination. We say the way the case has been put is incorrect as a matter of law, it is applying the wrong test and on the evidence there is no basis on which the court could find that Ms Dolby had a positive intention to exclude these amendments.

That takes us to the next topic, T14, which is the outward manifestation of accord. And to some extent some of these topics link together because it is kind of related to the question of silence.

We accept that the outward manifestation of accord can be tacit and therefore may possibly be derived from something that isn't said. So there's a link to the positive intention bit for the primary test.

However, in asking whether a non-statement is an outward manifestation of accord, we say the scope is limited and the barrier is high. It is more stringent even than the test for implied terms, because what

the court must be able to be satisfied of is that the matter not discussed was actually agreed so the non-discussion is evidence of actual agreement. I think it also ties in with positive intention. All these things fit together but can I show you -- if we go to the Court of Appeal in Four Seasons which is bundle 7, authorities 7, tab 154. Just to show the context of this, if you start at paragraph 80, the discussion is tacit agreement, ie the question is if you need an outward manifestation of accord, can you get it by reason of the dog that didn't bark.

So 86, there's a discussion as to whether you can and if so how you can and there is a reference to Chitty, which is:

"Parties in a statement of accord may include understandings ...(Reading to the words)... without being spelled out so many words."

So that's the -- and that was approved. So Chitty accepts that you can have a tacit manifestation of accord. And then as Lord Justice Leggatt said in 85, halfway through, he also accepted there can be cases with are depending on the circumstances the fact that an intention or understanding is shared may be apparent from the fact that nothing is said, a form of inference and there is the dog as we didn't know. But he then

explains what that means:

"Mr Masefield confined his criticism ..."

He was trying to resist the rectification:

"... to any suggestion that the test for applying ...(Reading to the words)... actual intentions."

And then in 87 the court says, third line:

"Provided it is understood that on a claim for rectification ...(Reading to the words)... is sound."

Two points about that, my Lord. First, that's why I said the test for the tacit agreement is a stringent test, more stringent than implied term. It requires the court to be satisfied that failure to talk about something evidences an agreement to do the contrary, which is -- that's why we need the Four Seasons factors to get there.

But also this completely dovetails with what I said before about the positive intention. It is completely consistent with the analysis that I indicated. Ie the question of what would you have done if you had thought about it is irrelevant in rectification. So the absence of a thought is irrelevant. What the court is always looking at is the actual intention and how you get there.

So it entirely confirms what I earlier said in relation to the need for positive intention.

So that's the test. It is a high test. It is likely to be satisfied only when the facts are extreme, as in Four Seasons itself, where -- we're still in the Court of Appeal -- if you go to 35, there is a sort of double set of facts. So 35, the Court of Appeal reiterated that it would have been commercially absurd to undertake the obligations. We saw that from Mr Justice Henry Carr. And if you go to 191 this is in connection then with the objective test, but these concepts fit together:

"The absence of any discussion about a fundamental change ..."

But if you go to the end of that paragraph halfway through:

"It is hard enough to conceive ...(Reading to the words)... negotiate anything in return."

That's the negotiation point.

"It is if anything still more inconceivable that the parent would have done this without even mentioning to Barclays this was its intention."

So there was a double inconceivability here: it is commercially absurd to do so and inconceivable that if you were going to do so, you would do so without mentioning it.

So that was the platform in which in that case

the court was able to conclude that there was an objective manifestation of accord through the dog that didn't bark.

Now, it is suggested, as you are aware, that this requirement for outward manifestation of accord may be unnecessary because this case is more akin to the pensions cases and it is correct that in the pensions cases, if I can call that as a class, it is sufficient for there to be a common intention without an outward manifestation of a shared intention.

We say there is no basis for that submission. The distinction, as we know, in rectification context is between the rectification of contracts, multilateral or bilateral contracts -- let me start again. There is a primary distinction between rectification of contracts and rectification of unilateral instruments and of course in unilateral instrument the sole intention of the settlor or trustee is sufficient.

Pension deeds are sort of hybrid instruments and the hybrid instruments because they are largely unilateral but there is normally a company who is a party and therefore needs to consent, but the critical point is that the trustee in such documents has a power to amend, just as in unilateral contract. So it is unilateral, unlimited, fiduciary power, subject only to the consent

of the company. And of course if all the company can do is consent or not consent, there are going to be terms around that consent and you get SOSOMA(?) duties and all sorts of things attached to that, so it is different from a contractual agreement between parties, it's a different balance because there's a primary power and merely an obligation or right to consent or otherwise.

As a result of the special nature of these instruments, there is this different rule when it comes to rectification, and that's explained in the Court of Appeal in Four Seasons at paragraph 78. So 78 summarises -- I think -- at least I hope what I just said, that the trustees have a power to alter the rules provided they obtain consent sufficient that the employer gives its consent, therefore you don't need the mutual exchange. And it is also explained further in the passage cited in 79 from Re IB Pensions, Mr Justice Warren:

"There needs to be cogent evidence ...(Reading to the words)... relevant in a contractual case."

So one can see there the unilateral on the one side, contracts on the other side and this hybrid in the middle which is a different animal from a contract. That explains why in those circumstances you don't need -- well, that is put forward as the explanation as

to why in those circumstances you don't need an outward manifestation of accord.

Now, that isn't in any way analogous to the present case. These notes are in fact bilateral but potentially multilateral contracts, commercial contracts to be used in the market between the issuer and the noteholders. There is nothing exceptional about that. They are a regular species of commercial contract.

The only basis on which there could be an amendment, or at least an amendment such as this, to change the payment of interest is for there to be a mutual agreement between the parties to amend, in the normal way. That is how one amends contracts and that is the only way in which this contract could be amended. Neither party has a power to make amendments and neither party has a right only to consent to the amendments. It is just not in any way analogous to a pension. Indeed it would be, with respect, a very surprising outcome to conclude that a commercial note transaction is more equivalent to a pension than a contract.

If you go to clause 12(a), which I think is the clause relied upon, which is bundle E, tab 4. Now, just to preface this, there is no clause that grants a power to amend. What clause 12 does, as per the heading, is deals with certain mechanical issues -- and 12(a) to

begin. Because there are potentially, as this is a tradeable instrument, any number of noteholders, there is a practical question, as with all such contracts, as to how you can represent the noteholders in any further amendments or anything to do with the notes, ie do you need all of the noteholders, or can you do it with some of the noteholders and what 12(a) provides for, in a standard and unremarkable way, is that the class of noteholders can be represented by either a majority for some matters or a two-thirds majority for other matters.

The other matters is the reserve matters of which this would obviously be one because it is to do with the deferral of interest.

So 12(a) says nothing at all about this point. 12(a) merely defines how noteholders can be represented if there are going to be further discussions.

12(b), on the face of it it might look a bit more promising to begin with because it is at least headed "Modification and waiver" but that gives no power to any party to modify either. All it says is:

"The Registrar may agree to any modification ..."

Essentially which is of a formal or technical nature. Again this isn't one of those. And then:

"No modification, save for ...(Reading to the words)... without the consent of the FSA."

And that is it. This is nowhere near a pension case. These are simply mechanics. For any amendments to be made there would have to be, in the normal way, an agreement between the two parties to the contract to make that amendment.

Now, the point seems to have arisen which in a sense is in a slightly back to front way, or at least the relied upon, by reason of the drafting of the resolution on page 70. The drafting of the resolution, true it is -- I think -- it is a bit unclear. I think it is a resolution by SLP3 which is assented to by LBHI2, so to that extent it uses the word "assent" -- not in fact "consent" but it uses the word "assent" in the drafting. But in a sense there it is. The nature of the contract can't change because of the piece of paper which was used to effect the amendment. That would be working an extraordinary contractual contortion. This evidences the fact that there was an agreement to make the amendment and it is evidenced through a resolution to which assent is given, but that is simply evidence of an agreement. The contract requires an agreement to be made.

When you are therefore asking the question, does any rectification case of this amendment require there to be an outward manifestation of accord, the route to the

answer does not involve looking at the written resolution to which it was done, it involves looking at the contract which is sought to be amended and the contract which is sought to be amended is a commercial contract which requires an agreement to amend.

So many interesting side roads in this case and that may be one of them, but frankly it goes nowhere because this has to be a contract and it has to have a requirement.

Can I move on, my Lord, to my topic 15, which are the relevant decision-makers. As I said a little bit earlier, we say the authorised decision-makers are the relevant decision-makers. It doesn't really matter how divided up. Rush and/or Jameson on behalf of LBHI2 and Triolo and/or Upton on behalf of SLP3. It doesn't, I say, precisely matter which is which because none of them are here. The contrary case from SLP3 has always been until now Ms Dolby and Ms McMorrow, as I showed you, and there is no reason for any change.

As I said earlier, if anything Ms McMorrow was more directly involved in the amendments than Ms Dolby. Ms Dolby says -- witness statement paragraph 39 -- that Ms McMorrow was the primary point of contact with Allen & Overy and if you go please to bundle C/21 this is the interview of course adduced by my learned friend

in his evidence. 275, Ms Dolby is being asked questions about Ms McMorrow and she says, line 8:

"Sarah worked in the legal department ...(Reading to the words)... Sarah was the main point of contact."

At this point they were still on the Ms McMorrow was the actual decision-maker case. She was asked by Mr Wilson representing SLP3.

"So she was the driver ...(Reading to the words)... kind of set that note up."

Now we of course say that neither Ms Dolby nor Ms McMorrow was the actual decision-maker, but it is a strange outcome where one can run a case where Ms McMorrow was the decision-maker, you can specifically ask questions seeking to set up that case and then can simply abandon it at a later date.

Anyway, real problems with my learned friend's case on authorised decision-maker, whether it is Ms Dolby or whether Ms McMorrow comes back in for a late showing. First of all, it is actually contrary to the evidence of Ms Dolby. I made this point in opening but I'm not sure your Lordship has seen it as such. Still in C/21 and remembering the question -- or the issue my learned friend is asking the court to determine now is that Ms Dolby solely was the actual decision-maker in this case. C/21, my learned friend's evidence, if you go to

287 halfway down at line 20, asked by Mr Taylor:

"Did you make the ultimate decision ...(Reading to the words)... did you advise the boards?"

Then she talks about Mr Rush.

288, her role was limited to tax matters, top of the page:

"I wouldn't be saying 'You should be doing this ...(Reading to the words)... director in due course."

And 289, asked again -- actually maybe 288 you see the question. Focusing on the euro bonds, that's specifically this transaction:

"Did you make a decision for or on behalf of any ...(Reading to the words)... signed off on that."

Line 23:

"2008 amendments, did you make any decisions ...(Reading to the words)... enter into the amendments?

"No."

I suppose it might be said "Well it's all a matter of law to some extent" and therefore the court can make some legal finding based on the evidence, if there were any, contrary to that, but it is a strange starting point that my learned friend's primary -- in fact only submission I think now on this point is directly contrary to his own evidence.

So that's the first difficulty with that.

Secondly, Ms Dolby also explained, again unchallenged, and adduced in the transcript very much, the issue of subordination was not a matter for her anyway because it didn't affect tax. It would have been a matter for other departments. The quote was -- I think it is in the transcript -- "it wasn't a thing we were interested in". That also makes it very difficult, putting it at its lowest, to suggest that she was the decision-maker in any relevant sense that we are concerned with, because it then leads to this false contention that the case on rectification is based on the contention that she is the decision-maker and had no intentions about a matter she wasn't interested in, so that doesn't seem to us to work in any logical sense.

So Ms Dolby's actual evidence about whether she was or wasn't, Ms Dolby's evidence about what she was interested in, which wasn't this ...

Moving on and still on the question "Who was the decision-maker", we've got no evidence, as your Lordship knows, from Messrs Rush, Jameson, Triolo or Ms Upton to explain what their processes were. So to explain if they were or weren't the actual decision-maker, what part they played in this, what they thought about it and what they did, that's the sort of evidence the court

would require before a safe conclusion could come that those parties were not in fact the decision-makers in these transactions. No evidence from them, no evidence from Ms McMorrow as to whether she did or didn't discuss it with Mr Jameson. Again that could have been done. No evidence generally on the US side about how Mr Triolo went about his decision-making; we don't know about that. And as far as Mr Rush is concerned the evidence from Ms Dolby that she regularly updated him about the transaction.

Now, there's a separate question as to what that means for his intention, but the fact that he was regularly updated on the transaction, that he knew the tax issues and dealt with it on that basis is further evidence inimical to the suggestion that he was not the actual decision-maker.

Your Lordship will remember already going back to the Murray case, the test is a high one. Quite apart from that there is no evidence to support the contention they fall on the right side of the line. The evidence of Ms Dolby puts Mr Rush completely different to the corporate services provider in Murray. It puts Mr Rush as an active knowing party in this transaction. So he can't not be the decision-maker based on that evidence and there's no basis on which to suggest that he wasn't

the decision-maker.

There was a line of cross-examination, as your Lordship will recollect, by reference to -- I think it was an email of 22 July as to whether the transaction had in fact been put in the books before the board minutes were signed and the document I think is F6/3201. Ms Dolby understandably didn't really remember the details of that. And the language may not have been entirely precise in the emails. It is pretty unclear as to what she did or didn't know at the time, no evidence of that, and her evidence in cross-examination was understandably a little confused. But whatever those emails say or don't say, they are certainly inadequate to construct a case that the corporate governance here should be thrown out the window and something different should take its place. That is a very small piece of evidence which is wholly inconclusive.

Equally this position isn't bolstered by my learned friend's reference in closing to Mr O'Grady's evidence about when the interest deferral was switched off for bookkeeping purposes, because we simply have no idea as to why that happened, who knew about it, how it fitted into the corporate governance or anything of the sort. Those are with respect the thinnest of straws of evidence to try to establish something which requires

material evidence at a high threshold.

As I said -- I keep trying to give your Lordship an easy way out -- if they are the decision-makers then one doesn't have to trouble too much about much of the rest of the case.

That takes us to my next topic which is that the decision-makers did not make a mistake. So the premise here is the only relevant intention is the intention of the authorised decision-makers, to which as we know none has given any evidence and there is no other evidence from which the court can make any safe conclusions about what they in fact thought and that makes it -- and we do say this unrepentingly -- impossible for the court to reach a finding of rectification. There simply isn't a basis in the evidence. It would require impermissible speculation and there is no course for that.

But if one goes down that route of speculation -- one has to follow all the different chains -- it is also important to identify the true nature of the supposed mistake in this case because there is an imprecision and a conflation in speaking about a mistake about ranking change.

On the face of the documents, as I submitted earlier, the amendments affected ranking and they did so by ranking the notes at preference share level, in

a substantial replacement of the previous model. The previous model was solvency condition, the new model was preference share level. Any sophisticated reader of those amendments would see that this was an amendment about ranking and that it was a change because it was different from what preceded it.

Now, it may have been a matter of indifference, but that is the objective effect of the words used and on that premise there is no basis to speculate that anyone who hasn't given evidence made a mistake about the ordinary meaning and application of those words.

If there was a mistake at all -- and we don't accept there was, but trying to chase down all the different possibilities -- the mistake was probably at Allen & Overy level in not realising that there was another debt which would rank above the preference share level. But that is not a mistake as to legal effect because the legal effect is to rank these instruments at preference share level; it's a mistake as to facts and they didn't know what the facts were. It wouldn't be a relevant mistake and in any event it is not said to be an adopted mistake. But that's the only real area of mistake that's relevant in this case when properly analysed.

There is no mistake about the effect of this

amendment, which was to make an alteration in the mechanics of ranking and potentially the consequences of ranking.

So going on to the directors and, insofar as it is possible, to speculate about what they did and didn't think. On one view it could be said and to some extent has been said that all the amendments we are concerned about flowed from the interest deferral.

If you go back to, if you still have bundle C, Mr Grant's witness statement. C, tab 2, Mr Grant's witness statement, paragraph 35. This is where he describes his amendments and he does say there -- albeit he accepts:

"The tax deductability ...(Reading to the words)... not relate to the new provisions."

He does say:

"The proposed interest deferral could potentially have exacerbated the problem if not properly drafted."

So to that extent on the face of the evidence these amendments were linked to the interest deferral request and therefore may be said to be -- I don't want to put this case too highly because the evidence is a little bit obscure, but may be said to be part and parcel of the interest deferral purpose. These sort of distinctions shouldn't really matter in terms of

rectification but there we are.

So even if one narrowly focuses the case to the interest deferral purpose, on the face of that evidence these amendments responded at least in part to that purpose and it is perfectly plausible to assume, in the absence of evidence to the contrary, that the directors knew that.

Beyond that, and again speculating about what the directors might and might not have done, it is likely -- there is no evidence to the contrary -- they would have read the amendments. It is likely they would have seen they dealt with ranking. It is likely they would have known they were drafted by Allen & Overy. May have known they were to address tax sensitivities as Allen & Overy said. And likely they would have been aware the drafting technique placed the subnotes at preference share level.

In those circumstances it is entirely possible that there was an understanding and that was what was being done. One just doesn't know. That's the trouble -- and this speculation exercise is inappropriate, but the reality is one simply doesn't know what these directors thought when they read these documents. But if the premise is, which is the right premise, that these amendments affected the ranking of the notes, there is

no basis to conclude that the directors when they read them didn't realise that. And therefore we say at the very minimum there is simply no basis for the court to conclude that the directors, who haven't given evidence, must have made a mistake as to the meaning of these amendments. Simple as that.

My learned friend also relies on the board minutes because the board minutes refer to a single purpose of the amendments, but as you will recollect from the evidence Mr Grant accepted that it wasn't even supposed to be an exclusive statement of purpose, and it wasn't an exclusive statement of purpose because they dealt with other things, both at the time the solvency condition and subsequently the FSA amendment change. So there is nothing on the face of the board minutes and we know from Mr Grant there was no intention (inaudible) that the statement of purpose was an exclusive statement of purpose. So one doesn't get round the evidential hurdles by pointing to that document because that document was an incomplete statement of purpose.

The only other way the case is being put is through Ms Dolby. So your Lordship will recollect the suggestion that Ms Dolby shared her intentions with Mr Rush. I'm going to argue with my junior about the linguistics here because there's a transitive and an

intransitive about "shared". She may well have done that, she may well have discussed -- I'm sure she did discuss -- what she thought with Mr Rush and that is evidence of what she told Mr Rush. That is no evidence of what Mr Rush actually thought, or what he actually intended when he came to authorise the amendments and it doesn't again fill the gaps which your Lordship would have to fill to get to where my learned friend seeks to go. And she didn't say she shared her intentions with anyone else: Mr Jameson, Mr Triolo and Ms Upton. So that doesn't fill the gap either.

So if I'm right to say we're only looking at the authorised parties, the absence of evidence from the authorised parties is fatal to this case before anything else arises.

Now, next topic, what happens -- moving down a notch -- if it is really Ms Dolby and potentially Ms McMorrow -- still lingering with Ms McMorrow because in a sense if it was Ms Dolby it would have to be Ms McMorrow too because they are indistinguishable in terms of -- if it is not the authorised people who would it be? If anything it is more likely to be Ms McMorrow because she was the one who actually dealt with Allen & Overy, so one can't simply scrub her out and say "We prefer Ms Dolby". If it is not the authorised

people, it couldn't be Ms Dolby by herself. It would have to be at least Ms Dolby and Ms McMorrow and maybe only Ms McMorrow because she had the more direct role with the drafters of the document. So again we have the problem that she hasn't given evidence, what does she know? Nobody knows.

Just in terms of Ms Dolby herself though, if one is moving down the scale and asking the question what were her intentions if that were a relevant question, we say the amendments achieved exactly what she intended. There were three purposes we have identified. First the purpose to defer interest and note, as I said above, it is entirely possible that the ranking amendments were part of that. But secondly, as she says in her witness statement, to maintain lower tier 2 status because that was critical for the tax purposes. That ties in very closely we know with these amendments and why they were made, because we know the sequence from Mr Grant. Mr Dehal produces the tax issue. The solution to the tax issue is to remove the solvency condition. The problem with removing the solvency condition is that you unsubordinate the notes and you lose your status. So the status amendments, the ranking amendments, were a necessary consequence of the need to retain the ranking and therefore the notes were intended not just

to defer interest per se but to subordinate the debt and thereby retain the ranking which Ms Dolby intended to retain.

It is very possible -- we don't know it, no suggestion has been taken to the contrary -- that the subordination amendments were the only way the ranking could be preserved consistently with Mr Dehal's tax issues. The SLP3 hasn't suggested a different way one could deal with the tax and yet avoid the amendments to ranking. And we know that two associates and two partners in Allen & Overy thought that at least this was the best way to do it. So we don't know if it was the only way to do it but at least we know they thought it was the best way to do it, but either way, it can properly be said that the subordination amendments were required precisely to fit Ms Dolby's purpose of preserving the regulatory status.

One doesn't dissect interest deferral and everything else. She had the purpose of regulatory status, these amendments we know were specifically directed to ensure that status was preserved.

Her third purpose was to agree such changes as Allen & Overy considered necessary. Her intention, on unchallenged evidence, was to allow Allen & Overy to get on with the drafting, which she wouldn't second-guess.

That's her witness statement, paragraph 65. Now, we don't say, to be absolutely clear, that means she didn't read them, or she ignored them or blindly let them do whatever -- or it is a Lansing Linde situation. There is a happy medium between a client who asks a question about every single document and a client who never reads a document. There are many clients, and we submit this is one of them, who read the document, satisfied herself there was nothing in there that caused them a problem and otherwise was content to agree the amendments which her specialist solicitors proposed. That is not an unusual situation. We would say in fact that's the usual situation. And it can be probably be said in those circumstances that her third intention was to agree the amendments proposed by Allen & Overy, with which she had no difficulty.

And that would never lead to rectification. It might in a different set of facts if it were said the solicitor made a mistake and the mistake was adopted, because then you get the mistake up the chain. But again that's not this case. We say there was no mistake because these amendments were indeed what Allen & Overy considered necessary and she satisfied herself that they were appropriate.

So because she had those three purposes and because

the amendments entirely matched those three purposes, we say that even if one gets to the Ms Dolby level, there was no mistake.

Now, if one says "That doesn't all matter, what about subordination?", we say there isn't any real purpose in looking into that because of what we know she did intend, but if one does get down to that level then we have the difficulty of the legal test which I no doubt laboured earlier.

If the right question is "Well, let's look at Ms Dolby's intention" and the right question is what's her intention about subordination, first of all we don't know because it is a long time ago, but second of all this wasn't a matter for her. She had no intention about subordination and it was not put to the witness that she had an intention not to subordinate.

This is not a case, if they were the right question, where it would be appropriate to draw an evidential conclusion from the absence of a discussion that there was a positive intention to do something or not to do something. This would never be a case equivalent to Four Seasons for the reasons I explain earlier.

So even if one is in that inquiry, the facts would have to be different to these facts in order to reach a conclusion that Ms Dolby, by not thinking about

something, had an intention not to do it, because again that is the test and that's why I spent a long time on that test even though, as your Lordship is aware, on my primary, secondary and probably tertiary cases we never get there.

Next topic and we're doing -- my Lord, I can say we're doing well for time but I can also indicate my understanding is neither Ms Tolaney nor Ms Hilliard will be going the distance if you like and so Mr Phillips will get his 45 minutes, no problem about that, so if I run just over lunch it will be just over lunch.

MR PHILLIPS: I wonder if my learned friends could just help me a little bit with that because that's just a little bit vague. Is it being suggested that I might have the whole of tomorrow afternoon, or -- what's the thinking?

MR BELTRAMI: My Lord, I certainly wasn't encouraging to hear all the same stuff again. I think Mr Phillips has 45 minutes. What I was saying is if I run over ten minutes after lunchtime, that 45 minutes is not in jeopardy.

MR JUSTICE MARCUS SMITH: What you are saying is that the timetable as stated in the documents is not impaired because if you go long, Ms Tolaney will go a little shorter.

MR BELTRAMI: My Lord, yes.

MR PHILLIPS: I understand, I was just for a moment wondering if I was about to find myself on my feet again rather sooner than expected, that's why I was asking.

MR JUSTICE MARCUS SMITH: I don't think that's --

MR BELTRAMI: I can't speak for the other two but I don't imagine and I wouldn't insist Mr Phillips gets on his feet today. I don't think that's even a likely prospect.

MR PHILLIPS: I will given the opportunity.

MR BELTRAMI: Topic 18, and only really to try and complete the analysis of the significance of Allen & Overy, we say most of that evidence is of no real significance particularly because there would be no suggestion that any mistake they made, if they did make, was adopted, so there's a hard break at the Allen & Overy level and it would be wrong to try to import a mistake when no such mistake is alleged to be relevant.

The reason that there is that hard break is rather obvious, in that there probably wasn't a mistake, or at least there certainly wasn't a relevant mistake, this was a deliberate and careful piece of drafting as a collaborative exercise between at least four specialist solicitors where the intention was specifically to put in place a mechanism for subordination to preserve (inaudible), which is exactly

what they did. And they must have realised, we say, that the consequence of what they did was that their ranking of the subnotes was at preference share level, because that's what it actually says.

There was no suggestion that what they actually did didn't resolve the tax problem, didn't resolve the status, or that there was a better way of doing it. So it is very difficult to suggest that they actually made a mistake and it is very far removed from Four Seasons.

As I said earlier, if one is pushed with a gun to say "What was the mistake or was there any misunderstanding or was there a failure to complete the understanding perhaps", it was a failure to understand that by doing that, which worked, there was a consequence in relation to a debt which they didn't know about. But that's a factual difference. There's no difference as to the legal effect of the instrument. The legal effect is to rank at preference share level. There is a factual impact which is that a document at preference share level is below another document at subordinated debt level. They didn't know about that other document.

The fact that they didn't know about that other document doesn't in any way support a case in rectification.

Of course Lehman did know about it so that's another problem about confusing the two.

We have in a footnote to our note a little thought experiment on page 74, which is: what would the analysis be if there had been no subdebt at the time? So they go ahead with the amendments, they amend them as they do, there's no mistake at all because what I said earlier about not knowing it was the other ones wouldn't count because the other ones didn't exist. So they would do exactly what they intended to do, it would have exactly the legal effect which objectively and subjectively we say it had; there would be no question of rectifying that document. It would be a document which completely complied with the intentions of the draftsman and indeed with the client. But if a subsequent debt arose later, could one then say "Well, I will have rectification"? Obviously not. That's a factual difference which doesn't affect the question of rectification. One can't have a non-rectifiable document which becomes rectifiable if a factual event happens later on.

But what is the difference then between the existence of a debt which you didn't know about and the potential of a future debt which might not happen? It is again trying to focus on what rectification is about and whether it is actually about a difference as to the

legal effect or a difference in relation to some factual consequence and we say that that helps to illustrate why the real problem, if there is a problem, would be that factual level, but not the legal effect level.

Ultimately that's why we think, because there's no real mistake anywhere, that what this case -- I know Mr Phillips will stand up and say "This is not my case at all", but what we interpret their case to be is a case about lack of instruction or authorisation. That is in effect what they say in their written opening, paragraph 457. But that is not a basis of rectification. The case that they were instructed to do interest deferral amendments and they did more than that isn't enough.

In any event the case -- we should maybe just pull it up. Your Lordship will probably recollect that it is bundle B/457, tab 5. This is the sort of culmination of the case:

"Common intention can be given effect by removing the wording ...(Reading to the words)... not shared with the Lehman Group."

That's where we get that, it is really instructions, authorisation, not sharing is the supposed source of the claim. However, that claim as it is first of all fails on the facts because these amendments were not outside

Mr Grant's instructions. As your Lordship recollects, Mr Grant certainly didn't think so. He said that at Day 2, page 100 to 101. He gave his three areas of instruction and accepted that what he did fell within his areas of instruction as one would expect. So his instructions weren't just narrowly focused on the deferral of interest, at least as he understood it.

No one suggested at the time that he was acting beyond his instructions. No one suggested at the time the tax sensitivities he mentioned fell beyond his instructions. Other than in that paragraph, no one has even suggested it even now and nor was it put to any witness that he was acting beyond his instructions. So we say that the premise of all this is just not supported by the evidence and also unrealistic in respect of the contribution that a specialist solicitor can give in a situation such as this.

Equally, and going back to 457, it is not the case that his tax concern was not shared with the Lehman Group, because he did tell them of the fact there were tax changes -- your Lordship will recollect the sequence. He did his first amendments which specifically dealt with interest deferral. He said "I'm going to run this past Mr Dehal". The then said I have spoken to Mr Dehal and he has some tax points and I will

deal with those in the next draft". He did the next draft and said "By the way there are tax issues which I have dealt with". So he considered in his evidence that he had "flagged" it for Lehman, was the word he used, and we say: well he did. He did all the way through. He made it quite clear that beyond the very narrow question of deferral of interest he was considering and then amending these documents to address tax issues and no one has suggested that he didn't address tax and no one has suggested he didn't flag those tax issues to the client. Again that wasn't put to any witness, Ms Dolby, that she didn't understand that he had addressed tax issues.

So, going back to paragraph 457, my Lord, both those elements simply aren't made out in the evidence, that he did something he wasn't instructed to do and he did something that wasn't shared with Lehman Group. Unsupported on the evidence, but in any event unsupported as a matter of principle because that's not a rectification case.

It goes back to the nature of the relief sought which we mentioned earlier. None of that responds to mistake. That responds to a different question of lack of authority. And we say that even if a solicitor did go beyond the narrow confines of his instruction, that

wouldn't give rise to rectification either. It might give rise to claims about lack of authority, but not rectification.

My Lord, I'm glad to say this is my last topic so it may well be -- shall we do it now and then finish? Would that be better?

MR JUSTICE MARCUS SMITH: Why not.

MR BELTRAMI: The last topic is no outward expression of accord.

MR JUSTICE MARCUS SMITH: Yes.

MR BELTRAMI: Various documents are relied upon, my learned friend's opening paragraph 446, but essentially they are the board minutes et cetera. There is no document that says there's no intention -- or there's an intention not to change subordination, so this has to be a tacit agreement case, ie look at what they said, they didn't say anything about ranking change, therefore they had an intention not to make a ranking change. That's the way the argument would go in accordance with the correct test. But that is undermined by the evidence. We know the documents weren't intended to be exclusive, that's the board minutes et cetera, it is not suggested to have been commercially absurd as in Four Seasons. The evidence from the witnesses is that the point was irrelevant. And therefore the absence of a discussion

and the absence of a mentioning of the point of a ranking change is at least consistent with the fact that no one thought about it. So it doesn't evidence an agreement not to do it. And your Lordship will remember from Lord Justice Leggatt's test, that is what you are looking for. So evidence is what we know about the case, which is an absence, not a presence.

The highest it was really put, if you go to opening paragraph 444, where it is said to have been implausible that SLP3 would have agreed to it had they known about it. Now, we know from Lord Justice Leggatt that's not the test, unfortunately for them, but even if it were, it is unsubstantiated because we don't have any evidence from anyone from SLP3. We don't know what they would and wouldn't have done had they known about it and that's another gap in the evidence which simply can't be filled, and we say there is no basis to speculate as to what they would and wouldn't have done. There's no evidence about corporate benefit, there's no expert evidence about corporate benefit and it simply can't be taken as read that there was no corporate benefit to this company to agree these amendments. One would have to consider the amendments as a whole to see what was being achieved and to identify the corporate benefit in that context and there's no expert evidence about that

and no direct evidence about that.

It always is a major problem that this was a matter that was considered so irrelevant that it is impossible to know what the reaction would have been, if that's the right question.

The last reference is to -- your Lordship will recollect my learned friend's closing submissions -- the so-called corporate benefit report that was engaged through Allen & Overy. If you go to bundle F5/2819, the corporate benefit report is attached to this at 2830. In effect -- and as we will see why -- it indicates that the Lehman Group should make their own mind up about corporate benefit. So if you go to 2831:

"The question must be asked of the board of directors ...(Reading to the words)... such arrangement are those."

So there is no advice about corporate benefit other than "These are the matters to consider and you must consider it".

The document itself, if you go on to 2889, potential value, there is an email from Ms Mozel about that report:

"I realise this is nonsense ...(Reading to the words)... we need to push back on this."

So that's the value of the corporate benefit report.

But in any event if you go back to 2692, we see its origin which is a request -- there are a few emails and this is just one of them -- it is requested by Ms Dave, second paragraph:

"Confirm from a corporate benefit perspective ..."

Just looking at the request:

"You have considered whether it is appropriate ...(Reading to the words)... cash payment of interest."

That is not what Allen & Overy purported to say, they didn't answer that question at all. But anyway, it was requested by Ms Dave but we have no evidence from Ms Dave. We don't know why she requested it, we don't know what she thought when she read it, we don't know what she would have thought has she known about the subordination issue, we don't know she didn't know about the subordination issue; it is just another loose thread which doesn't give an answer.

So insofar as my learned friend is saying "Well, you can infer a manifestation of accord from the fact that it is implausible these parties would have agreed to it, one simply doesn't know again. The that's another evidential void.

My Lord, five minutes late, but those are my submissions.

MR JUSTICE MARCUS SMITH: Mr Beltrami, I am much obliged.

1 We will resume at 2 o'clock.
2 (1.05 pm)
3 (The short adjournment)
4 (1.55 pm)
5 Closing submissions by MS TOLANEY
6 MR JUSTICE MARCUS SMITH: Ms Tolaney.
7 MS TOLANEY: My Lord, I will start by addressing
8 your Lordship on the PLC application on release. I very
9 gratefully adopt Mr Beltrami's submissions this morning
10 and yesterday and I have in the interests of managing
11 I hope to stick to my time I have prepared a note which
12 I will hand up now. (Handed).
13 MR PHILLIPS: Well, this one is only 39 pages, my Lord.
14 MS TOLANEY: Well, my Lord, some of it responds to the note
15 Mr Phillips himself passed up.
16 My Lord, just to say I intend to speak to this note
17 and have put it down overnight, so with apologies for
18 any wrong references I will pick them up as I go along.
19 The point really is to try and manage to do this this
20 afternoon and it is a lot of material to get through.
21 MR JUSTICE MARCUS SMITH: No, of course there is.
22 MS TOLANEY: Thank you very much.
23 So, my Lord, starting with the summary, you will see
24 from the note and you have already heard, my Lord, that
25 Deutsche's case is essentially that following the

assignment to LBHI of the PLC subdebt in April 2017, LBHI's claims constitute causes of action of a debtor against a UK affiliate and on a plain and ordinary reading of the text those causes of action we say unquestionably arise from/are based on, connected with or related to facts and circumstances in existence prior to the settlement agreement.

And to be clear -- can I clear this away at the outset -- there is nothing in those words that requires the relevant facts and circumstances to have existed exclusively between any particular parties, no such limitation can be found and I will come on to address your Lordship on the text in a moment.

We say that is sufficient, those three elements, for LBHI's claims under the PLC subdebt to fall within the very broad terms of section 802 of the settlement agreement.

Just by way of overview I just want to outline our case on the various points and then I want to get straight into the textual analysis of section 802. So the starting point is we say that the textual analysis is absolutely key and that textual analysis that we put forward gives effect to all the language of section 802. It is supported by the provisions of the settlement agreement read as a whole, in particular the recitals,

Article 2 and Article 15.

It is also, we say, entirely consistent with the objective commercial purpose of the settlement agreement and it is important to discern that objective commercial purpose from the context in which the settlement agreement was made as set out in the recitals themselves and as set out in the express terms of the settlement agreement itself and what is obvious when one goes to those clauses is that the purpose of the settlement agreement was to draw a line under all disputes arising pre-insolvency and, as Judge Smith put it, to achieve total peace, we would say, and it was in order to facilitate the wind-down of the group and the expeditious distribution to creditors.

Pausing there, my Lord, I don't believe there's any real dispute about that. I think that was what Mr Geraghty accepted, that was the purpose of the settlement agreement.

My Lord, the reason I don't think there is any dispute about it is that it is pretty sensible and the parties chose, we would say for sound commercial reasons, to enter into in that context the broadest of releases, save only for those categories of claims they carefully agreed to exclude and plainly given the commercial purpose it wasn't in the parties' interests

for there to be future claims on an ongoing and potentially quite long-term basis, distributing the orderly wind-down. Look at these proceedings.

It is also relevant that the broad terms of the release read in the context of the settlement agreement as a whole, as construed by Deutsche Bank, would prevent abuse by either side, because we say fairly obviously it would have undermined the operation of the settlement agreement as a whole if the parties thereto could simply have circumvented the deal so carefully negotiated by buying up claims and litigating against each other, undermining that intention to draw a line.

At the outset, my Lord, I would just like to say something about New York law. The key principles of interpretation are largely agreed by the experts and frankly they are similar to the approach under English law and we say and we said at the outset that the relevant New York and US case law applying those principles is going to be of limited assistance to your Lordship, insofar as they simply demonstrate the application of agreed principles in various different factual contexts, in courts of various different compositions.

And it is well-established we say that the relevant principles of New York law having been identified, it is

for your Lordship to apply those principles to the settlement agreement and to reach your Lordship's own decision.

What we do say is that the one case that may provide some assistance -- and I say "may", but may provide some assistance is the appellate decision in the Prosat case and that's relevant for two reasons. First of all, the decision demonstrates that contrary to the assertion made in LBHI's position paper -- and I'm not sure whether your Lordship will have seen this, the reference in is paragraph 62.1(ii) and it is at A, tab 10/208 and I set it out in paragraph 7.1 of the document I have handed to your Lordship.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: They assert that there is a principle of New York law that the release of an after-acquired claim would need to be expressly provided for. That was asserted in their position paper. Now, that point is not correct and it wasn't pursued in LBHI's oral closing and it was not supported by the evidence of Judge Gropper, who your Lordship will remember couldn't identify a single authority to support the proposition that the release of an after-acquired claim would need to be expressly spelled out in order to be effective. It was his view that that is what should happen and it

was put to Judge Smith that that is what needed to happen, but there was no principle of New York law to that effect and that is demonstrated by the Prosat decision if there needs to be any confirmation of that because your Lordship will remember that it was accepted that there was no relevant difference between Californian law and New York law for those purposes by both experts.

The second point to which Prosat could be seen to be relevant is simply that it is a case we say on point that assists to show how New York law approaches a generally worded broad release and in that case, as set out in paragraph 7.2 of the note that I have handed to your Lordship, the clause was:

"All claims that are not expressly enumerated in the release ...(Reading to the words)... including unknown future claims of any character, nature and kind."

That clause was held to include the after-acquired claim in issue and we say that if anything the clause in this case is broader and it is unsurprising therefore that Judge Smith's opinion was that the holding in the Prosat decision would be applicable to the instant case under New York law. I am going to come on to address your Lordship on the point that was made in more detail but just clearing it away now, the suggestion that

Prosat was decided on special facts is simply not sustainable when you look at the appellate decision. The ratio of the appellate decision is clearly based on the language of the release and that was very clear and the suggestion that Judge Smith made any form of concession about that is wrong and that's set out at 7.3 of our note.

Just while I am on that subject, my Lord, because of the nature of the submissions that were made yesterday we have included -- and I won't go to it now but I will just tell your Lordship it exists -- an appendix in which we correct the statements that were made about Judge Smith's evidence, usually taken out of context or not fairly representative of the evidence he actually gave and we have given your Lordship the transcript references so that your Lordship can see precisely what he said.

So on this point Judge Smith was very clear in cross-examination that whatever special facts there may have been in the Prosat decision, whether it was complicated or detailed or so on, he understood the holding of the decision to be based on the language of the release and he endorsed that approach.

So we say, my Lord, that is why the Prosat decision has some relevance.

We also say that for that reason extrinsic evidence is completely irrelevant to your Lordship in this case and it is an interesting case because both sides, both Deutsche Bank and LBHI, have said to your Lordship in terms that they believe that the release clause is clear on its face and Mr Phillips said it in his opening submissions, he said it yesterday -- and I will give you the references when I come on to that -- and we also say it.

Nevertheless both parties have also said "If you're going to look at it, here is lots of evidence that your Lordship should look at", and Mr Phillips was quite keen at all times to weave in the subsequent conduct he relied upon. We submit -- and I will come on to that conduct -- that that conduct is wholly unreliable and your Lordship would be in very dangerous territory taking any comfort from those matters and I will come on to explain why.

MR JUSTICE MARCUS SMITH: But the primary position is, as I think I put to the US judges, that they accept that if the wording of the settlement is clear there is no room for extrinsic evidence, as you call it, save for -- I think they would accept that one could look at factual matrix as we would understand it in English law.

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: It is at times not quite clear to discern where they draw the lines between factual matrix, parole evidence rule and evidence regarding previous negotiations and subsequent conduct, but I think I'm right that everything is out if the agreement is clear, apart from the factual matrix.

MS TOLANEY: My Lord, that's right and I will come on to address you specifically on those principles but that is an accurate summary and one can see exactly why.

MR JUSTICE MARCUS SMITH: Indeed.

MS TOLANEY: Given actually the nature of the sort of debate that has been had in this case.

What I will say though is that if your Lordship -- and I am not encouraging your Lordship to do this, it is not my primary case -- wished to look at any form of subsequent conduct then the only evidence before this court as to what the parties did in terms of turning their minds to the scope of the release in the 2011 settlement agreement is evidenced by what came subsequently in the agreements they made and in particular the 2014 agreement to which there were overlapping signatories to both agreements and their conduct and what they did. But I don't need that. I don't perceive it to be relevant. I think the clause is clear on its face and that's where I would start.

My Lord, with that introduction what I intend to do in my submissions is to first of all outline very briefly the key principles of New York law, which are broadly as your Lordship has just expressed, but then to go straight on to the construction of the relevant release and when I say "the" construction I'm going to start with our construction, and then I'm going to go through the various constructions that LBHI has advanced at different times to demonstrate why they don't work, and then finally I will address your Lordship briefly on commerciality and extrinsic evidence but it may be at that point if I have run out of time I will refer your Lordship to our note, particularly as I put that very low down the pecking order.

My Lord, starting then with the relevant principles of New York law and I set these out at paragraph 11 of my note and these, as I understand it, are common ground. There are three key principles.

The first is that New York law will give effect to the intentions of the parties as expressed in the language of the written contract and that is I think fairly common ground between US and English lawyers, and your Lordship will see that in determining the claims covered by a release the court should of course consider the purpose for which the release is executed and the

intention of the parties, but in each case looking at the agreement itself for indications.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: The second relevant principle is that the language of the contract is not to be construed in a vacuum but, again obviously, in the context in which the contract was agreed. But again there is a distinction to be drawn from what is objectively apparent on the face of the contract and extrinsic evidence of subjective intentions, whether before or after the agreement, and Judge Smith explained that in his cross-examination. Again this is similar to the distinction between factual matrix and inadmissible, subjective intent evidence and perhaps one of the key points that I should rely upon is Judge Gropper's acceptance, following a question from your Lordship, that where a contract is clear, that should be the end of it.

The third relevant principle, my Lord, is that the contract must be interpreted as a whole, giving effect -- and this is important -- to each of its provisions where possible and so where the draftsman uses different words, the court should seek to give to each of those words a distinct meaning and again this was Judge Gropper's evidence, Day5/13:13 to 14:2. And

again this is a familiar concept to an English lawyer. So that is relevant to the new construction that was advanced yesterday.

Now, my Lord, moving, as I said I would, then swiftly to the textual analysis. So if your Lordship has the settlement agreement in bundle E, tab 16, the starting point my Lord -- and this picks up on one of your Lordship's point -- is looking at the factual matrix that is admissible, what we can see and is agreed is that the settlement agreement a written contract made between highly sophisticated parties following extensive negotiations between experienced professionals including three law firms. And indeed it was common ground, as accepted to the extent it is relevant, by Mr Geraghty that the contract recorded the intentions of the parties. The contract for what it is worth also contains an entire agreement clause at Article 15 and that's at page 505 if your Lordship wants to see that.

MR JUSTICE MARCUS SMITH: I have looked at that.

MS TOLANEY: So looking at the four corners of the settlement agreement, what is clear on the face of the document is that its purpose was to achieve the wholesale settlement of any and all claims of whatever type and whether known about or not, whether foreseen or not, subject only to certain limited and express

exceptions and it was made between the debtors on the one hand and the UK affiliates on the other. In other words, as we said, the aim was to draw a line as far as possible under all and any present and future disputes.

So starting then with the recitals, and we accept the release clauses are of course to be read in the context of the settlement agreement as a whole and one looks at the recitals to start with, but one has to remember these are the recitals which set out the objective background to the agreement and what one sees is the factual recitation on page 458 of how this agreement has come about, the bankruptcy date and so on. One then sees crucially at recital 5 -- and that's the one that's at the top of page 459 that I have mentioned before -- the definition of proofs of claims, the UK affiliate's proofs of claims, thereby identifying the claims that have in fact been filed, known and identified claims, and similarly recital 6, the debtors have asserted they have claims which are -- they are defined as funding claims, so again known and identified claims, and then one drops down to the last recital relied upon so heavily by LBHI, the desire to resolve all disputes -- just pausing there, one has seen and I'm going to come back to "outstanding", but one has seen a desire to keep on mentioning the word "outstanding",

but of course the entirety of the clause is "all disputes and all other outstanding issues" between them "except as expressly excluded herein" and to avoid extensive and expensive litigation. So one sees the purpose; one sees the rather wide term "all disputes and all other outstanding issues" and one sees the approach of "except as expressly excluded".

Now, my Lord, the next relevant clauses before one gets to Article 8 is Article 2 and this is a clause which has not been engaged with despite me raising it both in my written opening and in my oral opening submissions and it is important -- I don't suggest your Lordship reads all of it now but as I mentioned in opening submissions, by this clause what one sees essentially in some detail is the treatment and resolution of the known claims between the parties and they were carefully characterised and defined and treated in very specific detail, thereby we say giving effect to the intention to deal with the known and outstanding claims between the parties.

The reason why it is so important to cast one's eye through these provisions for that purpose, my Lord, is that it is important because one then approaches Article 8 in the context that another article has gone through all these many types of known claims and dealt

with them. And one then comes on in that context to clause 8, and you see the heading is "Releases" and as I have said before and put to the factual and expert witnesses of LBHI, the releases are of course mutual, so each party gave up and benefited from it a reciprocal release of everything other than those specific claims that were expressly carved out and so any argument that a broad reading of the release is uncommercial because it released claims that had not and could not be valued, hasn't really, we say -- and LBHI hasn't really grappled with the mutuality of the clause and the risks and the benefits.

One then turns to the text of Article 8 and the first point, my Lord, is that the structure -- your Lordship looks at the structure -- the structure is very informative. Because just as one saw in the recital and approach of "all disputes and outstanding issues except anything excluded", that's precisely mirrored then in the structure of clause 8.02. The clause first excludes the specific categories, so the parties absolutely addressed it and had it in mind what this release would not cover, and then the structure of the clause is to then release absolutely everything else whatsoever and so, put another way, the releases in Article 8 were not limited to specific categories of

claim. And that's what LBHI would wish your Lordship to read into this clause, but you can't. Even before one gets to the actual language, the structure of it belies that submission, because all causes of action were released subject to enumerated exceptions and this isn't a case, as it was characterised in LBHI's closing, of deemed inclusion. There's no need to deem anything because the structure of the clause is expressly inclusive of unenumerated claims -- it uses the words "all claims".

My Lord, backing up that point, it is highly significant that the release was not limited to the defined term funding claims that I showed your Lordship in recital 6, because those were all the claims that the debtors had at that time asserted against the UK affiliates and you can see that definition in recital 6. But instead clause 8.02 makes it clear at (i) that the release, it uses the word "includes" funding claims. So it is a much broader release on the face of the clause.

You then, my Lord, have one other very significant point, again a point never engaged with by LBHI, which is that fraud is excluded expressly. Now, that's a really important indicator because one could usually proceed on the basis that fraud would always be excluded and didn't need an express exclusion, but here,

absolutely consistent with the structure the parties have taken, they have specifically identified it because they are identifying everything that would not fall within the release, because everything else does.

Then, my Lord, what one then has is you then see more positively the intended breadth of the release is absolutely apparent from the language used, because the release is granted by each debtor -- so this is, as your Lordship knows, about six or seven lines in:

" ... on behalf of itself, its estates, assessors and assigneds ..."

So it is as wide as possible in terms of the party. It is granted in favour of each release party, which itself is defined very widely and that definition is at E16/462. It is all consistent with the intention to grant a broad release and an overall settlement to prevent parties, assigneds and so on trying to take a different line.

You then have the words "fully and forever releases", again a further indicator of breadth. And also they suggest the absence of any temporal restriction on the scope of the release.

The release then is of all causes of action, so you have got the word "all", which in turn then is on a definition -- and if your Lordship could then just

look at that definition again because it does bear looking at in the context of this clause and that's at page 461, and it is hard to have a wider definition. It means:

"All manners of action ..."

So it doesn't just mean causes of action because then you have cause so actions next to it:

"... judgments, executions, debts, liabilities ...(Reading to the words)... and claims of every kind, nature and character whatsoever."

Hard to imagine a wider clause and particularly if one puts the word "all" in front of "causes of action" as section 8.02 does.

What one can safely say, just pausing there, is that the definition in the context of the broad section can only be read as indicating an intention to preclude any future argument that a claim was not released based on it being a particular type or category of claim and that's why the definition of causes of action can't be read as excluding claims merely because they are after-acquired claims.

My Lord, this is all set out, if it would help your Lordship, at paragraph 16 of my note.

One of the things I'm going to come on to address your Lordship on is it is not entirely clear what LBHI's

case is in this regard, but I think that LBHI accepts that on its face causes of action as defined would include after-acquired claims and the way it now puts its case is that it has to be claims between certain parties and there is a factual nexus, that was yesterday, but it would be very difficult to argue on that definition that there was a particular type of claim that was excluded because it doesn't sit with the language.

You then have, my Lord, picking back up from the text, a yet further indication in the text of section 8.02 that the release is not limited to claims of a particular type or character by the words "whether in law or in equity" and so on and so forth, so it is actually making the point as widely as possible. And then one then comes, having had all of that to the words accrued/unaccrued, foreseen/unforeseen and so on.

Now, my Lord, if any confirmation was needed that the release given was not limited to known and identified claims held at some specific point in time, these words put the matter beyond any doubt and the words used clearly indicate that the parties wished to avoid any possible basis on which it might be said that a claim was not released. That is the obvious purpose of them. And they are a cumulative and comprehensive

essentially designed to ensure that even claims that were not known about, not foreseen, even those that could not be foreseen were released and the juxtaposition of the terms was not restrictive as was suggested yesterday -- and I will come on to that in a moment -- the juxtapositioning is actually quite the opposite because what it shows is an intention to capture absolutely everything. So known and unknown indicates that it matters not whether a claim is known or unknown: either way it is released. And that's the purpose of the juxtaposition.

My Lord, as well as making sense of all the words, Deutsche Bank's construction, unlike LBHI's construction, gives effect to all of the words in the clause, so it gives effect to the words unknown and unforeseeable, because just standing back, a claim identified in the negotiations is plainly known about and so much was obvious from Mr Geraghty's evidence. He said that there was a "population of claims", that was a phrase I think used by Mr Phillips yesterday. So those are known claims. They are plainly not unknown claims. Unknown on its ordinary and natural reading encompasses claims that were not known about as at the date of the settlement agreement or at the release date and that in itself we submit is fatal to the contention

that the purpose of the release was to address known claims held by the parties at either of those dates.

You then have the words foreseeable or unforeseeable, foreseen or unforeseen and they can only we say be understood as a reference to claims that a debtor might acquire after the date of the settlement agreement from another party, because first of all that interpretation gives effect to the ordinary meaning of the words; they are plainly directed, from the words unforeseen, unforeseeable towards future events, but it is also supported, my Lord, by the context in which the settlement agreement was made, because the Lehman Group was in a terminal insolvency process as Mr Geraghty accepted so there would be no ongoing business dealings between the parties that might give rise to unforeseeable future claims. So, my Lord, that can be, we submit, the only interpretation -- not just as a matter of ordinary language and common sense, but also in the particular context of this agreement.

By contrast, LBHI's interpretation gives no effect to these words and, my Lord, in that regard that's why I was saying it is important to identify what exactly is the dispute between the parties because it seems to us that LBHI is not contending that the PLC subdebt would not per se constitute a cause of action of a debtor, or

that an after-acquired claim would not per se be a cause of action. As we understand their case it is that the release in section 8.02 should be read as being limited to particular claims held by the parties to the settlement agreement at a particular time, or as they put it in closing submissions, to a particular population of claim that was contained in the agreement. That was Day7/37:9-10. And we say that just isn't sustainable as a construction not least in the light of the words unforeseen and unforeseeable and unknown.

We also say that it is unsustainable in light of the further text of clause 8.02, because if one then goes on to look at the further text, the release expressly applies to all causes of action, whether known or unknown in each case, that arise from, are based on, connected with, alleged in, or related to -- and then just pausing there you can see just how wide that clause is: arise from, based on, connected with, alleged in or related to. And then you have "any facts or circumstances", so the word "any", and circumstances as well as facts, "in existence prior to the date hereof".

My Lord, the cause of action has only to arise from, be based on, be connected with, alleged in or related to any pre-existing facts or circumstances in existence prior to the date of the settlement agreement, so the

temporal qualification relates to the facts and circumstances in existence, not the causes of action being released. And the point is demonstrated because the parties easily could have said, if this was what was meant, that the causes of action released were those in existence prior to the date hereof. It doesn't say that.

In contrast the words actually used are incredibly broad such that one simply cannot read in any requirement that the facts or circumstances should arise in any particular context, let alone that they needed to be facts or circumstances existing between the debtors and the UK affiliates. And just pausing there, it is not even clear what that would mean.

So the argument about some sort of factual nexus, which I'm going to come on to, just doesn't withstand scrutiny.

My Lord, the next stage of the clause is a clause that we say demonstrates that on its own terms after-acquired claims are included in the clause because the clause goes on, having had all of the general description and the words that I have addressed so far, you have then the word "including", so it's not a limitation, it's an including:

"... any funding claims ..."

Which we have addressed:

"... any causes of action to the bankruptcy code ...(Reading to the words)... guarantee or similar document."

Pausing there, your Lordship has the point from my opening submissions in our skeleton argument that as at the date of the settlement agreement LBHI had not made any distributions to its UK affiliates based upon a guarantee and it couldn't do so until its Chapter 11 plan was confirmed. So on its face you have the clause excluding within its scope release of claims that LBHI might accrue after the confirmation of the plan as a result of payments under a guarantee and we say that's another indicator.

A claim acquired by subrogation is a claim acquired from another party, so if after the date of the settlement agreement LBHI had discharged a secured liability of a UK affiliate, it might have been subrogated and acquired a security interest such as a fixed charge from the creditor and that would have also been an after-acquired claim falling within the scope of the clause.

Now, it was advanced yesterday in closing submissions by Mr Phillips that the word "asserted" in section 8.02 assisted his construction. It doesn't.

What we submit is the word "asserted" is a further indicator of the breadth of the release and not a limitation because it is intended to make clear that the release covers any secondary claim regardless of how it is asserted to have come into the hands of the releasor. In any case, there is no indication that the assertion itself has to have happened at a particular point in time.

My Lord, even if I am wrong on that, the word "asserted" wouldn't support Mr Phillips if it had the construction that he was suggesting, ie that it means a pre-existing claim, because the absence of that word elsewhere in the clause would only be in contrast and undermine his point elsewhere. So it doesn't help him.

Nor do the references to the United States bankruptcy code because first of all it's not clear in the context of this clause why the treatment of claims under the US bankruptcy code in relation to subrogation would be relevant because we're concerned here with claims against the UK affiliates who are subject to English insolvency proceedings and therefore it is a question of English law not the US code.

Secondly, insofar as LBHI relies on the US bankruptcy code it does so in any case only for the proposition that it is possible to claim in a US

bankruptcy in respect of the contingent right and that was the only point on which expert evidence was adduced and that's in paragraph 50 of Judge Gropper's report. But that doesn't detract from the point that Deutsche Bank is making which is that LBHI could not have acquired a claim by subrogation until it made a payment on a guarantee after the effective date and that's what Judge Smith confirmed.

Third and finally, LBHI can't in any case rely upon the US bankruptcy code insofar as it is different to New York law because the law applicable to the settlement agreement is not only New York law. The Rome I regulation doesn't permit a contract to have more than one applicable law and we set all of this out in our skeleton argument at paragraph 89, B, tab 3, page 31 and the reference, my Lord, is in this document at paragraph 23.3. And that hasn't been in any way challenged.

We say by way of ordinary construction it doesn't help, as a matter of the context of the clause it doesn't help. If it did in fact, contrary to those two points, have the meaning that Mr Phillips contended for, it would kill him on the rest of his construction. And in any case the bankruptcy points don't help.

MR JUSTICE MARCUS SMITH: Just to be clear though, you say

that looking at section 12.02 --

MS TOLANEY: 8.02, my Lord, or 12.02?

MR JUSTICE MARCUS SMITH: 12.02, on page 504. That although the clause expressly refers to the bankruptcy code, the English conflict law rules preclude me from having regard to it because only New York law applies?

MS TOLANEY: That's right I do. And I just want to check one point, my Lord, on this. As my understanding is, Judge Gropper himself says at paragraph 36 of his report:

"The bankruptcy courts follow applicable state law in construing contracts."

My Lord, then coming on to LBHI's construction of section 8.02 and, my Lord, could your Lordship pick up this in the speaking note at paragraph 24. The reason I say this is that it is useful to see how it has been put on the page so to speak.

So the starting point, my Lord, is that the oral opening submissions of LBHI asserted that the language of the release didn't release the claims, and similarly in oral closing submissions as a matter of ordinary language, and it is quite important to have that in mind when we come to the most recent construction. But as we say in this note, having asserted that, LBHI then didn't in fact engage with the language in the clause,

including the definition of causes of action, and in fact no textual construction was advanced as to the meaning of unknown, unforeseen, unforeseeable in LBHI's written opening. All that was done was a quotation from Judge Gropper's report in paragraph 31 where Judge Gropper just asserted that those words don't include after-acquired claims and there was no textual analysis.

MR JUSTICE MARCUS SMITH: No.

MS TOLANEY: So until yesterday LBHI's only textual arguments were those set out at paragraph 27 of the note. First of all that as a matter of New York law the release of an after-acquired claim would have to be expressly provided for and I have addressed you on that and I will do so briefly again, because I'm not sure that's still pursued and I don't see how it could be.

Second, that the release in it section 8.02 was limited to claims held by the parties at some particular point and this appears to be a case that's advanced purely on the words "upon the occurrence of the effective date", or on the basis of the recitals referring to outstanding claims. So I will come on to that as well.

Third, the third textual analysis it was said was that the release should be read as limited to the

specific outstanding or known claims again referred to in the recitals.

MR JUSTICE MARCUS SMITH: That's the page 459 point.

MS TOLANEY: That's right.

MR JUSTICE MARCUS SMITH: There are other clauses that have been perhaps a little elliptically referred to.

MS TOLANEY: Yes, there are representations clauses which I'm going to come on to.

MR JUSTICE MARCUS SMITH: That's right.

MS TOLANEY: I think those are the only other ones.

MR JUSTICE MARCUS SMITH: It is section 4.04(b) and section 5.04(a).

MS TOLANEY: Exactly and I will come on to those.

MR JUSTICE MARCUS SMITH: Okay.

MS TOLANEY: I'm not sure they fit within those three textual points on section 8. They are relied on in support of, but --

MR JUSTICE MARCUS SMITH: Yes, I think they probably fall under your heading 3, that they go towards a reading of clause 8.02 that draws a line at some point temporally between claims that are as it were pre-existing and claims that are after-acquired.

MS TOLANEY: That's quite right and I'm coming on to that under the third head.

But just taking each argument in turn, the first

argument I have already addressed your Lordship on and is addressed at paragraph 29 of that note, that it is not sustainable, there is no evidence of such a proposition.

The second argument we say is no better and this is at paragraph 30 of the note. Because, my Lord, if your Lordship just turns up how this has been put, and you will see this in the note I have handed to you, first of all it is said in the reply position paper that it was upon the occurrence of the effective date that the release took effect, therefore it extended only to causes of action held on the effective date. In the written opening it was said that the section 4.04(b) envisages that the claims being released are ones held at the effective date. But Mr Geraghty then said the settlement agreement was intended to release only the intercompany claims held as of the bankruptcy date and in cross-examination it shifted to effective date. And then in oral closing submissions it was said, inconsistently, the release is a release of extant causes of action existing between the parties at the time of the settlement agreement but then later it relates to all of the causes of actions based on the facts or matters existing as at the date of the settlement agreement but they are released as at the

effective date.

So the case, that's why we have been saying it seems to be rather unclear, but looking at the words of section 8.02, insofar as all of this argument is derived from "upon the occurrence of the effective date", we say it just doesn't bear that sort of meaning. That is obviously saying when the release comes into effect and is akin to a condition precedent to the release because it was to ensure that it was conditional on the plan becoming effective that the release would then take effect. It is nothing to do with the substantive scope of the release.

MR JUSTICE MARCUS SMITH: So what you say is it is, as you say, when the release comes into force as opposed to what is released?

MS TOLANEY: Exactly. And that's exactly how it reads, because it is "upon the occurrence of". And I think that one sees that in the explanations that are given by LBHI they tend to use the words they are released "as at" the effective date or "on" the effective date, but the words are "upon the occurrence of", which is something rather different.

In any case, as I have said to your Lordship in the context of the earlier construction point, if they are right that the release are claims as at the effective

date, which is certainly one of the varieties of argument that they have gone for, then that undercuts their whole case about after-acquired claims for the reasons I have already identified.

One then has the fatal flaw in any case on that construction that the "upon the occurrence of the effective date" is given a particular meaning by LBHI, but they can't then construe unknown, unforeseen and unforeseeable and that's why, as I said to your Lordship, there was construction of those words. And Judge Gropper was in fact forced to accept in cross-examination that his assertion in paragraph 31 of his report, relied upon in the opening submissions of LBHI, didn't give any meaning to those words, that was at Day5/12:23 to 13:10. And we say that what happened then was, fatally for LBHI's case, he accepted that those words on their ordinary meaning must refer to future claims.

He attempted, your Lordship may remember, to salvage the argument by seeking to distinguish unforeseeable future claims from claims that were after-acquired and he used the analogy of a storm and the reference for your Lordship's note is Day5/14:3 to 15:3. That though is a distinction, if your Lordship goes back and reads that passage, without any difference at all, because

a claim arising from damage caused by an unforeseeable future storm is still an after-acquired claim.

He also in cross-examination abandoned his original position at 27 of his report that the words of a general release, however wide, would always be limited to claims specifically in the contemplation of the parties at the time of the release, because he conceded that it was in fact possible to release unknown claims but only where the court has concluded that unknown claims are within the contemplation of the parties.

The cases that he therefore relied upon, as we set out in paragraph 36 of the note, didn't take the matter any further, for the reasons we give there. Even in the personal injury context it was accepted if the language had been clear enough -- and your Lordship may remember it didn't include the words "known or unknown". If the language had been clear enough even in that context, with its own particular policy considerations, the court still said it would have given effect to the words of that clause. And the other cases which we identify as the second category are ones in which the generally worded release was given as part of a resolution of a specific dispute generally between unsophisticated parties and as Judge Smith pointed out, that principle we say has no application to a comprehensive settlement

agreement in this context between sophisticated parties.

So that then left, prior to yesterday, the outstanding claims point. And the outstanding claims point if one starts with first of all the recitals, my Lord, it just doesn't bear the meaning or the emphasis that LBHI would seek to give it, because it can't be read as limiting the scope of section 8.02, and it doesn't purport to. And that's the killer point. But even beyond that, looking at the language, it's not as narrow as LBHI suggest because it refers to all disputes.

But in any case, the purpose of the recital was undoubtedly to record aspects of what was factually happening and indeed nobody is challenging that they were desiring to resolve the outstanding issues between them. They were desiring to resolve all disputes between them. The use of the word "other" doesn't in our submission limit the term "all disputes". And even if the recital could be read as then expressing a desire to resolve -- let's put it in a different way -- the population of claims they knew about, when one then goes to section 8.02, it is not limited to that.

So the recitals just simply can't bear the meaning that they have tried to put on it and it is not reflected in clause 8.02 so it can't overwrite the terms

of the clause itself.

Similarly, if one looks at sections 4.05 and 5.05, my Lord this was addressed in our skeleton argument at paragraph 119 and that's at bundle B, tab 3, page 42. If one looks at both clauses what you can see is that section 4.04(b) is expressly concerned with restrictions on the ability of the UK affiliates to assign claims released under the settlement agreement and similarly 5.04(a) is a representation that:

"Each debtor owns all claims it may have including all claims released hereunder."

Both clauses are not purporting to suggest that claims falling within the release at any future time would not be covered by the relevant representations. And in particular if one looks at 5.04(a) you can see that it owns all claims it may have against a UK affiliate "including all claims released hereunder". Well, the whole construction of the release clause is that upon assignment the release captures the claim that's been assigned whereupon the debtor is making the representation it is making correctly and it is interesting to contrast (ii) of (a) because that actually refers to the execution date.

So all these clauses are concerned with is just simply that a need to ensure -- and it actually goes to

my commercial purpose argument and I think I put this to Judge Gropper in cross-examination, that they go to needing to ensure that somebody isn't going to come along and say later "Well actually I owned that claim that you purported to release". It is again a way of shoring up the scope of the release to all future claims and all present claims known or unknown so that a line can be drawn and we would say there is nothing inconsistent in this language upon the analysis -- the only reason it would be inconsistent is if one followed the analysis of Mr Phillips that you had to tie the release clause into a particular date and the claim had to exist at a particular date in the hands of LBHI and therefore then it would fall within this clause. His construction goes one way, mine goes the other; these clauses don't take it any further.

Can I then come on my Lord to the new construction argument --

MR JUSTICE MARCUS SMITH: Well, pausing there, just to ask you a question about either 5.04(b) or 4.04(b), because the same point arises in each, you said in describing the commercial purposes of this settlement that one of the purposes was to stop after-the-event acquisition of claims thereby prolonging that which was intended to be put to bed.

MS TOLANEY: I think I said it in the terms of a general buying up of claims.

MR JUSTICE MARCUS SMITH: Yes, exactly so.

If you look at 5.04(b) there is a fairly clear express prohibition on the assignment of claims that are "released hereunder", and equally in 4.04 one has got a prohibition on assignment, which seems to be directed to the preventing of that sort of later dealing in claims and the question that I've got is do these two provisions suggest that you need to have, to use Mr Phillips' phrase, some kind of jural relationship because without that you don't have anything to transfer or assign and therefore does that inferentially lead you to a restriction on the scope of 8.02?

MS TOLANEY: No, my Lord, in the sense that this is dealing with -- it is actually headed "No prior transfer of claims", section 4.04.

MR JUSTICE MARCUS SMITH: Yes, 4.04 is; 5.04 isn't.

MS TOLANEY: No, but this is trying to take away the mischief of actually dealing with the allowed claims if you look at (b), 4.04(b), so you can't release anything provided that after the effective date you can participate any of the allowed claims.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: And similarly 5.04(b) excludes out of its scope

the JPM and excluded items. Nothing here would stop somebody going off and I think buying up from a third party to the agreement claims and so it doesn't cover that scope.

MR JUSTICE MARCUS SMITH: No, I understand that, it doesn't cover that, but what it is doing is it is fairly carefully delineating an inability to transfer or deal in claims and I suppose my question is if one was seeking to prevent the later acquisition of Lehman claims, why not simply have a further prohibition in section 4.04 or 504 saying "Look, you may not acquire claims by whatever way from these particular parties"? Wouldn't that be a slightly neater way of achieving what you say 8.02 achieves?

MS TOLANEY: Well, in a way, my Lord, not really and the reason I say that is because even when your Lordship just said that, you said "from these particular parties", the truth is you may be in a situation where you couldn't identify precisely which claims they might be, or who from. You might not want to get into naming lots and lots of other different parties and in a sense the reason why you don't need to is because what you've got here is such a broad release, you've got it covered, because what's being said is even if the claim as at this date is unforeseen, if it is against PLC for these

purposes you have released it, you have drawn a line, so the release covers we would say into the all possibilities and that's why it is worded in the broadest of terms and I don't think you could read it down from the absence of something further expressed that might have been quite difficult to articulate.

Just to put it this in context, your Lordship is picking up, I accept perfectly fairly, on a point I made about the commercial purpose being to draw a line and saying it would be inconsistent with that purpose if that someone went out and bought claims up, but that does not mean that that inconsistency with the commercial purpose had to be recorded expressly. It may have been regarded as rather obvious that somebody wouldn't do that.

So, my Lord, I would submit to your Lordship that the absence of an express "You can't do the following 20 things in the negative and here is everything I could think of" is unnecessary when you have a release saying "You can't bring a claim between each other" essentially.

My Lord, can I then move on to the new construction argument and what I would just like to emphasise to your Lordship, and I'm sure your Lordship has picked this up, this is the first time it has ever been

articulated. So in oral closing submissions a new argument that was said to be based upon the plain and ordinary and natural reading of the clause was advanced for the first time. I only make that point forensically, because if it was so plain and obvious from the ordinary meaning one might have expected it to come in one of the many written documents and to have been put to the witnesses where all other points were made. The reason it hasn't been advanced before is because it has only just been thought of and the reason it has been thought of is because of the concessions that were made in evidence by Judge Gropper, which left very little room for the previous argument.

MR PHILLIPS: My Lord, there is a limit. The reason was that my learned friend raised unforeseeable --

MS TOLANEY: My Lord, I can't just be interrupted. It's discourteous.

MR PHILLIPS: -- for the very first time in her oral opening.

MR JUSTICE MARCUS SMITH: Mr Phillips, it is a jury point, none the worse for that, but I will make the point that sometimes late arguments are sound. I entirely take your point, but ...

MS TOLANEY: I only make it -- obviously, my Lord, if it is a good point I have to deal with it, but I make it

because it is being said to your Lordship -- and it is relevant. It's not just a jury point, it is relevant that, because it said that this is on the ordinary meaning of the language.

Now, my Lord, can we just turn up, because I don't want to do Mr Phillips a disservice otherwise I will be interrupted so many times I will never get to the end of my submissions, so why don't we look at exactly what he said and this is at Day 7 of the transcript, and it starts at -- I think we should pick it up at page 47 of yesterday's transcript. At page 47 Mr Phillips is going through the words of the clause and if one picks up at line 10, he says:

"So that is then identifying types of claim, types of claim that are included in the words "all causes of action". And there is a fraud exclusion and we then come to what those types of claim may be ..."

Then he reads them out. He then says we have "a series of juxtaposed concepts" and then we get to the assertion in line 3 of page 48:

"There are six objective elements. If one looks at these, there are subjective and there are objective."

Now, I have to say I had to read this passage -- with no disrespect to my learned friend who may be far more astute than me -- several times because I really

didn't understand how one would read section 8.02 in this way, because what he seems to be doing is picking out random words and saying one is objective, one is subjective. But he says "the six objective elements" then he lists them out, then at line 10:

"There are then two subjective tests."

I don't know what he means by the word "tests". As he said, there is a description of the types of claim, but he has just introduced the word "test" --

MR JUSTICE MARCUS SMITH: I think the distinction he is drawing is between the description of a claim that is simply the case as a matter of law, so one can for instance say definitively whether a claim is accrued or not. It is simply a question of the consideration of the local law as applicable to that claim and so that, as I understand it, is what he calls objective. Subjective is something which is dependent upon the state of mind of the persons party to this agreement and you can see it I think in the contra-distinction between on the one hand foreseen and unforeseen and foreseeable and unforeseeable, so the latter is objective and the former is subjective. That distinction I get. Quite where it goes I'm less sure.

MS TOLANEY: Well I would just take one step back because on the wording here it has been suggested that there are

two subjective tests, known or unknown, foreseen or unforeseen, that's the language used, lines 10 and 11. Now, of course known is not a subjective question necessarily. Where something is known -- the way it was used by Mr Geraghty was it was an identified population. That is factual. It could be subjective, but it could also be objective: is it factually listed?

MR JUSTICE MARCUS SMITH: The question is always: known by whom, isn't it?

MS TOLANEY: Perhaps.

MR JUSTICE MARCUS SMITH: That's what I suspect one gets the subjective element.

MS TOLANEY: Perhaps. But it could have an objective element too if known is intended to refer to, as Mr Geraghty suggested, an identified population of claims.

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: And also, just picking up that theme, Mr Phillips himself then said -- I will just skip on but I would like to come back -- at page 49, lines 12 to 19, that unforeseeable was objective. So it was not very clear which he said fell into which category.

One then gets to line 12 on page 48: looking at the objective elements, a number of them overlap. That may be right. I think what's true is a number of the

different categories overlap because you could have a claim that was unknown and unforeseeable, you might not. But then you get the statement at line 20 on page 48:

"Any of the subjective elements can apply to any of the objective elements."

And then the statement on 49 that because of all of this, which is Mr Phillips' own take on the clause:

"... what you cannot do when construing this part of the release is to parse each constituent word into just that word and say 'Well, what does that separately from all other words refer to?'"

So what he then does, entirely unilaterally, and we will come back to look at the words of the clause, is to suggest that, as the reading on an ordinary and natural meaning which is so obvious to any independent reader, you pick out from this list different words and what you do is that you then have to apply a two-stage test, and it is line 8, "so that you should have a claim that is either" one of the types he identifies. And then line 11, "and you then apply the state of mind to it". And then line 14:

"But you have to fit it into accrued/unaccrued [et cetera] before you ask was it known or unknown ..."

Then line 20:

"The fact that something is unknown or unforeseeable or any of the above does not mean you have a claim because you have to fit into those objective parts first and what we submit when you construe this, my Lord, is it is illegitimate to take the subjective elements, foreseen and unforeseen, and that say an after-acquired claim was unforeseen, it may have been unforeseeable and therefore after-acquired claims fall within clause 8.02. The subjective state of mind, without first finding the objective existence of a claim, is not enough."

Now, just pausing there, what Mr Phillips is saying is that, somewhat late in the day, one obviously has to read what is plainly simply a comprehensive and comprehensible list of different types of claims, accrued or unaccrued, foreseen or unforeseen, not in the way that the natural reader would read the list of claims but picking out different words on his objective and subjective test, then applying a two-stage test that you have to somehow be both objective and then subjective -- I just simply don't know how you read it that way or how you get to that on the words, but all of it is designed with the ultimate aim of the case to say "Ha-ha, that's why if it is an unforeseeable claim it doesn't work because it has to have been an accrued claim first and therefore unforeseeable."

MR JUSTICE MARCUS SMITH: I may be doing Mr Phillips a gross injustice, but I don't think he was saying that.

I think what he was saying, he was mounting an attack on the point that both I have made and the US law experts made, that one should read agreements so as to avoid redundancy of expression, in other words one should give each term its distinct meaning and I think what he was saying was that although no doubt that is a general proposition of construction under both US and English law, it didn't apply in this case and that what one had was descriptors of claims which to a greater or lesser extent overlapped in the sense that one could have a given claim that would tick multiple boxes.

I don't think he was going so far as to say --

MS TOLANEY: Well, my Lord, I think he is, with respect.

MR JUSTICE MARCUS SMITH: Is he?

MR PHILLIPS: Your Lordship is absolutely right.

MR JUSTICE MARCUS SMITH: Ms Tolaney, we may be able to shortcut that. If it Mr Phillips is not saying that then we can take it more quickly.

MR PHILLIPS: Your Lordship articulated it absolutely correctly.

MS TOLANEY: Right. Well, my Lord, I have to say if your Lordship reads over page 50 and our note as to the passages, the whole point of this argument as

I understood it was to say that the clause doesn't apply simply to unforeseeable claims because if you have to find an objective element first you then can apply it as pre-existing.

MR JUSTICE MARCUS SMITH: Well, it sounds like an awfully clever argument but it seems to me it is a little bit too clever given the way the clause is read. I don't think one can apply these restrictions conjunctively. I mean the point that you are articulating is one that goes a stage further than simply overlap.

MS TOLANEY: Indeed.

MR JUSTICE MARCUS SMITH: What you are saying Mr Phillips is saying -- which he isn't, but the argument you are dealing with is to say that you've got to read these criteria or descriptions of claims in some way conjunctively so that you have to tick two boxes before it actually --

MS TOLANEY: Yes.

MR JUSTICE MARCUS SMITH: That clearly can't be right.

MS TOLANEY: I'm grateful, my Lord, because that's the argument I thought I was tackling.

Insofar as it is being said you don't need to give each different word a different meaning, first of all, all English lawyers and indeed his own expert try and construe a contract giving a meaning to each clause.

Our construction isn't suggesting that the words foreseen and unforeseen would apply distinctly to a particular category of claim and nothing else. That's not what we are saying. Obviously, and I think I put it to one of the witnesses, you could have a claim that was both unknown and unforeseen, but you do have to give a meaning to the words unknown, unforeseen and unforeseeable and that is what Judge Gropper and LBHI didn't do and we submit have still failed to do.

MR JUSTICE MARCUS SMITH: Yes, so I think what you are saying is that particularly in a list like this a degree of overlap is to be expected but that -- again one isn't articulating a hard and fast rule, but one would seek to avoid a construction that involved tautology, in other words one is not going to have synonyms. So you will have perhaps an overlap, but they will be each directed at a slightly different point.

MS TOLANEY: Exactly. And the reason why you have such a long list and comprehensive list, with the risk of overlap, is because --

MR JUSTICE MARCUS SMITH: Is to make it all-embracing.

MS TOLANEY: Indeed.

My Lord, is that a convenient moment?

MR JUSTICE MARCUS SMITH: Yes indeed, Ms Tolaney. Thank you very much. We will rise for five minutes.

(3.17 pm)

(A short break)

(3.26 pm)

MS TOLANEY: My Lord, just finally finishing on that point, essentially therefore what we submit is that the construction advanced by LBHI doesn't give effect to the words foreseen, unforeseen, unknown, but simply tries to fix the claims at a particular point in time and tries as well to introduce a second restriction of it being only between the parties to the agreement as at that fixed point in time and the words "factual nexus" were used. In our submission that isn't right on a true reading of, to use your Lordship's words, the all-embracing clause and in order to give a proper meaning to it what one has to stand back and do, as well as looking through the individual clauses, is to stand back and look at broadly what was trying to be achieved here having regard to the language and the other provisions of the settlement agreement and what was trying to be achieved here was a broad and general release save those matters that were expressly carved out, and even, as I say, Judge Gropper had to accept -- and I referred to his storm analogy. Even on that analysis, even if it wasn't and I was wrong an after-acquired claim, he was certainly accepting it

was an unknown claim and he was unable really to distinguish for the purposes of LBHI's argument how his argument fitted in and gave meaning to those words and that is why he ultimately in my view had to make the concession that future claims were what was being referred to by unknown, unforeseeable and unforeseen and once you have that point in mind, all that LBHI is left with is a reading that we say is impermissible, which is to try and limit the claims to being held at a certain date, because otherwise you can't get any further.

So, my Lord, what we say is the construction that they are advancing doesn't work on the words, it doesn't fit with the purpose and it doesn't sustain on any sensible reading of the contract.

And in answer to your Lordship's point over the other clauses of 4 and 5, I have already addressed that, but obviously one of the points there is that a party -- those were dealing with a releasing party going off and selling its claims. It may just simply not have been envisaged that LBHI as here would take an assignment of a debt years down the line, particularly of a claim, which I'm going to come on to, that appeared to have, or appeared to be given no value and then be in litigation, and in any case even if it was anticipated that there might be such behaviour, a broad release and no doubt

lawyers acting would say "Well it is unlikely that would happen but a broad release here would cover that" because they're releasing every future claim.

So in a sense what it does is demonstrate why you would have such a broad release.

My Lord, may I then move on to -- and I will take it briefly -- the commercial purpose argument. What we say is notwithstanding the submissions that were repeated that it was all about the language one only has to look through the transcript yesterday to see that every opportunity what was referred to was in fact two points: one that it was suggested it was terribly uncommercial for me to give away a big claim; and two, the extrinsic evidence supported that that wouldn't have been done.

Just dealing first of all with commercial purpose, what we say is that the commercial purpose of the agreement is apparent from the terms of the agreement itself, as your Lordship knows, and there is no need to go beyond it, and you also have the mutual release of the clauses, so one has to be careful when looking at concepts and arguments about commercial purpose that parties aren't in fact using commercial purpose to circumvent the actual terms and that's what we submit is happening, that the commercial context that's obvious on the face of the agreement we say is sufficient to show

the commercial purpose, and just taking the points very briefly because I'm conscious your Lordship will have them.

First of all the release we say just draws a line except for identified claims that plainly, as Mr Phillips put it yesterday, were a bit more complicated and had to be held over for another day, but otherwise having had this detailed lengthy negotiation they were trying to move things along to basically cease to exist, to wind themselves up. And what we say is in that context you've got affiliated entities within a complex corporate structure. Each entity presumably knew the other's business pretty well and therefore there was a reason why a line would be drawn in a way of releasing everything, unless it was something that somebody was making a fuss about there and then and needed special treatment.

The second point we say is that if you are looking at the text of the agreement -- this is at paragraph 62 of the note -- it wouldn't have made any commercial sense for LBHI to release its secondary claims in respect of the PLC subdebt but to retain its ability to acquire the primary claims. And I made this point in opening that at the time of the settlement agreement LBUKH had already asserted a guarantee claim against

LBHI in respect of the PLC subdebt and that was an allowed claim under the settlement agreement, so LBHI knew that it might in principle be required to pay substantial amounts in respect of the PLC subdebt to LBUKH, but it released pursuant to clause 8 its secondary rights to pursue PLC for any such sums and in it so doing it must have appreciated the scope of that.

The release of the secondary claim makes perfect sense we say because of the desire to draw a line under the disputes between the debtors and the UK affiliates, but if that's why it makes sense then it made no sense for LBHI then to retain the ability to claim the primary debt as against PLC, because it would only undermine the plausible reasons for releasing the secondary claim.

So we say on the face of 8 as well the commercial purpose undermines the submissions being made.

We also make, in paragraph 63, the abuse point that I have highlighted before.

Then finally, my Lord, fourthly on commerciality, can I say something about the mantra that was advanced by many of the witnesses as well as in submissions that there was something terribly unfair because this was a $2 billion claim.

MR JUSTICE MARCUS SMITH: Sorry, just pausing there. Looking at your paragraph 63, isn't the blatant abuse

prevented by the clauses we were discussing earlier, clauses 4 and 5, in that you can't effect a transfer by debtor away and then have a retransfer back? You obviously can have a retransfer back, but I'm not sure how you get the transfer away?

MS TOLANEY: You do it before the settlement agreement.

MR JUSTICE MARCUS SMITH: Right. I see, so what you are postulating is when the release is being negotiated but isn't binding a series of transfers out. Okay, I see.

MS TOLANEY: My Lord, the fourth point, it was suggested that there was this terribly unfair proposition, but just standing back, your Lordship knows, and I think your Lordship put this to me, that obviously our construction of the clause would apply to an arm's length construction, because I'm just reading the clause, but just on this particular point lots of things have been said about the particular value or the particular parties and in that context it is obviously relevant to note that this was an intra-group transfer, there was no arm's length transaction and the same person signed on behalf of both sides on the notice of assignment.

In fact there's no evidence before your Lordship that LBHI paid anything at all for this. I'm not saying they did or didn't, I'm just simply saying that if it is

going to be said "Oh, well, it is terribly unfair, we wouldn't have given this away", first of all, they haven't established that they paid anything at all. Secondly, as your Lordship knows -- and I won't labour the point because it was put to so many witnesses -- there is no evidence that at the time of this agreement the claim had any value at all, given the way it was treated in all the literature and accounts.

So, my Lord, that is quite a relevant point in answer -- it's only an answer to some of the commercial cris de coeurs that have been made, but irrespective of that -- it was said against me in opening but I make the same point -- if what's happened at the end of the day is that a release clause bites on a claim that after the event, years later, suddenly the releasing party realises had a value, that doesn't change the construction of the clause. If somebody has made a bad bargain, that happens, and that's why in that context, for example, my Lord -- I told you about the context --

MR JUSTICE MARCUS SMITH: They haven't really made a bad bargain, what they have done is they have made a mistake.

MS TOLANEY: Made a mistake.

MR JUSTICE MARCUS SMITH: If your reading of the clause is right then it's not, as it were, uncommercial, it's

simply that they have mistaken the ambit of the release that they had signed up to with the result that what would otherwise be a transfer of a valuable or valueless claim, who knows, becomes a released claim. And I'm not sure that the term "commerciality" comes into it. It seems to me it is just the consequence, if you're right, of the agreement.

MS TOLANEY: Indeed. But the reason why I'm just highlighting it, and your Lordship has anticipated my next point, unlike in other contexts there's no application for rectification here. There's no suggestion that there was a communicated mistake across the line here. Your Lordship, to take any account of the sort of evidence that was put before your Lordship to undermine the construction, would have to have the clearest of evidence that there was a mistake and something had completely gone wrong and there's nothing, there's absolutely nothing. And if anything Article 17 would also shut out quite a lot of that material because it is yet another indicator that this agreement was to be read on its face.

MR JUSTICE MARCUS SMITH: That's the entire agreement clause.

MS TOLANEY: No, it is the entire agreement clause and also the sophisticated parties being recorded as having

negotiated the clause.

MR JUSTICE MARCUS SMITH: Fully negotiated, yes I see.

MS TOLANEY: My Lord, I have addressed this in a little bit more detail but I don't propose, having engaged your Lordship on the point, to say any more orally. It is covered in slightly more detail from paragraph 64 to 68 onwards, but the essential point has been made.

Turning then, my Lord, to extrinsic evidence and subjective intentions. I say this -- and I will approach this at a relatively high level because I approach it with a massive health warning that I just don't think we get here, I think it is highly dangerous, but I would like to say something about it given what was said yesterday about some of the evidence of Judge Smith.

The starting point, as we say at paragraph 69, is that the court should only have regard to extrinsic evidence if the meaning can't be determined on the basis of the language itself and given that both parties -- whichever way your Lordship goes on construction, but both parties are saying the language is entirely clear, it suggests that none of this really comes into play, and we say it doesn't. What we say as well is that Mr Geraghty's evidence just demonstrates how terribly dangerous it could be for a court to look at this type

of material, which is why under both New York law and English law this type of evidence is so readily shut out, because Mr Geraghty accepted, as he must, that he can't speak for any of the UK affiliates or explain any of their motivations for post-contractual conduct, nor could he identify any contemporaneous expression of LBHI's alleged subjective intention, let alone anything objective.

We say something in this note nevertheless about Mr Geraghty because yesterday LBHI relied upon aspects of his evidence and we would suggest that if your Lordship even goes near this evidence it would have to be treated with extreme caution because for the reasons we articulate, I think perfectly legitimately and I say it not lightly, he was not a satisfactory witness and the reason he was not a satisfactory witness was that he was plainly very entrenched in achieving a particular result for LBHI and there were three examples of that, amongst many, that we identify in the note.

The first was the attempt to suggest that the claim was worth 2 billion. Yesterday it was said "Oh, it was never said it was worth 2 billion, it was said it had a face value of 2 billion", that was what was said in oral submissions. That is not right and that's not the

expression that was used in either the skeleton argument or in Mr Geraghty's statement, it was suggested that the value of the claim was 2 billion and that was a retreat because clearly it wasn't. As Mr Geraghty accepted, the claim was valued at zero at the date of the settlement agreement.

The most egregious example though of his evidence being evidence one would have to treat with caution was what was said in relation to Mr Keen and the 2014 STG settlement agreement, because Mr Geraghty in his oral evidence -- and your Lordship can take from me that we have tried to be very careful in setting this out accurately with the references -- he tried to suggest in his oral evidence that his witness statement recorded his conversation with Mr Keen which essentially was to the effect that Mr Keen had told him that the relevant phrase in no way insinuated that after-acquired claims or assigned claims would otherwise have been released. But when your Lordship comes to look at, if you do, paragraph 77 of his very crafted statement, it is a paragraph that really does bear reading more than once, because it is quite an egregious paragraph. It first of all doesn't say what Mr Geraghty tried to suggest it does.

MR PHILLIPS: My Lord, I think your Lordship should read the

paragraph. I think my learned friend is suggesting that Mr Geraghty was telepathic and that Mr Keen didn't speak to him but he was -- I think you need to see the paragraph, my Lord.

MS TOLANEY: I almost got half an hour without an interruption, my Lord. I'm getting better.

My Lord, it is at tab 7 of bundle C and it is at page 105. So what is asserted is that John Keen was involved in negotiating the statement and has reviewed it in draft:

"Mr Keen does not recall any of the parties ...(Reading to the words)... following their transfer."

Now, that paragraph doesn't say -- it says he has reviewed in draft, it doesn't say "I, Mr Geraghty, have spoken to Mr Keen ..."

My Lord, I'm terribly sorry, Mr Phillips just has to stop shouting out. I know he is getting very agitated but --

MR PHILLIPS: No, but, my Lord, this is very serious and there is a question of professional propriety involved here.

MS TOLANEY: Well, standing up and interrupting is true.

MR PHILLIPS: Excuse me --

MS TOLANEY: Don't say excuse me when you are interrupting my submissions.

MR PHILLIPS: No, I'm sorry. Very serious things are being said about Mr Geraghty, who is sitting in court and as your Lordship knows is a very senior member of the Chapter 11 team at Lehman. My learned friend is making some suggestions about his evidence that frankly should not be made but nevertheless she is making them and if she wants to comment on his witness statement she should read it, and the suggestion that his witness statement does not record what he was told by Mr Keen, which is what he said in his evidence, is a matter that she should think very carefully about before pursuing.

MS TOLANEY: Well, my Lord, first of all I'm getting to the point of wanting to make a complaint about the interruption and disruption to my submissions.

Secondly, I object to being referred to repeatedly as "she". Mr Phillips should be courteous.

Number 3, I'm entitled to make submissions as I see fit. If your Lordship thinks they are inappropriate I will stop, but your Lordship should have in mind that I put this to Mr Geraghty and if one wants to turn up the cross-examination, this was put fairly and squarely.

MR JUSTICE MARCUS SMITH: What exactly are you saying, Ms Tolaney?

MS TOLANEY: What I'm saying is that the witness statement doesn't record -- and it is a surprising paragraph --

that Mr Keen had a specific discussion with Mr Geraghty in which he said, as Mr Geraghty tried to suggest, that the relevant phrase in no way insinuated that after-acquired claims or assigned claims would somehow otherwise have been released and Mr Geraghty when I put it to him accepted that, because Mr Geraghty was trying to suggest that Mr Keen was endorsing his evidence and in his cross-examination -- and the reference is Day4/102:7 to 103:17 -- that it was his subjective speculation that it was belt and braces.

The reason this is important is because this is the evidence that has been relied upon by LBHI. It is quite a surprising submission for them to suggest that the other side can't challenge the quality of the evidence, which is what I'm properly doing, by reference to questions I properly and fully put in cross-examination and the submissions I'm making are as a result of the contrast between what was suggested in cross-examination and this paragraph, which is an odd paragraph. Your Lordship needs to treat the evidence with caution.

But the second point, which I also put fairly and squarely, was that one would have expected this paragraph to have engaged with the fact, candidly, that Mr Keen and Mr Ehrmann who led Mr Geraghty's team both signed both the 2011 and 2014 agreements; it doesn't.

And what we say is that it is legitimate for us to invite your Lordship to draw an inference that Mr Keen certainly, who has been spoken to, and/or Mr Ehrmann, were not prepared to come to court to say that they agreed with the construction of the 2011 agreement, having negotiated and concluded the waiver in the 2014 agreement.

Now, my fallback point is even that submission demonstrates that your Lordship can't really engage with what was or wasn't in the minds of these people and that's what Mr Geraghty's statement is trying to encourage you to do but from a very, we would say, not frank perspective or full perspective at the very least and that that is precisely why this evidence is so dangerous.

The third example, which we also refer to in the note, was the claims schedule. Now, Mr Phillips can't really criticise me for responding on that given that he put a note in himself suggesting that we had got it all wrong in our cross-examination, so I don't know whether we will get objections to that, but perhaps your Lordship will look at the note.

The fact that that four points were put to Mr Geraghty in cross-examination about his claims schedule and this is at paragraph 82. Now, he relied on

this claims schedule, as we say at paragraph 80, as demonstrating that there had never been any assertion by the parties listed that any of the claims were released. We put a number of points to him and you can see that first of all we put to him that insofar as we relied on the fact that the UK affiliates were creditors of LBIE who did not object to LBIE paying distributions on after-acquired claims, that may well have been because they were paid in full and did not care and he accepted that all the parties to the settlement agreement would have been paid in full by LBIE.

The second point was that claims 18 and 19 in his schedule were irrelevant because the only creditor of LBUKH RE Holdings at the time of the assignment was LBHI and it made no economic difference to whether the claims were or were not released and again there was a concession by Mr Geraghty which we record.

The third point is that the release of claims 38 to 40 was waived by LBIE under the STC settlement agreement, so the fact that distributions were paid on those was in no way inconsistent with Deutsche's case on the settlement agreement and again Mr Geraghty had to accept that.

Now, it is said that they are included in the schedule for a particular reason, but the point is that

he never said that in his statement. He presented them in a different way.

Then fourthly, and these were the ones that I was criticised for, a material number of claims that form part of the security package for the LBHI2 Financing Ltd loan were not released and were instead expressly carved out. Now, he clarified in re-examination that these claims weren't part of his claims schedule, but in a sense that misses the point. I fully accept that, but Mr Geraghty relied in his witness statement on these claims as indicating that the UK affiliates ascribe value to claims that would have been released and we say that's just not correct.

So, my Lord, the reason I have gone through the evidence of Mr Geraghty notwithstanding the criticisms of that is that what I would say to you is that we didn't regard his evidence as satisfactory for a number of different reasons. I fairly put paragraph 77 to him and I invite your Lordship to look back at the transcript, and we say that insofar as your Lordship -- and it is only in this regard -- would otherwise be persuaded because it was said yesterday that Mr Geraghty was the only person who was there giving evidence and therefore he could tell your Lordship precisely what was intended and your Lordship should have regard to it, it

was also suggested that the claims schedule was reliable and the evidence of monies being paid completely undercut Deutsche Bank's arguments, those were the two points and they were made five or six times.

MR JUSTICE MARCUS SMITH: The point about the schedule was that, if I understood it correctly, a number of parties had made the same mistake as regards the width of the release. That I think is what it goes to.

MS TOLANEY: That's what would be being said and our answer to it was, even on the information that we have as a third party, we were able to demonstrate that there was no mistake in relation to a number of the claims, either because they didn't come into the scope of the release, as in the STG claims, or because there were good commercial reasons potentially why the deal would have been done and that was just a snapshot. Obviously we can't get into the minds of every person, and the two points we were making was that 1, therefore the claims schedule wasn't actually reliable evidence on its face of a mistake on the part of all these people; but secondly, what we said was it was presented in such a way as if it was when it was obviously able to be attacked in a number of respects, and that was even just on a cursory bit of knowledge. One would have to invite evidence from every party to every transaction to rely

on that claims schedule and to understand whether it really did demonstrate the point that it was relied upon for and that material is not available and so that's why I started by saying it would be dangerous to rely on evidence of this nature, because one could never be sure as to where it went.

MR JUSTICE MARCUS SMITH: Yes. Well, inevitably anything that I say now is subject to further consideration, but I think I should put on the record that I am certainly at the moment in agreement with both of you that this matter is going to turn on matters of construction of black letter points rather than these matters.

MS TOLANEY: Indeed.

MR JUSTICE MARCUS SMITH: I think though, given the criticism that you have made of paragraph 77, I think I should make it clear that I am fully sensible of the probative value, or rather absence of probative value, of subjective assertions as to what an agreement means. I don't think it is necessary to go further in relation to paragraph 77 than that. It seems to me that what one has got is an attempt by Mr Geraghty to articulate what he thinks other people thought about the agreement.

MS TOLANEY: Exactly.

MR JUSTICE MARCUS SMITH: And I am not going to criticise him for doing that. What I'm trying to do is put down

a fairly clear indicator that I'm not sure that paragraph 77 is worth the time you are spending on it, but I understand why you are doing it.

MS TOLANEY: Indeed, my Lord, and I don't invite your Lordship -- I should make absolutely plain --

MR JUSTICE MARCUS SMITH: No, you made it clear right at the beginning.

MS TOLANEY: -- I am not inviting your Lordship to engage with any of this and therefore to make any criticism at all. I'm simply saying that because the point was taken against me, and if you see the transcript, so many times, I had to deal with it.

MR JUSTICE MARCUS SMITH: No, of course you did, but I'm conscious that you were going quite far in terms of criticising the quality of Mr Geraghty's evidence and I'm not sure that that point is one that I would agree with. On the other hand, to the extent that you are criticising the quality of the points that he is making, I see the force in what you say.

MS TOLANEY: Indeed, my Lord.

The only other point that I need -- if your Lordship -- just to put this in context, obviously a part of a speaking note was handed up yesterday that heavily relied on the evidence of Mr Geraghty -- I don't know if your Lordship has that?

MR JUSTICE MARCUS SMITH: I have it here.
MS TOLANEY: It was described as compelling evidence, which is one of the reasons I have taken your Lordship to it.
MR JUSTICE MARCUS SMITH: No, I understand where you are going but it seems to me, both to save your time and indeed Mr Phillips' in reply, that an indicator along the lines that I have given might assist.
MS TOLANEY: The one thing I should address is that it was suggested that the letter from Dechert was somehow probative, that's at paragraph 16.3, to which the answer is your Lordship should look at that letter. We say again it is quite carefully drafted and one doesn't know what the thinking was, whether they got it right, what the motivations were, so the same point applies. But I think other than that everything else has been covered in what I have said.

My Lord, then that then takes me finally on this topic to the appendix which we put in on the evidence of Judge Smith.

MR JUSTICE MARCUS SMITH: Yes.
MS TOLANEY: Again I don't think I need to take court time up on this unless your Lordship would like to be taken through it. There were some heavy criticisms made yesterday of Judge Smith, or certain statements were made in submissions about what his evidence was, in

terms of it being suggested that there were concessions. We don't accept that and we have tried to identify examples -- obviously we have had to go for the examples in the time available -- of where perhaps if one read the full transcript or the full evidence of Judge Smith the submission made by LBHI is not a fair presentation and ultimately what we would say is to the extent that it becomes relevant and, again rather similarly to the points we have been discussing, I'm not sure it will do, we say that Judge Smith's evidence was both compelling and of a very high quality and to the extent of any disagreements is plainly to be preferred. But, again, I'm not sure that your Lordship needs to engage with that exercise.

MR JUSTICE MARCUS SMITH: No.

MS TOLANEY: My Lord, may I then come on to say something briefly about partial release.

MR JUSTICE MARCUS SMITH: Yes indeed. Just before you do, if you could pull up bundle E/16 page 506 up. When you were taking me to the article dealing with the construction, I noticed that there was another entirely to be expected provision in Article 16 regarding no oral modifications and it just seemed to me that this could be said to buttress the rule that I think both judges at the end accepted, that extrinsic evidence could only go

in where there was ambiguity and if one reads Article 16, it makes it clear that you can't modify or amend the agreement orally and if I were to reach the view that the agreement means X then even if there were compelling extrinsic evidence suggesting that the agreement meant Y, I'm not sure I would be allowed to look at it on the basis of this provision because I would be modifying the written agreement. So it is only in the case where I reach the view that it is unclear, ambiguous between X and Y that I can do so.

MS TOLANEY: Exactly.

MR JUSTICE MARCUS SMITH: And that's not simply because of what the experts have said, but also because --

MS TOLANEY: That's what the parties agreed.

MR JUSTICE MARCUS SMITH: -- the agreement is compelling me to that route.

MS TOLANEY: Indeed. I'm very grateful, my Lord, that's absolutely right.

MR JUSTICE MARCUS SMITH: Yes, partial release.

MS TOLANEY: My Lord, I'm raising this now -- I appreciate we only have ten minutes. We have set out our case in our skeleton argument and we understand it to be clear and the point that is made very clearly in our skeleton argument is that in the absence of a success on the primary case that there would be a partial release,

following the principles applicable to guarantees in circumstances where the surety has released any indemnity claim and what we say is that the case that we rely upon of Milverton v Warner World, which is a binding decision of the Court of Appeal and has statements of principle by both Lord Justice Glidewell and Lord Justice Hoffmann as he then was, is the end of the point.

We accept my learned friend's points on insolvency, namely that if you were in that scenario where you had a debtor and a surety competing that you would then in the rules of insolvency be able to each prove to ensure that one got paid. What we say is though we're not in that territory because there isn't a competing party and there is only one claimant and therefore you are into just the territory so well-known under guarantees.

And all of that is entirely set out in our skeleton. It was suggested yesterday that our position was unclear and that essentially that it was not known what we would say. I'm not sure that's right because the opening submissions of LBHI at paragraph 554 appear to suggest that points had been understood. It was secondly said that what was said in our position paper wasn't the same. Well, I accept that things may have moved on, but the essential point remains that payments by a surety

reduce the principal debt and the surety claim has now been released. And then thirdly it was suggested I think that the Milverton decision was a decision concerning a lessor, but we don't purport to rely on the facts of that case, nor do we see that there is a distinction to be drawn on the facts. It is a binding point of authority that we rely upon, the statement of principle.

So my Lord, I'm not sure where that leaves us. If it is being said, and it hasn't yet been said, that Milverton is a rogue case, or that it doesn't apply for some reason, then I would need to hear the reasons. I can tell your Lordship that there are a number of other authorities citing the same principle but we haven't cited them. Having got a case with frankly Lord Justice Hoffmann and Lord Justice Glidewell stating the principle very clearly it didn't seem to us to have any benefit to then produce a round of authorities on it, but I certainly can do. I'm reluctant to do that at that stage unless I hear what my learned friend has to say, but of course it is a bit rum that it would be in reply.

MR JUSTICE MARCUS SMITH: Well, I heard what Mr Phillips said about your written submissions. It seems to me that what he said was that when he read them he realised

how wrong you were and therefore he wasn't going to engage until you had rectified the glaring errors in your argument. So you of course are saying that it's lucid and right and it seems to me that given that you have nothing to add to your written submissions, I will take them, I will obviously re-read them, I'm not inviting you to add to them and I will make up my own mind as to whether you or Mr Phillips are right, but I don't think there is any need for Mr Phillips to explain in reply why you are your wrong because he should have done that I think --

MS TOLANEY: Exactly. I think that's my point really.

MR JUSTICE MARCUS SMITH: -- in his opening closing submissions. So there we are. So unless you have something new as it were to bring to the party, I'm --

MS TOLANEY: I don't at this stage.

MR JUSTICE MARCUS SMITH: -- more than happy.

MS TOLANEY: I was just anxious not to be bounced into a new point and then have given up any ability to deal with it.

MR JUSTICE MARCUS SMITH: No, I won't allow a new attack to be made on your written submissions when you don't know what it is.

MS TOLANEY: Indeed, my Lord.

May I raise then finally just points of housekeeping

and timing.

MR PHILLIPS: I'm sorry, if my learned friend would allow me just to ...

MR JUSTICE MARCUS SMITH: No, no.

MR PHILLIPS: The position in relation to this point of principle that my learned friend has just articulated is not dealt with in our written submissions at all because it wasn't part of their position paper, so we dealt in our skeleton with the position paper and there then appeared to be this new authority for this new principle which was in her skeleton, but quite how they are putting it, I don't know. And my learned friend now says there are other authorities, which is of some surprise but anyway, if she doesn't want to put those in I'm not going to invite her to, but the point is that I have nowhere addressed this supposed new point of principle. If my learned friend is telling your Lordship that how she has put it in it her skeleton is where she wants to leave it, that's fine, we will respond to that.

But there is a supposed point of principle and there's a supposed new case. I haven't put anything in this in writing about it. I can tell your Lordship that -- I was waiting to see how this was going to be developed so that I could understand the point.

MR JUSTICE MARCUS SMITH: Well, I think you will have to be aware, Mr Phillips, that you are skating on quite thin ice, because the fact is your response to the opening submissions of Deutsche Bank needed to be made I think when you were opening your closing so that Ms Tolaney had a chance to deal with any points in response. I'm not going to close you out from saying something, because that also would not be entirely fair, but I think you will have to confine yourself to exploring why on the face of it Ms Tolaney's argument in her written submissions is wrong, so I will not be particularly impressed if for instance you start wheeling out further authorities or new arguments.

MR PHILLIPS: No I absolutely won't do that my Lord.

MR JUSTICE MARCUS SMITH: If on the other hand you just want to show me that the dots that Ms Tolaney has joined are wrongly drawn then I'm sure I will be assisted by that.

But, Ms Tolaney --

MR PHILLIPS: My Lord, that's exactly what I'm going to do and I will do it efficiently.

MS TOLANEY: My Lord, the only concern I have about that is that Mr Phillips had the opportunity to do it and that is then leaving me without actually any opportunity to respond.

MR JUSTICE MARCUS SMITH: Well, as I say, I'm not going to

permit you not to have the last word on these points.

MS TOLANEY: I'm grateful.

MR JUSTICE MARCUS SMITH: I have made clear my expectations of Mr Phillips. If it is necessary, but I hope it won't be, if it is necessary that you need to put in a further round of written submissions confined to this point then I will certainly be open to that, but my expectation, given that you have pinned your colours to your written opening submissions and Mr Phillips' line is that they are just plain wrong, is that he can, without being unfair to you, explain their wrongness to me in reply, but I will keep a very careful eye on what points he makes.

MS TOLANEY: I'm grateful, my Lord.

Housekeeping

MS TOLANEY: May I then though just raise a question of timing. I can say this, that I have again stuck to my time so far today. Mr Phillips has obviously had an extra hour going along --

MR JUSTICE MARCUS SMITH: Yes.

MS TOLANEY: -- and is allocated 45 minutes for his reply tomorrow. I don't know whether you are going to be asked for more time but I think it would place some people in difficulties to sit late tomorrow, but also there does come a question of balance and fairness over

quite the amount of time being taken. But I leave that with your Lordship. I don't know about just whether we can at least agree an end time, if ...

MR JUSTICE MARCUS SMITH: Well, first of all, I have extended the offer to Mr Phillips, to Mr Beltrami and I must therefore extend it to you, so if you want 10 o'clock tomorrow --

MS TOLANEY: I don't, my Lord.

MR JUSTICE MARCUS SMITH: -- you may have it.

MS TOLANEY: I don't.

MR JUSTICE MARCUS SMITH: I entirely agree that it is a good thing to have a guillotine in terms of when we rise. I think I shall be clear that we will finish this case at 4.15. That said, within those limits, if you have had your say within your time or at your time and the same is true for Ms Hilliard, then I have no problem in Mr Phillips having more than 45 minutes --

MS TOLANEY: Neither do I, my Lord, that's absolutely fine.

MR JUSTICE MARCUS SMITH: -- if he wants it. What I don't want is for people to feel they are cut out for no good reason from having their say.

MS TOLANEY: Indeed.

MR JUSTICE MARCUS SMITH: So we will proceed on that basis.

Mr Phillips, you may I suppose say that you would like to have a 10 o'clock start.

MR PHILLIPS: I would indeed, my Lord.
MR JUSTICE MARCUS SMITH: Just because you want the time rather than Ms Tolaney.
MR PHILLIPS: My Lord, as a matter of functional reality, the only person who has in fact been guillotined at all is me and if we start -- as a matter of functional reality -- and I know I have had more time than we originally debated, I think I had about eight hours, my learned friends will have had something like 11. I would respectfully invite your Lordship to start at 10 if we could. If we find that we have gone along very well and that there is spare time towards the end of the day, that will be a good thing, but what I would respectfully want to avoid is finding myself rising to my feet at 3.30 and then under considerable pressure when a little leeway might alleviate that.
MR JUSTICE MARCUS SMITH: Well, Mr Phillips, I think everyone has been subject to a guillotine, it is just some people have managed to get their neck out of the way in time.
MR PHILLIPS: Well, I'm obviously in the basket.
MR JUSTICE MARCUS SMITH: In the basket. I'm very happy that we start at 10 for your convenience not Ms Tolaney's, but that will give you an extra half hour, possibly more, but I'm afraid the default is that you've

1 got a guaranteed three-quarters of an hour and if
2 circumstances permit there may be more, but that's in
3 the hands of --
4 MR PHILLIPS: My Lord, I understand and I'm sure
5 your Lordship and my learned friends will also
6 understand that at this point standing here, I couldn't
7 tell your Lordship whether I will be five minutes or 45.
8 That is something that I hope to know tomorrow.
9 MR JUSTICE MARCUS SMITH: I understand.
10 We will start at 10 and --
11 MS TOLANEY: My Lord, I should just say that Ms Hilliard
12 will be starting at 10.
13 MR JUSTICE MARCUS SMITH: Oh, I see.
14 MS TOLANEY: Because we thought logically -- first of all
15 you have not heard from Ms Hilliard and I'm sure you
16 would you would like to hear from her.
17 MR JUSTICE MARCUS SMITH: Indeed.
18 MS TOLANEY: And logically her argument is prior.
19 MR JUSTICE MARCUS SMITH: Is narrower, yes, I see. So
20 effectually she will interpose on the --
21 MS TOLANEY: Indeed. Ms Hilliard will go first and I will
22 then continue on the PLC ranking and discounting
23 aspects.
24 MR JUSTICE MARCUS SMITH: I understand.
25 MR PHILLIPS: My Lord, actually may I just raise one other

thing because my learned friend said when she handed in her very helpful note at the beginning of her submissions that it was in response to the note I handed in and I appreciate I handed a very short note in relation to the release issue, but this only deals with release. If there is a note that deals with the discounting point, if I could possibly have it it would help me enormously, because otherwise I'm going to have to respond to that, which is quite technical, tomorrow --

MS TOLANEY: There isn't at the moment.

MR JUSTICE MARCUS SMITH: There may be tomorrow morning I understand.

MR PHILLIPS: I don't know if I could extend the same invitation to my learned friend Ms Hilliard. It would just be enormously helpful if there is a note --

MS HILLIARD: There will be tomorrow.

MR PHILLIPS: But I can't have anything tonight?

MS HILLIARD: No.

MR JUSTICE MARCUS SMITH: Well that's, if I may say so, entirely understandable. If something is available before you attend court tomorrow then I would certainly not see it as a discourtesy to me if Mr Phillips got prior notice.

MS TOLANEY: Of course.

MR JUSTICE MARCUS SMITH: But I do understand the pressures that everyone is working under and I suspect it won't be very much before 10 o'clock, Mr Phillips. Good.

There is one point that I think I should put on the record in terms of the issues that I am having to address, because I have seen obviously and heard a great deal of reference to the prior position papers in bundle A. For the purposes of my ruling I am going to focus on the points that are taken in the submissions that have been made before me for purposes of this hearing.

MS TOLANEY: Indeed my Lord.

MR JUSTICE MARCUS SMITH: I will be looking at the position papers but have no intention of chasing each hare that has been run in the position papers.

MS TOLANEY: Well, my Lord, the very purpose, as I understood it, of position papers is to narrow the issues before trial such that the skeletons can then focus, so by definition in a sense they are redundant. I think both sides have used them at times forensically, but at the end of the day, as your Lordship said to me even on -- to the extent there had been a new point taken at trial, one has to deal with what's taken at trial.

MR JUSTICE MARCUS SMITH: Good. I was confident that would

be the parties' position but I felt it appropriate to make that absolutely clear now rather than later on.

MR PHILLIPS: My Lord, they are not pleadings.

MR JUSTICE MARCUS SMITH: No, they are not pleadings, they are position papers, I entirely understand that. But in a sense that has cut both ways, it has allowed parties both to drop points which you had in the pleadings, but also to make new points which you can't if they were pleadings. But what I want to be clear is I don't mind new points being taken, I just don't want the list to be expanded by reference to these extraneous documents.

10 o'clock tomorrow. Thank you all very much.

(4.20 pm)

(The hearing adjourned until 10.00 am on Friday, 22 November 2019)

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