

Thursday, 14 November 2019

(10.30 am)

(Proceedings delayed)

(10.37 am)

MR JUSTICE SMITH: Ms Tolaney, I apologise for the lateness.

I am afraid I had another matter which overran slightly.

MS TOLANEY: Thank you very much, my Lord. May I call

Mr Katz to the stand, please.

MR BENJAMIN KATZ (affirmed)

Examination-in-chief by MS TOLANEY

MS TOLANEY: Good morning, Mr Katz.

A. Good morning.

Q. Do you have a bundle C in front of you, I think it is being passed to you. And could you turn to tab 5, please.

A. Yes.

Q. Is that your first witness statement in these proceedings?

A. Yes.

Q. And could you turn to the last page of that tab where you will see a signature; is that your signature?

A. Yes.

Q. Could you then turn, please, to tab 11; is that your second witness statement in these proceedings?

A. Yes.

1 Q. And again, could you turn to the last page in the bundle
2 on this tab, you will see a signature; is that your
3 signature?

4 A. Yes.

5 Q. And then finally, if you turn to tab 11A, is that your
6 third witness statement in these proceedings?

7 A. Yes.

8 Q. And, finally, could you turn over the page to see
9 a signature; is that your signature?

10 A. Yes.

11 Q. Can you confirm to the court that taken together, these
12 three witness statements represent the evidence you wish
13 to give to the court?

14 A. Yes.

15 MS TOLANEY: Thank you very much. I think you will have
16 some questions now.

17 Cross-examination by MR PHILLIPS

18 MR PHILLIPS: Good morning, Mr Katz.

19 A. Morning.

20 Q. Mr Katz, could you turn to bundle C, tab 5, paragraph 5
21 of your witness statement. We will start with the easy
22 question of your role. From before January 2005
23 until September 2008, you were a managing director in
24 the structured capital solutions group which was later
25 the capital advisory group; that's right, isn't it?

- 1 A. Yes.
- 2 Q. Now, your team will have been involved in drafting the
3 offering circulars and the prospectuses, is that right?
- 4 A. Yes.
- 5 Q. Did you read them at the time?
- 6 A. I did not read everything at the time. I am sure I read
7 something at the time.
- 8 Q. I see. Did you refresh your memory about their contents
9 before signing your witness statements?
- 10 A. No, I didn't refresh my memory.
- 11 Q. I see. Let's just have a look at one of the things you
12 would have seen if you had either read them at the time
13 or refreshed your memory. Can I ask you to pick up
14 bundle E, please. If you could please turn to tab 10,
15 and you will see in the bottom right hand side a page
16 reference. Do you see that, 147?
- 17 A. Yes.
- 18 Q. This is the offering circular for LP1, do you see that?
19 And it was sent out on 29 March, or is dated
20 29 March 2005; do you see that at the bottom?
- 21 A. Yes.
- 22 Q. Would you turn forward, please, to page 188.
- 23 A. Excuse me.
- 24 Q. Page 188, please.
- 25 A. Yes.

- 1 Q. Do you see that it identifies the executive officers of
2 LBHI on the date on which you sent out the circular; do
3 you see that, bottom left-hand side?
- 4 A. Yes.
- 5 Q. Do you see the name of Mr Christopher O'Meara?
- 6 A. Yes.
- 7 Q. Do you see that he was the chief financial officer?
- 8 A. Yes.
- 9 Q. Can you go to E/365, please.
- 10 A. Excuse me?
- 11 Q. Could you go to E/365 which is in tab 15. Do you see
12 that?
- 13 A. Yes.
- 14 Q. This is the -- sorry, I should have asked you to go to
15 201 first in tab 11. I do apologise, tab 11 first. Do
16 you see that this is the prospectus for LP2?
- 17 A. Yes.
- 18 Q. Do you see at the bottom that was sent out on
19 30 August 2005?
- 20 A. Yes.
- 21 Q. If you would like to look at page 242, please.
- 22 A. Yes.
- 23 Q. Do you see it identifies the executive officers of LBHI
24 when you sent out this prospectus?
- 25 A. Yes.

1 Q. Do you see Mr Christopher O'Meara is identified as the
2 chief financial officer?

3 A. Yes.

4 Q. Do you see that? And now if you would go on to 365,
5 which is tab 15. Have you got that?

6 A. Yes.

7 Q. Do you see that that is the prospectus for LP3?

8 A. Yes.

9 Q. Do you see that that was dated 20 February 2006?

10 A. Yes.

11 Q. Could you go to page 408, please. Do you see that it
12 identifies the executive officers of LBHI?

13 A. Yes.

14 Q. Do you see that it identifies Mr Christopher O'Meara as
15 the chief financial officer?

16 A. Yes.

17 Q. Can we go to C5, back to C5, please, on page 63.

18 I suggest that you keep bundle C with you at all times.

19 Can you look at paragraph 6, do you see paragraph 6
20 of your witness statement?

21 A. Yes.

22 Q. "In this role I reported directly to the CFO of
23 Lehman Brothers, Erin Callan."

24 Do you see that?

25 A. Yes.

1 Q. And now I would like you to turn to tab 11A, and I would
2 like you to look at paragraph 5 of your recent witness
3 statement of 6 November. Do you see that?

4 A. Yes.

5 Q. I want to pick it up at the bottom. At paragraph 6:

6 "I stated that in this role I reported to Erin
7 Callan who I identified as being the CFO of
8 Lehman Brothers."

9 Do you see that?

10 A. Sorry, where?

11 Q. Bottom of the page, paragraph 5, have you got
12 paragraph 5?

13 A. Yes.

14 Q. Bottom of the page at paragraph 6, that sentence
15 starting four lines down at paragraph 6. Do you see
16 that? You must have seen this recently?

17 A. Yes, no, I do see this.

18 MR JUSTICE SMITH: I have some difficulties to see it as
19 well.

20 MR PHILLIPS: My Lord, it is four lines down, the last
21 three/four words on the bottom.

22 MR JUSTICE SMITH: I have it. I was looking on the wrong
23 page.

24 MR PHILLIPS: At paragraph 6:

25 "I stated that in this role I reported to Erin

1 Callan who I identified as being the CFO of
2 Lehman Brothers."

3 Do you see that?

4 A. Yes.

5 Q. And that is an accurate description of what you had said
6 in paragraph 6 of your first witness statement, do you
7 agree?

8 A. Yes.

9 Q. "I stated this to identify who Erin Callan was and did
10 not intend to convey that I reported directly to her in
11 her capacity as the CFO."

12 Do you see that?

13 A. Yes.

14 Q. You said that you reported directly to the CFO,
15 Erin Callan, in your first witness statement, correct?
16 We just looked at it?

17 A. Let's look at it again and see exactly what I said.

18 Q. Okay. Page 63, paragraph 6.

19 A. Yes.

20 Q. "In this role I reported directly to the CFO of
21 Lehman Brothers, Erin Callan."

22 Pretty unambiguous?

23 A. Yes.

24 Q. Yes, good. And you say, flip back to paragraph 11 -- to
25 11A, which is what we were just looking at, and you say

1 here that you stated this in order to identify who she
2 was. You did not intend to convey that you reported
3 directly to her in her capacity as the CFO.

4 Do you see what you said?

5 A. Yes, I see what I said.

6 Q. Well, that was because she wasn't the CFO, is that
7 right? She did not have a capacity as CFO at the time,
8 Mr O'Meara was the CFO; do you agree?

9 A. Yes, we just looked at that in the documents.

10 Q. Yes. So do you now accept that you were wrong about the
11 role of the person that you said in your first witness
12 statement you reported to? Do you accept that you were
13 wrong?

14 A. What I accept is that I reported to Erin Callan as the
15 global head of the structured solutions group, and she
16 later went on to become the CFO of Lehman Brothers
17 Holdings.

18 Q. Let's try again. When you reported to her, during these
19 ECAP transactions, was she the CFO?

20 A. She was not the CFO during that time.

21 Q. Thank you. So you were wrong?

22 A. I have given this witness statement to correct what
23 I said in the first witness statement.

24 Q. The correct answer about the identity of the CFO at the
25 time of the ECAPS transactions was in the offering

1 circular and the prospectus prepared by your team that
2 was sent to the ECAPS holder. That's right, isn't it?

3 A. That's correct.

4 Q. Yes. And there were three of them that you could have
5 picked up the correct answer from, is that right?

6 A. Yes.

7 Q. And you didn't.

8 A. I provided a third witness statement to correct the
9 first witness statement.

10 Q. I am sorry, you did not pick it up from any of the three
11 prospectuses your team sent to the ECAPS?

12 A. Sorry, what --

13 Q. Why do you find that so difficult?

14 A. I don't understand the question.

15 Q. You did not pick up from any of the three prospectuses
16 your team had prepared that Mr O'Meara was the CFO,
17 correct?

18 A. Yes, as I said, I did not review these prospectuses.
19 You asked if I refreshed my memory; I did not look at
20 these prospectuses to see that.

21 Q. It's fair to say, Mr Katz, that some 14 years after
22 these transactions, unsurprisingly, you don't have
23 a clear recollection of all the detail, and you missed
24 it in the contemporaneous documents that you could have
25 looked at which would have given you the correct answer;

1 that's fair to say, isn't it?

2 A. I think what's fair to say is I provided a third witness
3 statement to correct what I said in the first.

4 MR JUSTICE SMITH: Mr Katz, I am sorry, it may be I am being
5 slow, but can I just be clear exactly what it is you are
6 correcting. You describe in paragraph 5 of your first
7 statement your role, so page 63 of bundle C, tab 5. So
8 we have your role in paragraph 5, and then you say:

9 "In this role I reported directly to the CFO of
10 Lehman Brothers, Erin Callan."

11 So that is a statement of your reporting structure.
12 So that is very clear. You then say, going to your
13 third statement, tab 11A, page 144.2, that you didn't
14 report directly to her in her capacity as CFO.

15 A. Correct.

16 MR JUSTICE SMITH: Did you see that?

17 A. Yes, correct.

18 MR JUSTICE SMITH: Right. And you then set out the
19 chronology or narrative as to her career movement in
20 that paragraph.

21 A. Correct.

22 MR JUSTICE SMITH: So is the correction that you are seeking
23 to make in paragraph 6 that you reported directly to
24 Erin Callan, if you just delete the words, "to the CFO
25 of Lehman Brothers", would that then be right?

1 A. Yes. At that time of these ECAPS, I reported directly
2 to Erin Callan in my role.

3 MR JUSTICE SMITH: I see. So the error, because what was
4 puzzling me, what is triggering these questions is you
5 made clear that you did not report directly to
6 Mr O'Meara when he was CFO.

7 A. Correct.

8 MR JUSTICE SMITH: So the essence of the correction that you
9 are making is simply regarding the office that
10 Erin Callan was holding, is that the extent of the
11 correction that you are making to paragraph 6 of your
12 first statement?

13 A. Yes. She became the CFO thereafter.

14 MR JUSTICE SMITH: Right.

15 A. And I was sort of labelling her as a CFO of Lehman.

16 MR JUSTICE SMITH: Right. So the error is simply her role.
17 But you are not making any correction as to how you
18 reported in terms of the individual when you had the
19 role described in paragraph 5.

20 A. Correct.

21 MR JUSTICE SMITH: Okay, thank you.

22 MR PHILLIPS: Thank you very much, my Lord. And one reason
23 why you did not report to Mr O'Meara as CFO, and you did
24 not report to Erin Callan as CFO, is that you were not
25 in the finance division; that's the reason, isn't it?

- 1 A. That was a complicated question. I did not report --
2 I was not in the finance division, if that is what you
3 are asking, yes.
- 4 Q. Yes, and that is why you didn't report to them in the
5 capacity as the CFO, because you were in the structured
6 capital solutions group, weren't you?
- 7 A. Correct.
- 8 Q. And at the time of the ECAPS, the structured capital
9 solutions group, their role was they would sell products
10 to external clients, so this is an outward-facing role,
11 correct?
- 12 A. It was an outward-facing role.
- 13 Q. Thank you.
- 14 A. And -- and if I could add, my Lord, one comment to that.
15 In this capacity that we are here today, Lehman was
16 a client, so as much as I worked for Lehman, Lehman was
17 a client like any other client.
- 18 Q. Right. Can we now move back to your first witness
19 statement, which is in tab 5. And I would like to look,
20 if I may, at paragraph 13. Do you have that?
- 21 A. Yes.
- 22 Q. And you say -- I want to pick up the second sentence;
23 okay? You say:
- 24 "It was equally key that the ECAPS securities had
25 equity-like features in order that they could be treated

1 as equity for ratings and regulatory capital purposes at
2 LBHI."

3 Do you see that?

4 A. Yes.

5 Q. So as you structured the ECAPS, they ranked as tier 1
6 capital for consolidated supervision, is that right, at
7 LBHI?

8 A. Yes.

9 Q. In paragraph 14, you tell us, and I am reading the first
10 sentence:

11 "Amongst Lehman's ratings objectives for the ECAPS
12 was to achieve the same credit rating for the ECAPS as
13 LBHI's own preferred stock."

14 So what you were trying to achieve, as far as the
15 ratings were concerned, was the same credit rating for
16 the ECAPS as LBHI's preferred stock; is that right?

17 A. Correct.

18 Q. Thank you. And then in paragraph 15, you go on to say:

19 "In order for the rating agencies to rate the ECAPS
20 as equivalent to LBHI's own preferred stock, it was
21 important that the rights of the ECAPS holders to
22 receive scheduled distributions operated much like those
23 of a holder of preferred equity in LBHI."

24 So we can see there what you say. So you are
25 structuring the ECAPS so that the ECAPS rights to

1 receive distributions operate much like those of
2 a holder of preferred equity in LBHI?

3 A. Yes.

4 Q. And of course we know that distributions to shareholders
5 come after distributions to creditors, and you know
6 that, don't you, as a general proposition?

7 A. Please repeat the question.

8 Q. Distributions to shareholders come after distributions
9 to all creditors?

10 A. Yes.

11 Q. Can I then ask you just to take up -- keep bundle 6 on
12 the desk, I think that is a good idea. And if you could
13 take up bundle E and just go to tab 10. If you could go
14 to -- so you have already seen what this is, this is the
15 offering circular, and we will look at it a few times.
16 I won't show you that every time we look at it. If you
17 can go to 156, please. You deal with the ranking of the
18 preferred securities, and these are the ECAPS, correct?

19 A. Yes.

20 Q. What it says is:

21 "The preferred securities, together with the
22 subordinated guarantee [which we will come on to] are
23 intended to provide the holders with the rights on
24 liquidation equivalent to non-cumulative preference
25 shares of the guarantor ..."

1 That is LBHI, yes?

2 A. Yes.

3 Q. "...whether or not issued ..."

4 And then it goes on to say that claims under the
5 preferred securities in respect of any liquidation
6 distributions will rank.

7 And then it deals with senior to the rights of the
8 general partner and the preferential limited partner in
9 respect of other partnership interests, and then this,
10 "junior to the claims of creditors of the issuer if
11 any".

12 Do you see that?

13 A. Yes.

14 Q. So you explain the ranking to the purchaser of the ECAPS
15 in the prospectus?

16 A. Yes, this is the ranking of the ECAPS in the prospectus,
17 yes.

18 Q. Exactly. Thank you very much. If you can go back to
19 paragraph 15, so we have just dealt with the first
20 sentence, paragraph 15 of your witness statement. You
21 then go on and you say:

22 "For this reason, in addition to the no payment
23 notice, it was important that the ECAPS featured
24 a dividend stopper that would prohibit LBHI from making
25 distributions on its own stock, if any scheduled ECAPS

1 distribution was not paid."

2 So you explain that for the reason that you have
3 just given, which was that you -- for rating purposes,
4 they had to operate equivalent to LBHI's preferred
5 stock, you needed a dividend stopper, is that right?

6 A. The dividend stopper was there for several reasons.
7 That was one of the reasons.

8 Q. And that is the reason that you give in paragraph 15 of
9 your witness statement, which is what we are looking at
10 at the moment, yes?

11 A. Yes.

12 Q. Okay. Can we pick up F1, bundle F1, please. If you
13 could go to page 167. This is an e-mail exchange on
14 22 February 2005, do you see that from the top?

15 A. Yes.

16 Q. Okay, and the e-mail that we're -- we're going to look
17 at two e-mails. The first one is from you to Mr Curran,
18 Mr Tomala and Mr Ghafur, and dealing with the preferred
19 security structure. And you say:

20 "We can have either entity guarantee ... I don't
21 believe it will make a difference from a rating agency's
22 point of view ... given it is a soft guarantee, do we
23 have a US parent dividend stopper, as that will ensure
24 the right notching from the rating agencies ..."

25 So you see what you are explaining? You are

1 explaining that the dividend stopper will ensure the
2 right notching from the ratings agencies; yes, do you
3 see that?

4 A. I do see it.

5 Q. And that is consistent with what you have told us in
6 paragraph 15 of your witness statement, isn't it?

7 A. Let me read this, please. (Pause)

8 Sorry, your question was? Is?

9 Q. You said: do we have a dividend stopper as that will
10 ensure the right notching from the ratings agencies;
11 that is your input, and that is consistent with what we
12 have just been looking at in paragraph 15 of your
13 witness statement?

14 A. Yes, both are -- both are talking about a dividend
15 stopper. The e-mail, I am asking if we have one at this
16 stage of the product development.

17 Q. Yes. I understand. And you will agree, won't you, that
18 dividend stoppers are a common feature in hybrid capital
19 instruments, correct?

20 A. Yes, yes, they are very common.

21 Q. Okay. So if we can go back to bundle E and look at 147,
22 please, in tab 10. So this is our LP1 prospectus, and
23 I just want to look at 151. Sorry, do you have that,
24 Mr Katz?

25 A. Yes.

1 Q. Okay, these are the investment considerations -- it is
2 at the start of the offering circular -- and the risks
3 associated with the guarantor's financial position, and
4 you set this out.

5 "The issuer is a newly established
6 limited partnership with no previous operating history
7 or revenues. It is expected that the issuer's sole
8 source of funds to pay distributions on the preferred
9 securities will be payments which it received from its
10 investment in subordinated notes issued by the guarantor
11 or any eligible investments replacing the subordinated
12 notes."

13 Do you see that?

14 A. Yes.

15 Q. So you are there explaining that the issuer's source of
16 funds is -- yes. And it is pointed out to me that the
17 guarantor, of course, is PLC, I think I said it was LBHI
18 earlier, and that was a mistake. I do apologise,
19 I didn't mean to mislead you.

20 So there you identify the source of funds and then,
21 secondly, you say:

22 "The rights of holders shall be represented solely
23 by the subordinated guarantee and the preferred
24 securities ..."

25 So the rights of the holders were represented by two

1 things: the subordinated guarantee, they get the
2 subordinated guarantee, yes?

3 A. The holders received a subordinated guarantee. Your
4 second question is?

5 Q. And the preferred securities; I am taking you through
6 this paragraph.

7 A. Yes, no, I see it, I see it.

8 Q. Okay. Good.

9 "... and the preferred securities and under no
10 circumstances will the rights of the holders be
11 represented by the subordinated notes or the eligible
12 investments that might replace the subordinated notes."

13 So you explain quite fairly that their rights are
14 represented by the subordinated guarantee and the
15 preferred securities and not the sub-notes; do you see
16 that?

17 A. Yes.

18 Q. Thank you. And the next paragraph:

19 "The preferred securities are guaranteed on
20 a limited and subordinated basis by the guarantor
21 pursuant to the terms of the subordinated guarantee.
22 Accordingly, if the guarantor's financial position were
23 to deteriorate, the holders may suffer direct and
24 materially adverse consequences, including non-payment
25 of distributions on the preferred securities or of

1 payments under the subordinated guarantee."

2 Do you see that?

3 A. Yes.

4 Q. Now, let's have a look at distributions. Can you go to
5 155, please. It is in the same document. We are going
6 through a few of the terms now. Okay. You see
7 "distribution" and "capital stopper" on the right-hand
8 side?

9 A. Yes.

10 Q. In the event that distributions are not paid on the
11 preferred securities; yes? That is on the ECAPS, so if
12 a distribution is not paid on the ECAPS, yes?

13 A. Yes, I see that.

14 Q. LBHI has undertaken that in the event that any
15 distribution is not paid in full, it will not (a)
16 declare or pay any dividend on its shares of common
17 stock; do you see that?

18 A. Yes.

19 Q. Or, (b), repurchase or redeem any of its non-cumulative
20 preferred stock or common stock at its option until such
21 time as distributions on the preferred securities have
22 been paid in full for one year.

23 So that is the dividend stopper, correct?

24 A. Yes.

25 Q. Thank you. So the starting point is that a distribution

- 1 on the ECAPS is not made; that is the starting point,
2 the dividend stopper, correct?
- 3 A. Yes.
- 4 Q. Yes. And that is, if you like, I described it as
5 a starting point, it is the trigger, failure to pay
6 a distribution to the ECAPS; would you agree?
- 7 A. Yes, yes.
- 8 Q. Good. Now, have you still got your witness statement?
- 9 A. Yes.
- 10 Q. If you look at paragraph 15. I am just going to remind
11 you of the second sentence which we looked at, where you
12 described the dividend stopper, do you see this is five
13 lines down, the dividend stopper in inverted commas?
- 14 A. Yes.
- 15 Q. Okay.
- 16 "... that would prohibit LBHI from making
17 distributions on its own stock if any scheduled ECAPS
18 distribution was not paid."
- 19 Do you see that?
- 20 A. Yes.
- 21 Q. So you are there describing what we have just looked at.
22 Now, we agree that distributions on the ECAPS were
23 annual, correct?
- 24 A. Yes.
- 25 Q. So let's just have a look at that. If you look at

- 1 E/154. Do you see a subheading, "Distribution rate"?
- 2 A. Yes.
- 3 Q. And do you see that it says that the preferred
4 securities entitle the holders to receive distributions,
5 in the first subparagraph; that's just telling you they
6 are entitled to receive distributions; do you see that?
- 7 A. Sorry, you are speaking about the first paragraph under
8 "Distribution rate"?
- 9 Q. I am going to work through them with you.
- 10 A. Okay.
- 11 Q. Okay, you can see that first of all, it talks about what
12 distributions are. And then it says:
- 13 "Distributions will be payable out of the issuer's
14 own legally available resources annually in arrear on
15 30 March in each year."
- 16 Do you see that?
- 17 A. Yes.
- 18 Q. So it is 30 March each year. And you may or may not
19 recollect this, but if we go forward to page 215 under
20 LP2, you will see that there is in the definitions, do
21 you see a distribution payment date?
- 22 A. Yes.
- 23 Q. And that is the date in each year specified as in the
24 final terms, do you see that?
- 25 A. Yes.

1 Q. And I am not expecting you to remember this, but I will
2 just tell you that that was 21 September; the important
3 point, as you can see, it is annual, do you see that?
4 A. Sorry, see annual?
5 Q. Yes, distribution payment date, the date in each year,
6 in each year. So it's annual.
7 A. Yes.
8 Q. Yes, good. And then if you go forward to 380?
9 A. Sorry, 318.
10 Q. 380.
11 A. Oh, 380.
12 Q. If you want to look at 365, you will see this is LP3.
13 Do you have 380?
14 A. Yes.
15 Q. And you see the distribution payment date, and it meets
16 22 February in each year until the first call date, and
17 that is 21 February 2011, at which point it was going to
18 become quarterly, but for our purposes, we only need to
19 obviously -- we only need to look at 22 February each
20 year. Yes?
21 A. Yes.
22 Q. Good. So what we have established is that the ECAPS
23 were paid distributions annually on 30 March,
24 21 September and 22 February annually. Agreed?
25 A. You -- you said the September date. We didn't see that.

1 Q. Yes?

2 A. So I trust you on that one, and yes, this is -- this is
3 22 February, and then we have the March date, yes.

4 Q. Yes, and you said in your evidence that you knew it was
5 annual, so all we are doing now is just identifying the
6 dates?

7 A. Yes.

8 Q. Okay. Now, the annual distributions by the partnerships
9 on the three sets of ECAPS was approximately 40 million
10 euros a year; does that accord with your recollection?

11 A. I don't recollect the total amount of all three.

12 Q. Okay. Can you be given F6/343 -- F6, please. Could you
13 go to page -- if you have F6, could you go to page 3432,
14 please. Do you see this is the accounts of --

15 A. One second, please, sorry. 3432.

16 Q. 3432.

17 A. Okay.yes.

18 Q. So those are the accounts of Capital Funding LP, so that
19 is LP1. Could I ask you to go to 3442 in those
20 accounts. Do you see note 3, interest payable, on the
21 right -- it is the second item, note 3, interest
22 payable?

23 A. Yes.

24 Q. And do you see that it has interest payable on perpetual
25 preferred securities, which is the ECAPS, agree?

1 A. This is the accounts of ...

2 Q. LP1?

3 A. Of 1?

4 Q. Yes, I am going to show you all three.

5 A. Okay. Yes, that is the --

6 Q. This is LP1?

7 A. Mm-hm.

8 Q. And you will see in 2006, it would have been

9 11.8 million euros, and in 2007, it is 8.8 million

10 euros. So 8.8 million euros. These are the accounts

11 that are attached -- no, they are not. Scrub that.

12 Do you see that that was 8.8 in 2007?

13 A. Yes.

14 Q. Good. Now, can we look at 3447. This is the accounts

15 of LP2. If we look at 3458, at note 3, interest

16 payable, do you see, interest payable on preferred

17 securities, and again, for 2007, it is 12.8 million

18 euros.

19 A. Yes.

20 Q. Can we then go forward to 3463, please. That is LP3's

21 accounts, and if you would be kind enough to go forward

22 to 3474, you see interest payable, finance costs payable

23 on perpetual preferred securities, 17.7 million euros?

24 A. Yes.

25 Q. So it is round about 40 million altogether, but what's

1 important is that on 30 March of each year, 8.8 million
2 euros is paid to LP1; on 21 September each year, LP2
3 pays 12.8 million; and on 22 February, LP3 pays
4 17.7 million euros. So are we comfortable with those
5 steps so far?

6 A. Yes.

7 Q. Thank you. Now, the interest payments on the -- we need
8 to go back to bundle E, if we may. The interest
9 payments on the sub-notes were annual. They were also
10 annual, and I would like you to start by looking at E/9
11 at page 128, please.

12 A. Excuse me, tab 9?

13 Q. Yes, please, tab 9. If you could look on 128 at the
14 definition of "interest payment date". Yes, do you see?

15 A. Yes.

16 Q. 30 March of each year, which is the same as the LP1
17 ECAPS payment date, distribution date, yes?

18 A. Yes.

19 Q. You agree. And then if you could go to tab 12, at 299,
20 which is the LP2, one of the two LP2s, interest payment
21 date 21 September each year. Do you see that?

22 A. Yes.

23 Q. And then if you could go forward in tab 13 to 322,
24 a second, which was also 21 September of each year?

25 A. Yes.

- 1 Q. So you can see you have got those two notes which are
2 payable on the 21st, which is the same as the LP2
3 distribution date to the LP2 ECAPS; agreed?
- 4 A. Yes.
- 5 Q. And then finally, 14/345; 14/345, this is the final
6 sub-note. And you will see that that is 22 February
7 each year, and that is, of course, the same as the LP3
8 distribution date. So that is the distributions to the
9 ECAPS, that is the payments under the sub-notes, we have
10 seen all of those dates.
- 11 Distributions under the -- on the sub-debt were
12 monthly. Is that right?
- 13 A. Yes.
- 14 Q. And if we could just look at E/6/84.
- 15 A. Excuse me, which deck?
- 16 Q. E/6.
- 17 A. Okay, sorry. Sorry, which tab?
- 18 Q. It is tab 6, so when I say E/6, I do apologise, it is
19 all file 6, there is only one file E, and then I am
20 referring to the tabs.
- 21 A. Understood.
- 22 Q. Yes, it is much easier for us, because we have been
23 doing it for more than half an hour.
- 24 A. Yes.
- 25 Q. So, do you see under clause 8, this is the variable

1 terms. You understand, you have seen subordinated
2 sub-debt agreements before, haven't you?

3 A. Yes.

4 Q. Yes --

5 A. Not these ones but I have seen ones before, yes.

6 Q. You haven't seen these before?

7 A. These, I have not seen this before.

8 Q. Okay. If you look at clause -- if you look at 8,
9 interest. And you will see under number 2 that the
10 payment is made on the 14th day of each month, and that
11 is the payment provision. Interest is paid on the 14th
12 day of each month.

13 A. Yes, I see that.

14 Q. Yes. And you can take it from me that the total monthly
15 interest payments on the sub-notes were for -- sub-debt,
16 apologies, on the sub-debt, total monthly payments were
17 for between \$8 million and \$10.5 million a month, okay?

18 Now what you have seen is that you have got annual
19 payments -- are you okay, Mr Katz?

20 A. Yes, yes, I am fine, thank you.

21 Q. There are annual payments which are made to the ECAPS
22 and on the sub-notes on -- and you have seen the
23 dates -- 30 March, 21 September, 22 February, yes, and
24 there are periodic payment requirements which are
25 monthly on the sub-debt, which are on the 14th of each

- 1 month, yes?
- 2 A. Yes.
- 3 Q. So it is right to say that the sub-notes and the
4 sub-debt did not fall to be paid on the same date, yes?
- 5 A. It was not the same date.
- 6 Q. No. There was never a due date when the interest
7 payments on the sub-notes had to compete directly
8 against the interest payments on the sub-debt because
9 they did not coincide; do you agree?
- 10 A. I agree, the dates were different.
- 11 Q. Yes, and therefore they are not payable on the same
12 date, and therefore they do not directly compete on the
13 same date, do you agree?
- 14 A. I disagree.
- 15 Q. How do you disagree? How does a debt payable on the
16 14th of the month compete directly with a debt payable
17 on the 21st of that particular month, even though in one
18 case it is annual? How do they compete?
- 19 A. Well, I think they are all obligations of one company,
20 and when you have different obligations, different
21 rankings, everything is sort of competing with
22 everything in some way.
- 23 Q. Really?
- 24 A. And I address that in the witness statements.
- 25 Q. Okay. So your evidence is that despite the difference

1 in dates, there is an alignment when there might be
2 competition between them, is that right? Is that your
3 evidence?

4 A. Sorry, can you please repeat the question.

5 Q. Your evidence is they might be in competition even
6 though they are payable on different dates, is that
7 right?

8 A. Well, I think a company has limited financial resources,
9 and in that way, it has to use the financial resources
10 to settle its obligations, and in that way, all
11 obligations are competing in some way, based on their
12 terms and conditions.

13 Q. Okay. And that is the case, even if one is annual and
14 one is monthly, is that your evidence?

15 A. Yes.

16 Q. I see. Now, you have seen that the funding requirement
17 on the sub-notes was 40 million euros annually, yes?

18 A. Yes, you had --

19 Q. Roughly, roughly. Before Lehman's formal insolvency
20 in September of 2009, there was never any difficulty
21 paying annually 40 million euro coupons due on the PLC
22 sub-notes or the ECAPS, was there?

23 A. Everything was paid.

24 Q. Everything was paid. Yes. I just want to have
25 something of a reality check. Have you still got bundle

1 E? Could you turn to tab 11. This is, as you have
2 seen, your LP2 prospectus. If you could go forward to
3 page 273, please.

4 A. 273?

5 Q. 273, yes. You will see that this is the accounts for
6 PLC for November 2004, yes?

7 A. Yes.

8 Q. And these are part of the prospectus that you sent out
9 to the ECAPS purchasers, you sent out to the market; do
10 you follow?

11 A. Yes.

12 Q. And I want you just to look at page 289, please.

13 This is the balance sheet of PLC. Yes?

14 A. Yes.

15 Q. If you look at the balance sheet for 2004, which is the
16 most recent balance sheet in these audited accounts, do
17 you see that it showed shareholder funds of a billion,
18 and equity of 1.2 billion; do you see that?

19 A. Yes, equity of 1 billion, 49; non-equity, 1243, yes.

20 Q. Yes. Are you telling his Lordship that you and your
21 team had a concern that PLC would be unable to meet an
22 annual interest payment of 40 million euros, Mr Katz?

23 A. What I am -- what I am saying is that when we structure
24 these securities, you know, these are -- you picked
25 a point in time, excuse me. These are perpetual

1 securities, they do reset to floating. They could be
2 outstanding forever.

3 We do not know what the coupon will be on those
4 securities over a period of time. We don't know what
5 other obligations PLC will have over time, so we have to
6 structure things in a way that gives, you know, maximum
7 protection or maximum chance that the obligations can be
8 serviced, so that investors will be paid, and so that
9 the much smaller UK group doesn't bring down the parent
10 in the US, where there is a dividend stopper.

11 If that dividend stopper is invoked, and payment --
12 payment wouldn't have been made, obviously, on the
13 ECAPS. The ECAPS would have a rating of default. So
14 rating agencies, when you miss a payment they -- they
15 change the lettering to say default. And so a financial
16 institution, with fixed income obligations in the market
17 that are carrying a default rating, means game over.

18 So we weren't thinking about, you know, the total
19 cash flow at any moment in time as you have picked. We
20 were thinking about the possibility it could be anything
21 over time.

22 Q. Let's try again. At the time, are you telling his
23 Lordship that you and your team had a concern that PLC
24 would be unable to meet an annual interest payment of
25 40 million euros? Did you have that concern at the

- 1 time? That is the question I ask.
- 2 A. No, we didn't have that concern at the time.
- 3 Q. Thank you.
- 4 A. And that is why we were able to get the credit rating on
5 the ECAPS that we did and sell them to investors.
- 6 Q. Let's just look at the rights the ECAPS holders had,
7 okay. They were -- the first right they had is that
8 they were entitled to fixed annual distributions out of
9 interest received from the sub-notes, unless the general
10 partner -- unless the general partner gave a no-payment
11 notice, in which event the dividend stopper kicked in;
12 that is the first right and that is the right we have
13 looked at.
- 14 A. Right.
- 15 Q. The second right is on a liquidation they were entitled
16 to a junior share out of the assets of the partnership;
17 and that is in clause 3.1 which we can look at if you
18 want to, but if you are happy to -- with that
19 description, please say; would you like to look at it?
- 20 A. Yes, let's look at that, sorry.
- 21 Q. Okay. Page E/165.
- 22 A. Which deck are we in?
- 23 Q. Do you have that?
- 24 A. 165, yes.
- 25 Q. Yes, if you just have a look at 3.1.

1 "In the event of a dissolution of the issuer, the
2 holders will be entitled to receive the liquidation
3 distribution in respect of each preferred security out
4 of the assets of the issuer available for distribution
5 to the holders ... Such entitlement arises before
6 payments due to general partner and the preferential
7 limited partner ... before distribution of assets to the
8 general partner, but such entitlement will rank equally
9 with the entitlement of the holders of all other
10 preferred securities issued by the issuer which rank
11 pari passu with the preferred securities, if any."

12 Yes?

13 A. Yes.

14 Q. Okay. And then the third right that they have is that
15 on a trigger event, the ECAPS could be converted into
16 LBHI preference shares?

17 A. Sorry, where are you reading from?

18 Q. That is from elsewhere. Go to 221, just by way of
19 example.

20 A. Page 221?

21 Q. Yes, page 221. It is clause 5.1. So there is
22 a substitution for preferred stock. So if a trigger
23 event occurs, then:

24 "... provided that no relevant supervisory
25 authorities object ... general partnership ... take all

1 reasonable steps to cause the substitution of the
2 preferred securities by depository shares representing
3 substituted preferred stock on the substitution date."

4 And that was preferred stock in LBHI?

5 A. Yes.

6 Q. Yes. That was the next right. And then of course they
7 were entitled to a guarantee from PLC; that was that
8 junior debt in PLC?

9 A. Sorry?

10 Q. Would you like to see that as well?

11 A. What are you referring to?

12 Q. I am referring to the subordinated guarantee from PLC.

13 A. Yes.

14 Q. But let's have a look -- are you happy with that?

15 A. I know the PLC subordinated guarantee --

16 Q. If you want to look at it, it is at 176, clause 2.9;
17 clause 2 as a whole is a guarantee, and clause 2.9
18 explains that the guarantee is subordinated to all
19 liabilities, including subordinated liabilities.

20 A. Yes.

21 Q. Yes. I don't think there is any disagreement there.

22 If we look at 152, there is a heading, "No
23 limitation on senior debt", and what it explains in
24 relation to that guarantee is that the obligations of
25 the guarantor, that is PLC as we have discussed:

1 "... under the subordinated guarantee will rank
2 junior as to payments to all liabilities to creditors
3 out of the guarantor, including without limitation
4 depositors, general creditors and subordinated debt
5 holders ... claims of holders of senior ranking
6 securities. In the event the guarantor is wound up,
7 liquidated or dissolved, the assets of the guarantor
8 will be available to pay obligations under the
9 subordinated guarantee, only after all payments have
10 been made on senior liabilities and claims."

11 And then this:

12 "The guarantor is not prohibited from issuing,
13 guaranteeing or otherwise incurring further debt ranking
14 pari passu with or senior to its obligations under the
15 subordinated guarantee."

16 So the point that I was just putting to you is that
17 the ECAPS holders were told that senior debt could be
18 issued, and at the end, you will see it says:

19 "Accordingly, on the winding up of the guarantor and
20 after payment of the senior creditors, there may not be
21 a sufficient amount to satisfy the amounts owing to the
22 holders of the preferred securities."

23 Do you see that? So it is the description you give
24 of the subordinated guarantee, and just bear that in
25 mind when we come to look at some of the e-mails that

- 1 you sent in relation to what security or what support
2 the ECAPS holders were getting; yes?
- 3 A. Yes, yes.
- 4 Q. Okay, I think you are with me. Good. That has given us
5 a framework for some of the clauses.
- 6 Now, you tell us that you and your team considered
7 and assessed how the structures would behave in various
8 scenarios, correct?
- 9 A. Yes.
- 10 Q. And if we could just look first of all back in C,
11 tab 11. Paragraph 26.
- 12 A. Tab 11.
- 13 Q. Tab 11, bundle C?
- 14 A. Right.
- 15 Q. Your second statement, have you got that?
- 16 A. Yes.
- 17 Q. You say in paragraph 26:
- 18 " My team, who were involved in structuring the
19 transactions, would routinely consider and discuss
20 priorities in an insolvency."
- 21 Do you see that?
- 22 A. Yes.
- 23 Q. And you explain that you did that because that was part
24 of your jobs, correct?
- 25 A. Yes.

1 Q. And in your first witness statement, and I am sorry, but
2 we do need just to flip from one to the other, which is
3 in tab 5, in paragraph ... in paragraph 18, do you have
4 paragraph 18 on page 66?

5 A. Yes.

6 Q. Excellent. You will see that you talk about: LBHI would
7 have been strongly commercially incentivised.

8 But I am not interested in that part. It is this.
9 You say:

10 "For this reason I recall that the PLC note, being
11 the subordinated notes that provided cash flows to the
12 ECAPS issuer partnerships, and their only contractual
13 source of funds, would have been prioritised over PLC's
14 other subordinated debt payments to entities in the
15 legal group."

16 Do you see that?

17 A. Yes.

18 Q. So you recall they would have been prioritised?

19 A. Yes.

20 Q. Is that your language? Did you draft that?

21 A. Did I write this witness statement? Yes.

22 Q. Did you draft that language: I recall they would have
23 been prioritised.

24 A. Sorry, the language says "and their only contractual
25 source of funds".

- 1 Q. The language that says "I recall" --
- 2 A. "I recall that the PLC note".
- 3 Q. -- they "would have been prioritised".
- 4 A. Yes, I wrote:
- 5 "For this reason I recall that the PLC note ...
- 6 would have been prioritised ..."
- 7 Q. "would have been prioritised". What exactly do you mean
- 8 when you say you recall that it would have been
- 9 prioritised?
- 10 A. I recall that they ranked ahead over PLC's other
- 11 subordinated debt payments to entities in the
- 12 Lehman Group.
- 13 Q. You recall that they did, so you recall that it was
- 14 prioritised, not that it would have been prioritised?
- 15 A. Yes, was prioritised.
- 16 Q. I see. So -- because to recall that something would
- 17 have been or might have been is not the same as
- 18 recalling something that was. Do you understand? Do
- 19 you understand me, Mr Katz?
- 20 A. Yes, I understand you, yes.
- 21 Q. Good. And the question, one of the questions I have
- 22 got, because there are many coming out of this, is do
- 23 you mean that if you had considered priorities, you
- 24 would have prioritised the PLC sub-notes over other
- 25 subordinated liabilities; or are you telling his

1 Lordship you actually recall considering that the
2 sub-notes were senior to the sub-debt; are you telling
3 his Lordship you actually recall that?

4 A. I am telling my Lordship -- my Lord that -- exactly what
5 I am saying here, that I recall that the sub-notes were
6 prioritised to the sub-debt.

7 Q. Let's discuss this recollection. What exactly do you
8 recall? Do you recall a conversation?

9 A. It was part of the normal structuring for -- this --
10 this variety of transaction, obviously this was a first
11 time through, it had never been done before this ECAPS,
12 it was taking a US product, bringing it into the UK, and
13 the Lehman Group in the UK was the first group to ever
14 have used this US structure.

15 But having said that, the overall, you know, this
16 type of structure, these type of tier 1 structures were
17 commonly used throughout the world at this point in
18 time, and ranking and prioritisation was something that
19 we always discussed and we always made sure that
20 external capital market transactions would rank ahead of
21 internal obligations.

22 Q. So you recall actual discussions about this?

23 A. Yes, I do.

24 Q. You do, and do you recall whether those discussions were
25 oral or were they by e-mail?

1 A. You know, it's been a long time. I -- I recall that we
2 spoke about this.

3 Q. You spoke about it. Okay. So you recall speaking about
4 priorities. You have told his Lordship that you had
5 never read the sub-debt, about half an hour ago?

6 A. The sub-debt, no, I did not.

7 Q. You didn't read it, but you discussed making it junior
8 to the sub-notes, is that right?

9 A. I discussed with the team making sure that the
10 subordinated notes were the most senior ranking
11 subordinated notes tier 2 capital in the PLC capital
12 structure.

13 Q. Okay, so let's be crystal clear. When we look at the
14 e-mails passing between members of your team, we will
15 see discussion of the sub-notes ranking senior to the
16 sub-debt, is that right?

17 A. We haven't seen these e-mails that you are speaking of.

18 Q. I am talking to you, I am asking you about what we
19 should expect to see. If your evidence is correct, we
20 should see a discussion of the sub-notes ranking senior
21 to the sub-debt, correct?

22 A. I don't know what to expect and what you haven't shown
23 me.

24 MR JUSTICE SMITH: Mr Katz, I think it would assist. You
25 have given evidence of actual discussions. We quite

1 understand that time has passed and memory is a frail
2 thing, but you are very clear that there were
3 discussions?

4 A. Yes, absolutely.

5 MR JUSTICE SMITH: Right. Are you able to be clear as to
6 the format of those discussions? You say they were
7 conversations between you and your team regarding
8 priority.

9 A. Yes.

10 MR JUSTICE SMITH: You have an actual recollection of such
11 conversations?

12 A. Yes, I do.

13 MR JUSTICE SMITH: Okay. Is there any reason why such
14 conversations would only be conducted orally?

15 A. No, there is no reason why they wouldn't -- there
16 probably were -- if I had to guess, there probably were
17 e-mails; do I remember specific e-mails on the subject,
18 I do not. But I will also tell you, you know, as you
19 have seen in my witness statements, this transaction was
20 unique. This transaction had a very heavy US tax
21 component to it, and these subordinated notes needed to
22 be respected as debt, and making sure that they were
23 structured as strong as possible was -- was a very key
24 ingredient, and hence why I have a very good memory
25 about those discussions.

1 MR JUSTICE SMITH: Yes, thank you. I mean, obviously this
2 is not a memory test, and no-one is expecting you to
3 recall either the terms of a particular conversation or
4 the terms of a particular e-mail. It is just that when
5 counsel takes you through the e-mail correspondence,
6 I want to have established on the record that there is
7 no reason for such discussions of priority not to be in
8 the e-mail traffic.

9 A. Yes, there could be.

10 MR JUSTICE SMITH: We will see --

11 A. I don't -- I don't know. There could --

12 MR JUSTICE SMITH: I understand.

13 A. There could well be, there could well not be e-mails.
14 I haven't seen the e-mails yet.

15 MR JUSTICE SMITH: But you will, I am sure, be taken to
16 them --

17 A. Yes.

18 MR JUSTICE SMITH: -- but there is no reason for the
19 discussion to be confined purely to an oral
20 conversation?

21 A. Correct.

22 MR JUSTICE SMITH: You might equally have had it -- you may
23 not, but you might equally have had it by way of e-mail.

24 A. Yes, absolutely agree.

25 MR JUSTICE SMITH: Thank you very much.

1 MR PHILLIPS: Could you be given bundle F1, please, Mr Katz,
2 and just keep bundle C, but --

3 MR JUSTICE SMITH: Can we put bundle E away?

4 MR PHILLIPS: Yes, please, my Lord. Could you turn to
5 page 110, please.

6 A. Yes.

7 Q. Now, what you see here is an e-mail from Mr Ghafur on
8 26 January to Mr Tomala; these are both in your team, is
9 that right?

10 A. Yes.

11 Q. Okay. So your team were discussing the structure of the
12 ECAPS in January 2005 and we can see that if you go to
13 121.

14 A. Yes.

15 Q. Well, sorry, first of all, just turn the page and go to
16 111. I just want to show you what this is. A summary
17 of terms and conditions of junior preferred securities
18 and the subordinated guarantee; so you see that. Your
19 team was discussing the structure of the ECAPS
20 in January 2001. And if we can then go forward -- 2005,
21 I am sorry.

22 And then if we can go forward to page 130, and this
23 is an e-mail from Mr Tomala -- sorry, Mr Katz. If I --
24 if I do start before you have the document, please tell
25 me.

- 1 A. Yes, I have it.
- 2 Q. Good, from Mr Tomala, and it is to Martin Kelly, and it
3 is copied to a number of individuals, all of whom you
4 will recognise. It is a draft term sheet for the
5 Lehman T1 issue, so T1, what is that referring to?
- 6 A. T1, tier 1.
- 7 Q. Thank you. And what Mr -- Artur says:
- 8 "Martin, attached you will find a term sheet that
9 ... all the substance on the subordinated note and hence
10 should address all issues raised by you with respect to
11 variable interest. In addition we are attaching a slide
12 with the structure."
- 13 Over the page --
- 14 A. Sorry, just --
- 15 Q. If you want to cast your eyes over the rest, please do?
- 16 A. Yes, no, I was just trying to see if I was in this
17 e-mail; looks like I wasn't, okay.
- 18 Q. No, I haven't spotted you in that list. This is your
19 team discussing the structure at this point?
- 20 A. Yes.
- 21 Q. And if we look at 131, that is the summary terms and
22 conditions of the junior preferred securities and the
23 subordinated guarantee. And if you look down, you will
24 see it introduces subordinated notes. Did you see that?
- 25 A. Yes.

1 Q. I just want you to cast your eye over it at this point.
2 If you cast your eye over it, you will see there is
3 absolutely nothing about subordination at all at this
4 point; do you see that?

5 A. Yes.

6 Q. And then if we can go forward to 153, please.

7 A. Excuse me, what page?

8 Q. 153.

9 A. 153.

10 Q. This is an e-mail from Mr Tomala, dated 22 February
11 2005, and you can see that it goes to a number of
12 people, copied to Mr Ghafur, and it says:

13 "1. Please find attached the revised terms sheet
14 that is now split into terms and conditions of the
15 subordinated notes, and terms and conditions of the
16 preferred securities."

17 Do you see that?

18 A. Yes.

19 Q. And the preferred securities is the ECAPS, is that
20 correct, yes?

21 A. Yes.

22 Q. And the subordinated notes is the subordinated notes?

23 A. Yes.

24 Q. Okay. So you were not copied on that e-mail. But you
25 can see that it splits the subordinated notes and the

1 ECAPS, and just look at 154. That is the ECAPS, and
2 then if you can go forward to 161, we see that the
3 subordinated notes are separated out. Do you have that?

4 A. Yes.

5 Q. Okay. And if you just cast your eye over that, you will
6 see that there is nothing on ranking and subordination.

7 A. Sorry.

8 Q. Do you see that?

9 A. I am looking at it.

10 Q. Take as long as you like. In that summary of the terms
11 and conditions, there is nothing on subordination.

12 A. Doesn't appear to be, no.

13 Q. No. Then if we can go forward to 181, please. Mr --
14 sorry. 24 February 2005, Mr Tomala to Mr Curran and
15 Mr --

16 A. Excuse me, which page.

17 Q. 181?

18 A. 181, sorry. Yes.

19 Q. Yes. Mr Tomala to Mr Curran and Mr Ghafur, and it is
20 the rating agency draft. And what Mr Tomala asks
21 Mr Curran to do is:

22 "Can you please review these slides and add your
23 comments. On page 5 Ben ..."

24 Which I think is you? A reference to you?

25 A. Yes.

1 Q. "... mentions that there are some criteria for US
2 commercial banks and US investment banks, and if Ben
3 says so, he means it."

4 That is his quote.

5 "Over here we could not find it but supposedly Erin
6 sent him these ... pieces some time ago."

7 So you are talking about the rating agencies and you
8 are preparing some slides for the rating agencies. And
9 we see that presentation starting on 182, yes?

10 A. Yes.

11 Q. And if we go forward to 186, there is a draft slide, and
12 it talks about Ts and Cs, and it says:

13 "The securities have been structured to be eligible
14 for tier 1 capital treatment under the US and UK reg cap
15 framework and will therefore have the following
16 equity-like characteristics."

17 A. Excuse me.

18 Q. Sorry, do you not have that?

19 A. You are on page --

20 Q. 186?

21 A. 186, yes, I didn't see where you were reading from.

22 Q. I see. I was reading the bit in italics at the top, and
23 it then identifies some characteristics of the ECAPS,
24 and you can see the third bullet point:

25 "The securities will rank junior to the group's

1 dated subordinated debt and perpetual subordinated debt
2 pari passu with the group's most senior non-cumulative
3 preference shares and senior to the group's ordinary
4 shares."

5 That is the ranking of the ECAPS. Is that right?

6 A. I am just reading that. Yes, I think -- I think this
7 comment is a banker's deck comment directed to the
8 rating agencies that -- when we talk about rank here, we
9 are talking about rating criteria.

10 Q. Yes?

11 A. And the rating agencies, what we were trying to achieve
12 there is to have the rating agencies treat something as
13 if it were preferred stock of LBHI. It was not
14 preferred stock of LBHI, and it never actually was but
15 we -- the goal, the objective, what actually did happen
16 is the rating agencies ended up treating it as if it
17 were.

18 So when we talk about ranking in that way, that is
19 not from a legal perspective. That was from a rating
20 agency criteria perspective.

21 Q. Yes. And if you go to 244, we can see. There are
22 a number of e-mails passing between you in which you
23 discuss this precise ranking point, and how to get the
24 agencies to treat the ECAPS as equivalent to the
25 preference shares in LBHI, we see that?

1 A. Okay.

2 Q. Okay. Now, look at 244, and do you see that it is an
3 e-mail from Mr Tonucci on 2 March, and you are copied in
4 on this e-mail. And what Mr Tonucci says, and I will
5 just show you, up above you can see that you respond and
6 you say "Agreed", so I will just show you that before we
7 look at the actual e-mail.

8 And it points out:

9 "We have spent a lot of time on the main rating
10 agencies' concern that we anticipate ... where do the
11 securities rank in liquidation ... they will rank
12 pari passu with preferred stock and below trust
13 preferred. This will be accomplished through two
14 provisions."

15 So you can see that there are two things that are
16 going to give -- as far as the rating agencies are
17 concerned, going to give the ECAPS the rating as if it
18 was preferred security; this is what you are trying to
19 do, is that right?

20 A. If I may, my Lord, may I please read this e-mail just --

21 Q. I am sorry, please read --

22 A. There's a lot there and ...

23 MR JUSTICE SMITH: Mr Katz, please, this is, as I said
24 before, not a memory test. If you need to read
25 a document, then just say so, and you will be allowed to

1 read it.

2 A. I can read that, thank you. (Pause)

3 MR PHILLIPS: Have you read that, Mr Katz?

4 A. I am still reading it, sorry. (Pause)

5 Yes, I have read this.

6 Q. Excellent. You will see that what it talks about in the

7 first paragraph is ranking pari passu with -- the ECAPS

8 ranking pari passu with the LBHI preferred stock; that

9 was the first point?

10 A. Yes.

11 Q. Yes. And in the second paragraph, you refer to the

12 dividend stopper, yes?

13 A. Paolo does, yes.

14 Q. Sorry, Paolo does, Mr Tonucci does and you agree.

15 And you then go on to the partner having a claim

16 against LBHI. I am not -- there is nothing more

17 I wanted out of that. Can I just show you two more

18 documents and then we will break for the shorthand

19 writers, if I may. The first is 245. This is Mr Tomala

20 to Mr Tonucci, and this time you are copied, do you see

21 that?

22 A. Yes.

23 Q. And this is revised terms and conditions, do you see

24 that?

25 A. Sorry --

- 1 Q. I am looking at the e-mail at 245.
- 2 A. Revised terms and conditions.
- 3 Q. Revised terms and conditions, and he says "for what it's
4 worth this time". Can we turn over to page 246. Do you
5 see, this is summary terms and conditions of the
6 subordinated notes. So it is another draft by your team
7 of the terms and conditions of the subordinated notes,
8 do you see that?
- 9 A. Yes.
- 10 Q. Would you like to turn to page 247, please.
- 11 A. Yes.
- 12 Q. Would you like to read the paragraph on status and
13 subordination, or would you prefer that I read it
14 through with you? Would you like to read it?
- 15 A. I can read it.
- 16 Q. Thank you. (Pause)
- 17 Have you got to the end of that?
- 18 A. Yes.
- 19 Q. Okay, and what it says, it is dealing with status and
20 subordination, agree?
- 21 A. Yes.
- 22 Q. And it describes the subordinated notes as direct,
23 unsecured and subordinated obligations of the issuer,
24 yes?
- 25 A. Yes.

1 Q. And then it goes on to say this:
2 "The rights of the holders ..."
3 That is of the notes, yes?
4 A. Yes.
5 Q. "... in respect of the subordinated notes are
6 subordinated to the senior liabilities ..."
7 Yes?
8 A. Yes.
9 Q. "... and the existing tier 2 and tier 3 subordinated
10 debt of the issuer ..."
11 Do you see that?
12 A. Yes.
13 Q. And if we just pick up further down, "the issuer
14 shall" -- do you see the part that just says -- it goes
15 on to deal with the solvency condition, and it says:
16 "The issuer shall be solvent if it is able to pay
17 its liabilities other than the subordinated notes."
18 Do you see that?
19 A. Yes.
20 Q. What your team was discussing was the subordinated
21 notes, the sub-notes being subordinated to the existing
22 tier 2 and tier 3 sub-debt, do you see that?
23 A. Yes. I see the words here, yes.
24 Q. Well, do you disagree with me as to what the words mean?
25 A. They were -- they were discussing. No, I -- I see the

1 words, I understand what the words mean.

2 Q. Good. So the PLC sub-notes in this discussion were to
3 be junior to the existing tier 2 and tier 3 subordinated
4 debt of the issuer, yes?

5 A. Yes, this is a draft --

6 Q. Mr Katz?

7 A. Term sheet.

8 Q. We know it is a draft term sheet. It is a draft term
9 sheet that was produced by your team during its
10 discussions about the sub -- the sub-notes. So let's
11 just look at what this one says, as opposed to
12 discussing what it is, okay, Mr Katz?

13 A. Yes, yes.

14 Q. The issuer was PLC, agree?

15 A. Yes.

16 Q. The only tier 2 subordinated debt that PLC had issued at
17 this time, 2005, was the PLC sub-debt, which we know was
18 issued in 2004, do you follow?

19 A. Yes.

20 Q. The PLC sub-debt was the existing tier 2 and tier 3
21 subordinated debt that is referred to in this draft, do
22 you follow?

23 A. I don't know if it is referring to that. That is what
24 I am saying.

25 Q. Sorry, you don't know what the words, the existing tier

1 2 and tier 3 subordinated debt of the issuer --

2 MS TOLANEY: Let the witness finish his answer.

3 MR PHILLIPS: Okay, go on then.

4 A. I have never seen this term sheet, this draft term sheet

5 before you put it before me in this moment. You know --

6 Q. Mr Katz, you were copied --

7 MR JUSTICE SMITH: Mr Katz --

8 MR PHILLIPS: I am so sorry, my Lord.

9 MR JUSTICE SMITH: No, no, you were making the same point.

10 Mr Katz, you obviously had the opportunity of seeing it,

11 because it is attached to an e-mail which you are copied

12 in on.

13 A. Yes, I should say I don't recollect --

14 MR JUSTICE SMITH: I quite understand that you have no

15 recollection.

16 A. I am sorry, I do not recollect ever seeing this draft

17 term sheet until this moment.

18 MR JUSTICE SMITH: I see. Presumably, and I just want to

19 understand your usual practice, if you are copied in on

20 an e-mail like this, you would look at the attachment,

21 or is that something you cannot really speak to in terms

22 of your usual practice?

23 A. Well, I just don't -- I am just saying I do not

24 recollect seeing this term sheet previously.

25 MR JUSTICE SMITH: No, I quite understand, Mr Katz, and

1 I have every sympathy with that. What I am asking you
2 is that in the ordinary course of your business when you
3 are doing your job --

4 A. Yes.

5 MR JUSTICE SMITH: -- you are sent an e-mail like this, is
6 it your practice to look at or not to look at that which
7 is attached?

8 A. Yes, it would be my practice to look at it.

9 MR JUSTICE SMITH: Okay.

10 MR PHILLIPS: So Mr Katz, your team did give some thought to
11 an express subordination clause in the sub-notes, do you
12 see that?

13 A. Well, what -- what I would say, if I might have the
14 opportunity to say -- may I explain something, my Lord,
15 to you.

16 MR JUSTICE SMITH: By all means.

17 A. Okay. So when we do deals, we have a gentleman,
18 Artur Tomala, he was the most junior member of the team,
19 you can see that in the working group list that we have;
20 and what we end up doing is we get precedents from other
21 transactions and we start circulating precedents from
22 other transactions and over the course of doing a deal,
23 you mark it up.

24 I -- I cannot say that when we talk about existing
25 tier 2 and tier 3 subordinated debt, I never knew and

1 I -- I shouldn't say I never knew, I absolutely do not
2 recollect ever knowing that PLC had tier 3 subordinated
3 debt. I do not know if this draft term sheet had gotten
4 to the point of specificity of saying subordinated debt
5 of PLC. A lawyer will get a draft from another client,
6 and we start circulating that and we start marking it
7 up. So if I am being asked: oh, is this referring to
8 PLC for sure? I do not know that, even at the time
9 I wouldn't know that. Yes, this is the draft term sheet
10 for PLC, and there will be a lot of stuff that is in
11 there from other issuers that eventually gets cleaned
12 up.

13 MR PHILLIPS: Mr Katz, before we break, you told us that
14 your team discussed the question of subordination, yes?
15 You said you recollected your team having these
16 discussions, is that right?

17 A. Yes.

18 Q. You told us that?

19 A. Yes.

20 Q. Good. And what we see at this stage of the discussion
21 is that your team considered that the notes should rank
22 junior to the debt; that is right, isn't it?

23 A. I do not know that my team considered that. What --
24 what I see here, you showed me another term sheet that
25 was a draft term sheet 10 minutes ago, or something like

1 that, and you said: look, there is nothing in there on
2 status and subordination; and I said: correct. Now we
3 see a later draft, and somebody has dropped in the
4 beginning of some wording that would then be marked up
5 over the course of time to get to the final term sheet.

6 So just because we see a draft with -- with words in
7 it, does not mean that this was the intention of what we
8 were trying to achieve.

9 MR JUSTICE SMITH: Mr Katz, you can certainly take it that
10 I understand that this is a work in progress, if I can
11 put it that way, it is a draft that is evolving. So
12 I am certainly prepared to proceed on the basis that
13 Mr Phillips' questions are directed to documents that
14 are not the last word but a draft, and you won't need to
15 preface your answers saying that; I will have that well
16 in mind when considering the answer, if that helps you.

17 A. Yes, and I think it's a draft -- I would just like to
18 add, it is a draft. You know, we saw an earlier draft
19 that had nothing. We see the junior member of the team
20 now circulating a draft with the beginning words from
21 somewhere. We don't know where, at least I don't know
22 where they came from, or recollect where they came from.

23 We have a very unique fact pattern with the
24 Lehman ECAPS, because normally if we were covering
25 a client or doing a transaction for a client, it

1 wouldn't be like a -- you know, it would be -- actually
2 it would be more like the way the later ECAPS worked,
3 directly under LBHI, not under a subsidiary which gives
4 rise to incremental thinking.

5 So it wouldn't be as if we would call up a lawyer,
6 and say: hey, we're trying to do something like this,
7 let's go get the last one that was like that; because
8 there was no last one and one had never been done.

9 So the precedents that we start with are going to be
10 a lot different than what we ended up with. I mean,
11 normally when we would do a deal, there would be a very
12 high similarity, because it's the same boxes and arrows.
13 This was very different boxes and arrows. You have to
14 get words from somewhere. I do not know where these
15 words came from for this junior person. So I cannot say
16 contextually that: oh, because these words were here,
17 that means we were thinking about this for --

18 MR JUSTICE SMITH: I understand, but can I take it then that
19 these words would, at some point in the future, if they
20 hadn't already been, would have been looked at quite
21 carefully by you or someone in your team?

22 A. Yes.

23 MR JUSTICE SMITH: Would that be a convenient moment,
24 Mr Phillips?

25 MR PHILLIPS: Yes, my Lord.

1 (12.10 pm)

2 (A short break)

3 (12.20 pm)

4 MR JUSTICE SMITH: Ms Tolaney.

5 MS TOLANEY: Please can I raise a housekeeping point.

6 MR JUSTICE SMITH: Yes, of course.

7 MS TOLANEY: I don't know if your Lordship has bundle B,
8 tab 8, please. Your Lordship will see that is the
9 timetable and the time estimate.

10 MR JUSTICE SMITH: I am sorry, the timetable.

11 MS TOLANEY: I am sorry, my Lord.

12 MR JUSTICE SMITH: One moment. Yes.

13 MS TOLANEY: My Lord, the timetable allocated an hour and
14 15 minutes for Mr Katz.

15 MR JUSTICE SMITH: Yes.

16 MS TOLANEY: And my learned friend requested a further half
17 an hour when the timetable freed up.

18 MR JUSTICE SMITH: Yes.

19 MS TOLANEY: I am raising it because I tried to ask my
20 learned friend for an estimate, and I am very concerned,
21 because I do need one hour 45 minutes with Mr Geraghty.
22 I have gone short on all of my cross-examination, so
23 I shouldn't be squeezed, and I can't sit late with
24 apologies, my Lord, tonight, and also Mr Katz --

25 MR JUSTICE SMITH: Neither can I, I am afraid.

1 MS TOLANEY: And Mr Katz has a flight on the basis that he
2 was finishing this morning. That obviously could be
3 changed if needed, but there is a -- I think there is
4 a cut-off point of 1 o'clock for Mr Phillips which will
5 have given him two-and-a-half hours rather than one and
6 a quarter.

7 MR JUSTICE SMITH: Mr Phillips, I know, and it is no
8 criticism of either of you, that you are going through
9 it more slowly perhaps than you would have expected.

10 MR PHILLIPS: Quite.

11 MR JUSTICE SMITH: But Ms Tolaney does make an entirely fair
12 point. What is your best estimate in terms of how much
13 you have got to go through?

14 MR PHILLIPS: If Mr Katz continues to want to read every
15 document --

16 MR JUSTICE SMITH: He is entitled to.

17 MR PHILLIPS: Of course he is entitled to, but if he does
18 proceed on this basis, and your Lordship has seen his
19 familiarity with the documents, it is going to be
20 extremely hard for me to finish by 1 o'clock. But what
21 I would like to do is press on and make as much progress
22 as I can. My learned juniors are looking at what I can
23 skip. What I am on at the moment, I can't skip, and if
24 we can proceed on that basis, because I don't want to
25 waste this valuable time.

1 MR JUSTICE SMITH: That is fine, we will proceed. Whilst we
2 will have to stop at 4.15 today, we can, I think,
3 squeeze a little bit more time in tomorrow if we need to
4 move, or if you need more time tomorrow with
5 Mr Geraghty, I appreciate that we have -- must conclude
6 the experts on Friday.

7 MS TOLANEY: We have to, yes, due to the timing of the
8 experts.

9 MR PHILLIPS: Mr Geraghty will be here tomorrow.

10 MR JUSTICE SMITH: So we do have that in mind, but,
11 Ms Tolaney, you have been short, and more to the point,
12 you have re-allocated this time and he must have it.

13 MS TOLANEY: I am grateful, my Lord.

14 MR JUSTICE SMITH: We will proceed on that basis.

15 MR PHILLIPS: Thank you, my Lord. Mr Katz, could you turn
16 to page 253, please.

17 A. Yes.

18 Q. Do you see this is -- there is an e-mail from Mr Miller
19 to Mr Tomala, Mr Ghafur, and I just wanted you to see.
20 So you know who Mr Miller is?

21 A. Yes.

22 Q. He is the partner at Allen & Overy who was dealing with
23 this. If you look at the bottom two lines:

24 "Stephen, I am attaching a term sheet as of last
25 night. Can you please properly word the above two

1 changes directly on the term sheet and leave the red
2 aside. We seem to be happy with the T and Cs [terms and
3 conditions] of the sub-notes."

4 Do you see that?

5 A. Yes.

6 Q. And if you look at all the blocking, do you see that
7 Mr Miller says:

8 "Okay, but can you look at the comments in the
9 blocks below, especially the second one. I have not
10 copied in Callan."

11 The blocking does not relate to the sub-notes. Do
12 you see that? Will you take it from me that the
13 comments in blocking do not relate to the terms and
14 conditions of the sub-notes?

15 A. Sorry, what is -- I am looking here, I am saying, what
16 happens when the original subordinated notes -- that
17 there is talk about the subordinated notes.

18 Q. No, that is talking about -- what that's talking about
19 is when they mature and there have to be further
20 eligible investments. Do you follow?

21 A. Yes, I do follow.

22 Q. Good.

23 A. So your question is ...

24 Q. The terms and conditions of the sub-notes were not the
25 subject matter of Mr Miller's comments. The point I was

1 showing you is:

2 We seem to be happy with the [terms and conditions]

3 ... of the sub-notes."

4 Do you see that? That is from Mr Tomala to

5 Mr Miller?

6 A. Yes.

7 Q. Thank you. Then if we can go forward to 271, please.

8 A. Yes.

9 Q. Do you see that that is from Sharon Smith at Allen &

10 Overy to Mr Tomala, copied to Mr Miller:

11 "Artur, please see attached comments on the

12 subordinated notes term sheet which you sent through

13 yesterday evening."

14 Do you see that?

15 A. Yes.

16 Q. And then if you would turn over the page to 272?

17 A. Yes.

18 Q. Do you see summary terms and conditions of the

19 subordinated notes?

20 A. Yes.

21 Q. Turn over to the second page.

22 A. Yes.

23 Q. Do you see that status and subordination, there is

24 a paragraph -- entry on status and subordination; it is

25 unchanged. Do you see that?

1 A. Yes.

2 Q. And if you look over the page at tax redemption and then
3 turn to page 274, 275, 276 through to 278. Do you see
4 that there is quite a lot of red ink that has come from
5 Allen & Overy, and it is all to do with the tax matters,
6 do you see that?

7 A. Yes.

8 Q. But the subordination status and subordination stays the
9 same, yes, do you see that?

10 A. Yes.

11 Q. And so the subordination of the sub-notes to the
12 sub-debt was seen by the team at Allen & Overy; do you
13 follow?

14 A. Yes.

15 Q. I would like you to go forward now to 298. This is
16 from -- it is dated 4 March, from Mr Tomala to
17 Mr Tonucci, and you are copied, do you see that?

18 A. Yes.

19 Q. And it says "FYI", and you can see that there is
20 a document attached, a pdf document that is headed
21 "Subordinated notes final reviewed pdf".
22 Do you see that?

23 A. Yes.

24 Q. If you turn over to 299. This is the attachment, this
25 is the summary terms and conditions of the subordinated

1 notes. If you turn over to page 300, please, do you see
2 that?

3 A. Yes.

4 Q. You see the status and subordination?

5 A. Yes.

6 Q. And you will see that that is the same as the draft sent
7 the previous day, do you see that?

8 A. Yes.

9 Q. And the sub-notes were still junior to the sub-debt, do
10 you see that?

11 A. Yes.

12 Q. So we have seen the discussion going through various
13 members of your team and now through Allen & Overy, do
14 you follow?

15 A. Yes.

16 Q. And copied to you, yes?

17 A. Yes.

18 Q. And we have seen your team discuss subordination,
19 relative subordination of the sub-note and the
20 sub-debts, do you see that?

21 A. I don't know where -- where did we see my team discuss
22 subordination.

23 Q. In those e-mails, Mr Katz?

24 A. In the e-mails, yes.

25 Q. The e-mails that you were copied in on and the e-mails

- 1 you told his Lordship you would ordinarily look at.
2 Yes?
- 3 A. Yes, the e-mails that we just went through.
- 4 Q. Exactly. There is not just one rogue text, do you
5 follow?
- 6 A. I don't understand.
- 7 Q. Well you have seen a number of drafts to a similar
8 effect. It is not one rogue text?
- 9 A. I don't know what a rogue text is.
- 10 Q. It means a text that is out of sync with what you are
11 all discussing. Does that help?
- 12 A. Yes, I see an e-mail chain and term sheet for the
13 subordinated notes, you know, going back and forth, some
14 of the e-mails didn't talk about the subordinated notes
15 as you pointed out, others did.
- 16 Q. Yes, but once the terms and conditions of the
17 subordinated notes considered subordination, it
18 consistently provided that the subordinated notes are
19 subordinated to the subordinated debt, do you follow?
- 20 A. In this draft, yes, this draft, the US tax event, I see
21 as well isn't finalised. As I said, tax was a key
22 ingredient.
- 23 Q. And so you have told us that you recall your team
24 discussing subordination, and we see your team
25 considering subordination, and they consistently

1 referred to the sub-notes as being junior to the
2 sub-debt, and they drafted terms and conditions on that
3 basis, do you follow?

4 A. I did not see the team considering subordination.
5 I mean, when you look at the change between drafts,
6 I think the only thing happened was somebody capital --
7 capitalised "holders", so the language didn't change at
8 all.

9 Q. I am sorry, Mr Katz, is your position that if the
10 language doesn't change, your team is not considering or
11 discussing it? Is that the point you are making?

12 A. I am saying that they may not have gotten to it because
13 when I look at this US tax event, as I said, which is in
14 square brackets, that is another key ingredient.

15 Q. And do you recollect the e-mail to Mr Miller that said
16 that you were happy with the terms and conditions of the
17 sub-notes, do you remember that one?

18 A. I think you are talking about the Paolo Tonucci e-mail
19 where he had three bullet points, and I said that
20 I agreed with him that everything was clear.

21 Q. No.

22 A. Okay.

23 Q. Let's go to 253, just to remind you. Can you remember
24 this, we looked at this e-mail from Mr Tomala to
25 Mr Miller, and at the bottom, he said:

1 "We seem to be happy with the terms and conditions
2 for the sub-notes."

3 Do you remember that one?

4 A. Yes, yes, yes.

5 Q. And it went to Allen & Overy and it came back from Allen
6 & Overy with no amendments to the subordination
7 provisions, do you remember that?

8 A. Yes.

9 Q. And so we can see, you said you recollect discussions?

10 A. Yes.

11 Q. And we can see discussions. We can see them recorded in
12 the e-mails. The only problem is these discussions are
13 the precise opposite of the discussions you say you
14 recollect.

15 A. Yes, I don't -- I don't see any discussions, I see
16 a term sheet that hasn't changed one bit other than
17 somebody dropped in the status and subordination
18 provisions, and it has yet to be marked up, and the US
19 tax section -- US tax section is not yet finalised. You
20 are calling that a discussion.

21 Q. What would you call it?

22 A. I would call it a draft term sheet that is circulating.

23 MR JUSTICE SMITH: Of course, Mr Katz, that is right but

24 I presume that you circulated it for a purpose.

25 A. Yes. I think that when you have these hybrid

1 structures, you get to different things. I don't know
2 what stage in the factory this term sheet was in. When
3 I see a term sheet that doesn't have a finalised tax
4 section -- which page was the term sheet, sorry, I am
5 just going back to it.

6 MR JUSTICE SMITH: Page 273 of the bundle.

7 A. Yes -- no, the next one we had, you have US tax event --
8 actually you have US tax event struck out on 275.

9 MR JUSTICE SMITH: Yes.

10 A. But then when you get -- excuse me, when you get to the
11 one we were just looking at, the US tax event isn't
12 finalised. And I am saying that ranking is very
13 relevant to that, so that tells me this term sheet has
14 not been fully addressed in terms of ranking.

15 MR PHILLIPS: Could you look at 298 again.

16 A. What was the --

17 Q. 298. Look at the e-mail?

18 A. This is the term sheet.

19 Q. Could you please read what the subordinated notes are
20 described as, what the term sheet is described as,
21 please?

22 A. Subordinated notes final reviewed pdf.

23 Q. Well, that doesn't suggest it is an early draft, does
24 it?

25 A. It doesn't suggest that it is final either, when you

- 1 have a whole US tax event section in square brackets.
2 And if we look at what the US tax event is talking
3 about, there is some real risk there, that if this
4 instrument is not respected as a debt for US tax
5 purposes, there will be negative US tax consequences.
- 6 Q. Mr Katz, can we focus on the discussions about
7 subordination that you recollect.
- 8 A. Yes.
- 9 Q. Let's not go off on tax consequences, let's just focus
10 on those discussions, and you have seen the discussions,
11 and the next thing that happened is that the notes were
12 issued on FSA standard terms, amended to put them into
13 a bond format. Do you understand?
- 14 A. Yes.
- 15 Q. And you told his Lordship that you hadn't read those
16 notes before?
- 17 A. Sorry, the -- the -- no, I didn't say that, I said the
18 sub-debt I have not read before.
- 19 Q. Sorry, I withdraw that. So they were issued on FSA
20 standard terms, subject to a waiver, so they could be
21 issued in a bond format, do you follow?
- 22 A. Yes.
- 23 Q. Okay. And your team was saved from subordinating the
24 sub-notes to the sub-debt by the fact that they were
25 issued on standard terms, subject to that change, do you

- 1 follow?
- 2 A. I don't follow.
- 3 Q. You don't follow. Well, we see that your team, contrary
4 to your evidence, was considering making the sub-notes
5 junior to the sub-debt; we have looked at that, we have
6 seen that and we then need to go -- can you pick up
7 bundle E again, please. And don't put F1 away, please.
8 If you can go to E9, please.
- 9 A. Tab 9.
- 10 Q. Yes. Thank you. This is the final form. If you start
11 at 127, terms and conditions of the notes?
- 12 A. Yes.
- 13 Q. Okay and if you go to page 3, status and subordination?
- 14 A. Yes.
- 15 Q. And you will see that the terms suggested by your team
16 that would have subordinated the sub-notes to the
17 sub-debt have not been adopted because it was issued in
18 the standard form, do you follow?
- 19 A. This is -- this -- we are looking at the sub-notes.
- 20 Q. Yes.
- 21 A. And you are saying something was in the standard form.
22 I am not following what is in the standard --
- 23 Q. It was issued in this form and I will debate elsewhere.
24 This was issued in this form?
- 25 A. Yes.

1 Q. Right.

2 A. Yes.

3 Q. And so because it was issued in this form, it was not
4 issued subordinating the sub-notes to the sub-debt, do
5 you follow?

6 A. I don't -- I don't really follow, but ...

7 Q. You have seen the discussions in which your team wanted
8 to subordinate the sub-notes to the sub-debt, do you
9 follow?

10 A. I think you are drawing a conclusion to say that my team
11 wanted to do that. There was a draft that was
12 circulating, that was a work in progress, that we
13 eventually amended to get to this. We start as --

14 Q. Do you recollect that you amended --

15 MR JUSTICE SMITH: One moment, just finish your answer if
16 you have anything to add.

17 A. As I said before, we start with drafts of things.

18 MR JUSTICE SMITH: I understand that.

19 A. And then words as you -- when we do these kind of
20 structures, you have a balance between rating, tax,
21 accounting and regulatory. And so you also start with
22 a generic draft term sheet, and as you work through
23 those different filters, you come back and you adjust
24 things to get the balance that you are trying to
25 achieve. So we would have worked through those words to

1 get to this result, of course we would have.

2 MR JUSTICE SMITH: I see, Mr Katz, but -- it may be you
3 simply haven't been shown these materials, but from the
4 questions that are being put to you, it appears we have
5 a jump from the drafts --

6 A. Yes.

7 MR JUSTICE SMITH: -- that we have seen to this, which is
8 unarticulated in the documents.

9 A. Yes.

10 MR JUSTICE SMITH: There is just a blank. And do you have
11 any help you can give me as to why that might be?

12 A. Yes, I think that I do. I think when I look at that
13 term sheet, and as I said to you before, if we ever
14 looked at any of these term sheets, that tax was a very,
15 very big driver. And when I look at those draft term
16 sheets, that tells me that we never even got to tax, let
17 alone other things to get to this final version.

18 So as soon as you get to tax, you are going to
19 really get into the subordination and the ranking, and
20 then you are going to focus on it from all perspectives.
21 That -- that module.

22 MR JUSTICE SMITH: It may be that I wasn't clear enough in
23 my question. I understand the answer that you have
24 given me. But you have been taken through the drafts by
25 counsel, and you have indicated that they are a work in

1 progress, and then we get to this document, which is the
2 final executed document, and what we see is a shift in
3 the wording.

4 A. Yes.

5 MR JUSTICE SMITH: You understand that.

6 A. Yes.

7 MR JUSTICE SMITH: What we don't see are any documents
8 explaining that shift.

9 A. Correct.

10 MR JUSTICE SMITH: And my question to you is: why?

11 A. I don't recollect, you know, what documents there would
12 have been, as we have already said, about e-mails and --
13 and all of that. So I cannot explain why these
14 documents were found and other potential documents
15 weren't. But what I can tell you is what I put in my
16 witness statement, that ranking was very critical to
17 this transaction for a number of reasons as -- as I put
18 into the witness statement, and in my mind, that is what
19 explains the jump from the drafts we looked at to the
20 final.

21 MR JUSTICE SMITH: Thank you, Mr Phillips.

22 MR PHILLIPS: Mr Katz, I can help you to this extent. There
23 are no contemporaneous e-mails that show that the
24 dividend stopper was intended to ensure that the
25 sub-notes were intended to rank above the PLC sub-debt.

1 Do you follow?

2 A. I hear what you are saying.

3 Q. And what we have seen is that the opposite was discussed
4 in the e-mails we have looked at. Yes?

5 A. What we have seen is the e-mails that you have produced
6 and that you have found which we just went through.
7 I don't know if there are others. I do not recollect
8 others.

9 Q. Let me help you.

10 A. But as I said, we did have a discussion about ranking.

11 Q. Yes. Disclosure was given of many thousands of e-mails
12 passing between your team, yes? I am helping you with
13 this, and not a single e-mail in that disclosure
14 discusses the need for the PLC sub-note to rank senior
15 to the PLC sub-debt. Do you follow?

16 A. Yes, if that is what you say, yes. I don't -- I don't
17 know if there is thousands of e-mails or two e-mails.

18 Q. And the only documents that we have seen are the drafts
19 that show that the sub-notes were intended to be junior
20 to the rest of the sub-debt, do you follow?

21 A. Yes.

22 Q. And the reason for that is that your recollection is
23 faulty. There never was an intention to prioritise the
24 sub-notes over the sub-debt, and there never were any
25 discussions about prioritising the sub-notes over the

- 1 sub-debt; do you follow?
- 2 A. That is what you are saying. That is not what
- 3 I recollect, that is not what my witness statement says.
- 4 MR JUSTICE SMITH: No, Mr Katz --
- 5 A. And something absolutely happened between the final and
- 6 the documents that you have produced.
- 7 MR JUSTICE SMITH: Mr Katz, just to be clear, counsel is
- 8 very properly putting his case to you. I wasn't
- 9 expecting a yes.
- 10 A. Sorry.
- 11 MR JUSTICE SMITH: But -- it is important that your "no" is
- 12 reflected on the record, but it is simply the point that
- 13 is part of counsel's case, and he is obliged to put his
- 14 case to you, and that is what he has done.
- 15 A. Understood.
- 16 MR PHILLIPS: And the commercial driver point again is
- 17 nowhere to be seen in the materials, so, again, I am
- 18 putting this to you, so you are in no doubt, we say,
- 19 that that is just a convenient fiction. Do you follow?
- 20 A. I hear you.
- 21 Q. Now, let's move on to what will be the last topic,
- 22 because I have taken a couple out. Could I ask you to
- 23 go back to your witness statement, please; can I ask you
- 24 to go to BK2, in C/11, it is C, tab 11?
- 25 A. Which.

1 Q. Tab 11, bundle C?

2 A. Yes.

3 Q. And I want to look at page 138 following, it is

4 paragraph 9 onwards, in which you deal with Mr O'Grady's

5 statement. Do you follow?

6 A. Yes, yes.

7 Q. And -- in this part of your statement, you discuss the

8 operation of the solvency condition in the PLC sub-notes

9 and the PLC sub-debt, do you follow?

10 A. Yes.

11 Q. Okay. It is very legalistic, yes?

12 A. No.

13 Q. You don't think --

14 A. I am an accountant, a CPA. To me it's very --

15 accounting debits and credits. I am a CPA.

16 Q. You discuss the FSA standard form in quite a lot of

17 detail. You discuss the forms of the sub-notes and the

18 sub-debt in quite a lot of detail?

19 A. Where are you referring to.

20 Q. We are coming on to that; we will come on to that.

21 A. Okay.

22 Q. I take it that you were not yourself familiar with the

23 Standard Form 10, is that right?

24 A. No, the standard form was not something that -- that we

25 worked with on the desk.

- 1 Q. And I take it you are not familiar with the IPRU rules?
- 2 A. No, at the time I was very familiar with the IPRU.
- 3 Q. You were familiar with the IPRU rules. When did you
- 4 first consider them?
- 5 A. At the time I was very familiar.
- 6 Q. Okay, and what about the EU Directives, were you
- 7 familiar with those?
- 8 A. Yes.
- 9 Q. Okay. Now, you take issue with Mr O'Grady's statement,
- 10 and in particular you take issue with 94-96?
- 11 A. Sorry -- okay, right, right. Right. Yes.
- 12 Q. Would you like to just be reminded about the sections
- 13 that you are taking issue with?
- 14 A. Why don't you keep rolling, I remember Mr O'Grady's
- 15 essence of what he was getting at.
- 16 Q. Mr O'Grady states that:
- 17 "There would never have been a situation where an
- 18 entity would not have had enough cash to make
- 19 intra-group payments, and any such entity would merely
- 20 increase its inter-company liability to LBHI UK which
- 21 would in turn borrow from LBHI New York."
- 22 And as I understand it, your point is that the
- 23 remedial action that Mr O'Grady suggests to address any
- 24 cash shortfall would not have been permitted by the
- 25 subordination provisions, and I think that is what you

1 say in paragraph 13. Do you see, if you just look,
2 where you say:

3 "Mr O'Grady would not necessarily have been aware
4 that the remedial action he suggests to address a cash
5 shortfall would not have been permitted by the
6 subordination provisions in the sub-notes in
7 circumstances where there was a true capital shortage of
8 PLC."

9 Do you see that?

10 A. Yes.

11 Q. And we have established that we are talking about
12 roughly 40 million euros a year; yes?

13 A. We did not establish that. You said -- you picked
14 a point in time that the numbers added up to 40 million
15 on a perpetual security, as I explained to
16 your Lordship, you know, as we go through time, the
17 coupon on those securities could change; there could
18 also be further issuances of subordinated notes over
19 that perpetuity.

20 Q. Mr Katz, for present purposes, about that sort of
21 number?

22 A. At that point in time, the number was that, but we did
23 not structure --

24 Q. Thank you.

25 A. -- thinking about a moment in time when you are

1 structuring a perpetual security, an undated security.

2 Q. And you placed particular reliance on the solvency

3 condition in the standard form which we can see in the

4 sub-notes. Can you just go back. Have you still got E9

5 there? Just have a look?

6 A. No, it's coming. Yes, which section?

7 Q. It is on page 129, and keep this open.

8 A. Okay.

9 Q. Status and subordination. And you place a lot of

10 reliance on B.

11 "For the purposes of condition ..."

12 Do you see it?

13 A. Yes.

14 Q. "... the issue shall be solvent if it is able to pay its

15 liabilities other than the subordinated liabilities ...

16 disregarding obligations that are not payable or capable

17 of being established ... determined ... excluded

18 liabilities."

19 Do you see that?

20 A. Yes.

21 Q. Okay, just to remind you, because what you say is that

22 in paragraph 17, you say if PLC was to have borrowed

23 from LBHI UK, a loan would not have improved PLC's

24 ability to pay, because the liability would have become

25 a senior liability, and it would have continued to have

1 breached the solvency condition.

2 So just to get clear what you are saying. Your
3 point is that lending by LBHI UK, so this is lending,
4 could not get around the solvency issue because it puts
5 a new liability on the balance sheet which would
6 negatively affect the balance sheet of PLC, is that your
7 point?

8 A. Yes.

9 Q. Thank you. And it is in order to ensure that the
10 payments, and we were talking in the year we looked at,
11 at that 8.8 million, 12.8 million and 17.7 million, it
12 is in order to ensure that those payments are made in
13 full, that you conclude that the only answer to this
14 issue was for the PLC sub-notes to be prioritised, is
15 that right?

16 A. Sorry, the only issue -- I don't --

17 Q. The only answer to the issue of being able to pay the
18 ECAPS and avoid the stopper was to make the sub-notes --
19 give the sub-notes priority, the only solution to the
20 problem?

21 A. I don't know about only. The only thing I know is that
22 making the subordinated notes, as I have provided a very
23 simple example in my witness statement, making them
24 senior to the subordinated debt, would improve the
25 probability, likelihood, certainty of making payment on

- 1 those subordinated notes over time.
- 2 Q. Yes, so you are saying it is not the only way?
- 3 A. There may well be other ways. I -- I don't know.
- 4 I haven't thought about that.
- 5 Q. Okay. Well, let's -- because you did actually think
- 6 about it.
- 7 So let's just look at -- we have looked at the
- 8 solvency condition on 129. Can we just go back to look
- 9 at the definition of excluded liabilities on 127. Do
- 10 you see that?
- 11 A. Yes.
- 12 Q. So that is expressed to -- those are liabilities that
- 13 rank junior, yes?
- 14 A. Yes.
- 15 Q. And the definition of subordinated liabilities, do you
- 16 see that, is on 128?
- 17 A. Yes.
- 18 Q. "All liabilities to the noteholders in respect of the
- 19 notes and all other liabilities of the issuer which rank
- 20 or expressed to rank pari passu ..."
- 21 So if we look at the solvency test, it doesn't
- 22 include the subordinated liabilities, which is anything
- 23 that ranks pari passu; yes?
- 24 A. Sorry, if we look --
- 25 Q. Look at 129?

- 1 A. Yes.
- 2 Q. The solvency test?
- 3 A. Right.
- 4 Q. It doesn't include anything that ranks -- that is
5 subordinated, in other words anything that ranks
6 pari passu. We just looked at that definition, yes?
- 7 A. I am not following what you are trying to say.
- 8 Q. I will have to do this more slowly.
- 9 You rely on the solvency test, okay and you say you
10 cannot have put money into PLC because you would have
11 made a mess of the solvency test, and you then wouldn't
12 have been able to pay?
- 13 A. Right.
- 14 Q. I am looking at the solvency test and the issuer is
15 solvent, PLC is solvent if it is able to pay its
16 liabilities, and then it excludes two things. Two
17 things that don't count in the insolvency test; okay,
18 you follow? Good. One is subordinated liabilities?
- 19 A. Yes.
- 20 Q. And the other is the excluded liabilities, okay?
- 21 A. Yes.
- 22 Q. And we looked at the definition of subordinated
23 liabilities, and that is anything that ranks or is
24 expressed to rank pari passu with the notes, yes --
- 25 A. Yes.

1 Q. -- you follow? And the other one we looked at was
2 excluded which ranks junior?

3 A. Yes.

4 Q. So they don't count when you are making that
5 calculation?

6 A. Correct.

7 Q. So your criticism of Mr O'Grady assumes that injections
8 would have been by way of senior debt, correct?

9 A. Yes, yes.

10 Q. Yes. And the first point is that LBHI UK did not need
11 to lend the 40 million, or whatever it may have been, on
12 an unsubordinated basis, do you follow? Yes?

13 A. Say that again.

14 Q. They didn't need to put money in on an unsubordinated
15 basis?

16 A. Who is they?

17 Q. LBHI UK or LBHI?

18 A. You are saying, just to restate it, LBHI didn't need to
19 put money in on an unsubordinated basis. So the only
20 thing I know is that it put the money in through book
21 entry, which by definition, the default was senior. The
22 normal workings of billions of dollars of flows, as the
23 central bank of Lehman, everything was senior, for the
24 whole operation of Mr O'Grady's department. Somebody
25 would have to go to him to say: don't do that, do

1 something else. I am not aware that ...

2 Q. Can we start looking at some of the alternatives,
3 forgive me, Mr Katz, but they could have put some money
4 in as equity?

5 A. If I can address that point. When we are structuring
6 things, we are structuring things based on contract. We
7 have rating agencies that are looking at the contractual
8 internal plumbing for the source of cash flows. We
9 can't get a credit rating based on uncertain random
10 possibilities that -- let's -- let's -- maybe PLC will
11 be sold to BNP and they will have sources of cash flows.
12 I mean, these are just made up, made-up things, which,
13 no, we didn't contemplate made-up things.

14 Q. Mr Katz --

15 MR JUSTICE SMITH: Mr Katz, I think you are being put
16 questions on a hypothetical basis. I appreciate that
17 things may have been done in a certain way, but I think
18 the point that is being put to you is: was it possible
19 to do it in an alternative way, not whether you did it,
20 but whether it was possible to do so. And that,
21 I think, is the premise on which these questions are
22 being put.

23 A. Okay.

24 MR PHILLIPS: Thank you, my Lord.

25 A. Thank you.

1 Q. The first possibility was putting some equity in, and
2 you may or may not be aware that in the 41 months
3 between the creation of the ECAPS and Lehman's
4 insolvency, there were 12 issues of equity into PLC
5 totalling 2.35 billion, so that was a possibility.

6 A. I was not aware of that.

7 Q. But you will accept that is a possibility?

8 A. Yes, that is a possibility, yes.

9 Q. Okay. Second, LBHI UK did not need to provide funds to
10 PLC at all, in that LBHI UK could have injected money
11 straight into GP1, the general partner, couldn't it?

12 A. Yes, I guess if it was legally possible, yes. I -- if
13 you say so.

14 Q. Then I just want to show you, if I may, just a couple of
15 documents. My Lord, is it acceptable for me just to go
16 a little over time?

17 MR JUSTICE SMITH: I think you can run until five past.

18 Will that be sufficient for your purposes?

19 MR PHILLIPS: I might need a bit longer, but I am cutting
20 this down dramatically.

21 Could you get F1 back, please. Could you go to 341.

22 Do you have that?

23 A. Yes.

24 Q. Do you see, it is an e-mail -- this is 8 March, an
25 e-mail from Mr Curran to Mr Tonucci, copied to

1 Erin Callan, copied to you, and I want to look at -- you
2 are discussing the ratings, and I wanted to just pick up
3 the paragraph that starts:

4 "We do not believe that SPV ownership of PLC debt
5 should be critical to the rates of the preferred
6 securities. Whether payments are made on the sub-notes
7 is not critical to determination as to whether payments
8 on the preferred securities necessarily will be made.
9 As 100 per cent owner of the general partner, LBHI can
10 defer payments on the preferred, even when payments on
11 the PLC subordinated notes were made. However, if
12 a payment is deferred, Lehman Brothers will not be able
13 to make dividend payments to its ... holders. Therefore
14 LBHI will either (1) incentivise PLC to make the
15 interest payments ..."

16 And then it is this:

17 "... or alternatively LBHI will contribute its own
18 funds to SPV to pay the preferred securities in order to
19 allow it to make payments on its common dividends."

20 So you see that what you were discussing was exactly
21 that; if there might be a problem on payment of the
22 ECAPS, LBHI might pay the GP, GP1 or 2 or 3, directly so
23 that they can pay the ECAPS to avoid the dividend
24 stopper, do you see that?

25 A. Yes.

1 MR JUSTICE SMITH: Mr Katz, do you have an issue with -- I
2 mean, obviously you see the words. But, you accept that
3 this is a possibility?

4 A. Yes, I accept that it is a possibility.

5 MR PHILLIPS: Yes. And of course if LBHI pay the LP, the
6 limited partner, directly there doesn't have to be
7 a payment to PLC by LBHI, correct?

8 A. Excuse me?

9 Q. If LBHI pays the general partner, there does not have to
10 be a payment to PLC, that must follow?

11 A. There doesn't have to be a payment to PLC, correct.

12 Q. If we can just look at 339, which is backwards. No, I
13 am going to miss that out. Second, can we go to 149.

14 A. 149.

15 Q. Yes, 149. You will see at the top -- do you have it?
16 You will see at the top that you sent an e-mail on
17 18 February copied to a number of people, but I want to
18 pick up Mr Tonucci's e-mail first of all and you can see
19 it is copied to a number of people. He says, and it is
20 the second paragraph:

21 "The question of insufficient capital to pay the
22 coupon on the sub-debt..."

23 A. Excuse me, where?

24 MR JUSTICE SMITH: Just below the first holepunch, Mr Katz.

25 A. I am on okay -- oh, okay, sorry. Right, right.

1 MR PHILLIPS: Do you have that?

2 A. Yes, "The question of..." Yes.

3 Q. "The question of insufficient capital to pay the coupon
4 on the sub-debt I don't see this as a problem. If the
5 interest is not paid for some administrative error..."
6 Do you see that?

7 A. Yes.

8 Q. "Then we will have to fund the coupon payment to the SPV
9 or BV as a loan. If there are liquidity reasons for not
10 having the capital we would expect to defer the coupon
11 on the prefs..."
12 Which of course would trigger the stopper.
13 But what he is contemplating, Mr Tonucci identifies
14 the possibility that it might not be paid because it is
15 an administrative error. That was the sort of level he
16 was thinking about and importantly he suggests a direct
17 payment to the ECAPS general partner; do you see that?

18 A. Mmm mm.

19 Q. And there is no mention of course of priorities and
20 rankings or the solvency condition. So let me just --
21 and of course if you look at your response, Mr Katz, you
22 might want to cast your eye over your response. But you
23 will see that you did not respond to that point by
24 Mr Tonucci. So you see that. Sorry, have you had an
25 opportunity just to see that?

1 A. You are talking about my response at the top of
2 page 149, right?

3 Q. Yes. You don't disagree with the point that was made?

4 A. No, I didn't disagree.

5 Q. Thank you. And we don't see any discussion or mention
6 of the need to change priorities or rankings, that's
7 right, isn't it?

8 A. Not in this e-mail.

9 Q. No and we don't see any issue with the solvency
10 condition?

11 A. No, we weren't talking about that in this e-mail.

12 Q. Yes. So let's just bring some threads together.
13 A shortfall on the ECAPS coupons -- and you won't need
14 any paper for this, you will be pleased to know -- the
15 shortfall on the ECAPS coupons would arise if PLC was
16 unable to pay 40 million euros or thereabouts in whole
17 or in part; yes?

18 A. At that moment in time that you did your math it was
19 40 million, right, that would have been the shortfall.

20 Q. In the e-mails the non-payment of the ECAPS coupons was
21 considered a possibility resulting from, for example,
22 administrative error, correct?

23 A. They were talking about administrative error.
24 I think -- I think what's important is the context if
25 I may add some context, I think it would be helpful if

1 I may?

2 MR JUSTICE SMITH: By all means.

3 A. You know, when you have a dividend stopper again, if
4 ever that would be invoked, that means preferred stock
5 and other equivalent securities go into default from
6 a rating agency's standpoint, you know, the symbols that
7 they use; it is game over. So when you have one of
8 those you have to think about everything. What -- what
9 can we do at different levels?

10 I think when we were starting this conversation,
11 this bit that we're in, we were first talking about PLC,
12 we were talking about Gareth, we were talking about
13 ranking at that level. Now we are talking about the
14 partnership, what -- you know, if PLC would break down
15 there wouldn't have been any cash, you know the whole
16 thing went kaput, let's suppose. Then what happens?
17 What would LBHI do? Well, LBHI could put money into the
18 partnership and that is what they are talking about
19 here.

20 MR PHILLIPS: Yes, and as you say, you talked about
21 everything and what we see from the documents is that if
22 there ever was a shortfall there were alternative
23 solutions.

24 A. Yes. At this -- at this level that we are speaking
25 about yes, it is written.

1 Q. And prioritisation of the sub-notes over the sub-debt
2 was not a solution discussed at the time?

3 A. It was not discussed in this e-mail, but we have already
4 been through, as I said in my witness statement, it was
5 discussed. The beginning point of this is who's the
6 issuer of the -- of the feeder instrument, the main cash
7 flows. What do we contractually know?

8 Then we moved on to the next level. Should that
9 blow up -- and it actually did blow up -- what happened
10 if LBHI survived and it had these securities
11 outstanding, what would it do? And we just looked at it
12 here on page 149.

13 Q. Mr Katz, the only discussion we see in the e-mails, and
14 we have looked at them, about prioritisation between
15 sub-notes and sub-debts involved the sub-debt taking
16 priority over the sub-notes, yes, do you follow?

17 A. We were looking at those other term sheets earlier, yes.

18 Q. Yes. There is just a final point if I may. We heard
19 yesterday from Ms Dolby that you had no involvement in
20 the 2007 restructuring. Can you confirm?

21 A. That's correct.

22 Q. That's correct. Thank you very much.

23 My Lord, no more questions.

24 MR JUSTICE SMITH: Thank you very much, Mr Phillips.

25 Ms Tolaney, do you want to re-examine at 2 o'clock?

1 MS TOLANEY: Yes, please, my Lord.

2 MR JUSTICE SMITH: Very good. We will resume at 2 o'clock.

3 (1.07 pm)

4 (The short adjournment)

5 (2.01 pm)

6 MS TOLANEY: My Lord, mindful of Mr Katz's travel
7 arrangements, I have nothing to put to him. I am sorry
8 I kept him over the short adjournment; I have no
9 re-examination.

10 MR JUSTICE SMITH: That's absolutely fine. Mr Katz, thank
11 you very much. You are released from the witness box,
12 and safe journey.

13 MR PHILLIPS: I am so sorry, my Lord. My Lord, I need to
14 call Ronald John Geraghty.

15 MR RONALD GERAGHTY (affirmed)

16 Examination-in-chief by MR PHILLIPS

17 MR PHILLIPS: Mr Geraghty, do you have bundle C.

18 A. Yes.

19 Q. And could you turn to divider 7, tab 7, please.

20 A. Yes.

21 Q. Do you see a second witness statement of Ronald John
22 Geraghty?

23 A. Yes.

24 Q. I will perhaps just explain to his Lordship that there
25 was a first, but it is not material for the trial.

- 1 And if you could turn to page 106, please.
- 2 A. Yes.
- 3 Q. Do you see your signature?
- 4 A. Yes.
- 5 Q. Is this the evidence that you wish to give to his
6 Lordship?
- 7 A. It is.
- 8 MR PHILLIPS: If you just wait there, there will be some
9 questions.
- 10 A. Thank you.
- 11 Cross-examination by MS TOLANEY
- 12 MS TOLANEY: Good afternoon, Mr Geraghty.
- 13 A. Good afternoon.
- 14 Q. Could you please be given bundle E and could you turn to
15 tab 16, which is the back tab.
- 16 A. Yes.
- 17 Q. Now, this is the Settlement Agreement in issue in these
18 proceedings; you have seen it, before I take it?
- 19 A. Yes.
- 20 Q. And you are familiar with its terms?
- 21 A. I am.
- 22 Q. And this agreement was produced following negotiations
23 between a number of senior and experienced
24 professionals, wasn't it?
- 25 A. It was.

- 1 Q. And you were involved in negotiating on behalf of LBHI
2 and its US debtor affiliates?
- 3 A. Correct.
- 4 Q. And you worked in a team led by Mr Daniel Ehrmann?
- 5 A. Correct.
- 6 Q. And there are a number of senior professionals from PwC
7 who are acting on behalf of the UK affiliates?
- 8 A. Correct.
- 9 Q. And just to be clear, you didn't act on behalf of any of
10 the UK affiliates?
- 11 A. That's correct, not the UK admins or liquidation
12 companies; the US debtor-led companies that have
13 entities in the UK.
- 14 Q. Yes, but not the ones that are defined as UK affiliates?
- 15 A. Correct.
- 16 Q. And there were not two but three firms of lawyers
17 involved in negotiating and dealing with this agreement,
18 weren't there?
- 19 A. Correct.
- 20 Q. So LBHI and the US debtors were represented by
21 Weil Gotshal?
- 22 A. Yes.
- 23 Q. And the UK affiliates were represented by Linklaters and
24 Davis Polk?
- 25 A. Correct.

1 Q. And between them, they produced a 56-page agreement
2 following what you describe as a lengthy period of
3 negotiation?

4 A. Correct.

5 Q. So all of these sophisticated professionals agreed and
6 recorded detailed terms in a written agreement, did they
7 not?

8 A. Correct.

9 Q. Don't you think what they intended was embodied in that
10 agreement?

11 A. It was.

12 Q. You still work for LBHI, don't you?

13 A. I do.

14 Q. And no-one else who is involved in negotiating the
15 agreement has come to court to support what you say was
16 the intention behind it?

17 A. Correct.

18 Q. Now, can you turn to page 515, please. You see there,
19 do you have that?

20 A. I do.

21 Q. Thank you. Do you see there that John Keen signed this
22 agreement?

23 A. He did.

24 Q. Now, could you then go, please, to bundle F9, and could
25 you turn to page 4886. Now, do you have in front of you

1 an agreement between LBIE and various others, including
2 Lehman Brothers Holdings --

3 A. Yes.

4 Q. -- inc. And that is dated 10 October 2014, isn't it?

5 A. Yes, it is.

6 Q. Now, this is a subsequent Settlement Agreement agreed in
7 2014 which concerned the assignment of claims to LBHI,
8 didn't it?

9 A. It concerned, and I will get into my involvement,
10 I suppose, in a minute.

11 Q. I am not asking about your involvement.

12 A. So my understanding is it concerned a large amount of
13 reconciliation between many, many entities, and then
14 ultimately the assignment of three claims to LBHI.

15 Q. So to put my question again, it concerned the assignment
16 of claims to LBHI?

17 A. Among other things, yes.

18 Q. And if you turn, please, to clause 5 in this agreement,
19 and that is at page 4900, have you got that?

20 A. One second, please. Yes.

21 Q. And this is the assignment clause?

22 A. Yes.

23 Q. And what is happening here is that the agreed proof
24 creditors of LBIE are assigning claims to LBHI, correct?

25 A. Correct.

1 Q. And within that clause, we see the words, "and any
2 releases in the 2011 Settlement Agreement shall not
3 apply to those claims"?

4 A. Correct.

5 Q. So could you then turn, please, to page 425?

6 A. Excuse me 425.

7 Q. It is 425, and the page I am going to refer you to after
8 that is slightly further on.

9 A. Which bundle?

10 Q. 4925. I am sorry.

11 A. 4925, okay.

12 Q. So we see that this agreement was signed by
13 Daniel Ehrmann, yes, 4925, do you see his signature?

14 A. Yes, I do.

15 Q. Yes, and go back to 4918?

16 A. Yes.

17 Q. And you can see it is signed by John Keen as well?

18 A. Correct.

19 Q. Both of whom, as we have seen, were signatories on the
20 2011 Settlement Agreement?

21 A. They were.

22 Q. And --

23 A. I will point out --

24 Q. -- you have no personal knowledge?

25 A. I am sorry, counsel.

1 MR JUSTICE SMITH: Yes.

2 A. John Keen signed, I believe in the 2011, for
3 a particular entity, LBLIS; Daniel Ehrmann signed for
4 many, many entities --

5 MS TOLANEY: Yes, agreed, but they both were --

6 A. They were both signatories.

7 Q. Both signatories.

8 A. That is correct.

9 Q. And they were also signatories to this, and you have no
10 personal knowledge of the negotiations leading to this
11 2014 Settlement Agreement, have you?

12 A. I don't, no. I don't have any personal -- but I was not
13 in the day-to-day negotiation of that agreement, I am
14 sorry, of the commercial settlements. I had nothing to
15 do with the agreement itself. We were given updates on
16 the progress that the team was making in terms of
17 reaching settlement, so I had that general high level
18 knowledge but not the detailed knowledge, as you say.

19 Q. No, because the wording I have just shown you suggests
20 that those who were involved considered that it was
21 necessary to exclude the effect of the release clause in
22 the 2011 Settlement Agreement, did they not?

23 A. Well, as I put in my witness statement, since I was not,
24 as you point out, involved in the detail, I did -- or
25 John Keen has read this information, and we did speak to

1 him, and -- you know, to try to get a better sense of
2 what was intended or what that phrase might have meant.
3 And so my position, as best I can tell, is really just
4 from him, which is that -- that -- that phrase, that
5 provision, in no way insinuated that after-acquired
6 claims or assigned claims would somehow otherwise have
7 been released.

8 Q. Let's look at that, shall we. Let's go to paragraph 77
9 of your witness statement and see exactly what you say.

10 Do you have that?

11 A. I do.

12 Q. So what you say here is simply that Mr Keen does not
13 recall any of the parties asserting that in the absence
14 of the words that I have shown you, the claims would be
15 released.

16 It doesn't say what you have just said to the court,
17 according to your witness statement?

18 A. I thought it did. So my witness statement says that he
19 doesn't recall that and that the phrase that had been
20 pointed out to him --

21 Q. But that is not in your witness statement, is it? The
22 phrase that has been pointed out to him; you go on to
23 say that the phrase that has been pointed out to him
24 didn't have -- I think you said, we will go back to the
25 transcript --

1 A. I am paraphrasing it, my Lord. So it says Mr Keen does
2 not recall any of the parties to the STG, Settlement
3 Agreement, the one we were just looking at, asserting
4 that in the absence of the words that Deutsche Bank --
5 5.11, which is the provision we just read, that the
6 claims would be released following the transfer.

7 Q. So what those words say he doesn't recall anyone
8 asserting that; it gives no clue to the reason for why
9 people who were signatories to both agreements thought
10 those words were necessary, does it, that sentence?

11 A. I couldn't speculate what they were thinking.

12 Q. No, but you do speculate, don't you, Mr Geraghty,
13 because you go on to assert:

14 "As a result I believe that those words were a belt
15 and braces approach."

16 That is your personal speculation, having had no
17 involvement with that agreement?

18 A. That's correct.

19 Q. And Mr Keen hasn't given a witness statement in support
20 of your position, has he?

21 A. He has not.

22 Q. No. And in this paragraph, you make no mention of
23 Mr Keen supporting what you say about the 2011
24 agreement.

25 A. Well, it is right here, so he has read the witness

1 statement, and the provision that had been highlighted
2 does specify, you know, a release provision from the
3 2011 agreements. So I believe his statement does
4 support my position.

5 Q. But he hasn't seen fit to give a statement and neither
6 has Daniel Ehrmann, has he?

7 A. Daniel Ehrmann has not. We obviously made reference in
8 my statement to his declaration that was submitted in
9 the planned reorganisation.

10 Q. None of the UK affiliates have given any evidence about
11 the intentions behind the agreement, have they?

12 A. They have not given direct evidence, no.

13 Q. No. So the only person saying that there was
14 a particular intention, unless it is reflected in the
15 agreement which we will come on to, is you?

16 A. I am the only one who is giving witness evidence on this
17 point, that is correct.

18 Q. So shall we have a look at the Settlement Agreement in
19 question, so going back to the last tab of E, please.
20 Can we please go to page 459. You will see at the top
21 of the page, the fifth recital refers to the fact that
22 UK affiliates have filed proofs of claims against the
23 debtors, correct?

24 A. That's correct.

25 Q. And then the sixth recital, the second one at the top of

1 the page, the debtors have asserted funding claims
2 against the UK affiliates; do you see that?

3 A. I just want to make sure, second from the top:

4 "Whereas certain other debtors have asserted that
5 they have claims against certain of the UK affiliates,
6 including claims asserted by LBHI against LBIE and
7 certain UK affiliates in respect of intercompany
8 funding."

9 Q. Yes, I am just recording that is what the debtors had
10 asserted.

11 A. Just to highlight that, you know, since the US process
12 had a -- hard bar date claims process, they obviously
13 had submitted, the UK processes, not as much of a hard
14 bar date process. So we are saying we have claims,
15 I think claims had -- into the UK entities, had maybe
16 not even started yet to go in, but we had claims,
17 meaning that we knew we were pursuing.

18 Q. Yes. So there are two sets of defined claims, is the
19 point?

20 A. Correct.

21 Q. So if you go on then to page 473, please, article 2 --

22 A. Yes.

23 Q. -- then concerns the settlement of claims, and do you
24 see section 2.01A, settles LBIE's claims against LBHI
25 for an agreed amount?

1 A. Yes.

2 Q. And that is referred to as the LBIE guarantee claim?

3 A. Yes.

4 Q. Correct. And that is one of the guarantee claims you
5 refer to in your witness statement at paragraph 23B and
6 24, I don't know if you want to look at it?

7 A. I trust you. Yes.

8 Q. Then section 2.05, which is a little way on, and that is
9 at page 477, at (a) --

10 A. Yes.

11 Q. -- settles the debtors' claims against the UK affiliates
12 for agreed amounts set out in a schedule?

13 A. Correct.

14 Q. And these are the claims you refer to at paragraph 25 of
15 your witness statement?

16 A. Yes.

17 Q. And these are all claims that the debtors or the UK
18 affiliates held as of the bankruptcy date?

19 A. They were -- so the population of claims that is in this
20 agreement as stated were the claims that the UK
21 affiliates, all 50-some odd of them, filed in proofs, so
22 very formalised proofs, and the claims that had not been
23 so formally filed, but that the debtors, I believe they
24 had at the -- at the point of bankruptcy, that's
25 correct.

1 Q. And your evidence is that the purpose of the Settlement
2 Agreement was to resolve these known claims held by the
3 parties at the bankruptcy date?

4 A. Yes.

5 Q. In addition to the claims being settled that we have
6 seen under article 2, the Settlement Agreement obviously
7 contained the releases that you are familiar with?

8 A. Yes.

9 Q. And if we go to those at article 8, page 497, we see
10 first of all in section 801 the release by the UK
11 affiliates against the debtors, correct?

12 A. Correct.

13 Q. And then over the page, at 802, the debtors' release
14 against the UK affiliates?

15 A. Correct.

16 Q. And those are the mutual releases there in common terms?

17 A. Correct.

18 Q. Now, these releases were not limited to existing claims
19 known or foreseen by the parties to the Settlement
20 Agreement as at the bankruptcy date, are they?

21 A. I do not agree with that.

22 Q. Right. Let's go through it. First of all, let's start
23 with, I think we can agree that the release doesn't
24 refer to the funding claims that I have shown you. It
25 doesn't use that defined term. If you look through

- 1 8.02, it does not use that defined term, does it?
- 2 A. Release doesn't refer to the funding claims; is the
- 3 funding claim a defined term?
- 4 Q. I just showed you that in the recitals. I will show it
- 5 to you again.
- 6 A. Sure.
- 7 Q. We looked at it together on page 459, that second
- 8 recital from the top of the page?
- 9 A. Agree, it is a defined term.
- 10 Q. And instead what the clause refers to are the words and
- 11 if you go back to page 498, do you have that?
- 12 A. Yes.
- 13 Q. The word refers to -- clause refers to causes, any
- 14 causes of action. Do you see that, it is halfway down?
- 15 A. I do.
- 16 Q. And do you also see that it refers to foreseen or
- 17 unforeseen, foreseeable or unforeseeable? Do you see
- 18 those words?
- 19 A. I do, I do, yes.
- 20 Q. So it plainly isn't limited to known or foreseen claims
- 21 held on the bankruptcy date by the parties to the
- 22 agreement, is it?
- 23 A. Well, I believe in my opinion, and it is stated in my
- 24 witness statement, that this release applies to, upon
- 25 the effective date, everything that had been identified

- 1 at that point, so --
- 2 Q. What is meant by unknown?
- 3 A. So unknown would be if, let's say we had derivative
4 trades that we were settling, and say we had ten of
5 them. And we found out after we had settled them that
6 part of the Settlement Agreement, there were two more
7 that existed prior to, and they just weren't known at
8 this date, but they did exist prior and they were all
9 captured by that release. That is how we see that.
- 10 Q. You say we see that; you mean that is how you see that?
- 11 A. That is how I see that, yes.
- 12 Q. Yes. So what you are saying is that the words
13 "foreseen", "unforeseen", "foreseeable",
14 "unforeseeable", "known" or "unknown" are to be
15 interpreted actually in a very restricted way that you
16 know about, that nobody else reading this agreement
17 would?
- 18 A. Well, it would be how I see it, and I put to you how
19 anybody who was involved in this agreement would see it.
- 20 Q. As I pointed out, nobody else who is involved in this
21 agreement is here; it is only you.
- 22 A. I am here with my witness evidence and all my support.
- 23 Q. So shall we look now at E/16/459, please.
- 24 MR JUSTICE SMITH: Same page.
- 25 MS TOLANEY: Same document, I beg your pardon, page 459.

1 And can you see the last recital with the word
2 "Whereas", so it is one up from the bottom.

3 A. I just want to make sure -- this is back to the main
4 agreement, sorry, yes.

5 Q. Yes?

6 A. Whereas -- the one that says "whereas the debtors"?
7 Q. "and the UK affiliates desire", that one?
8 A. To resolve all disputes and all other outstanding issues
9 among them except as expressly excluded and to avoid
10 extensive and expensive litigation.

11 Q. Yes so LBHI was in a terminal insolvency process, wasn't
12 it?

13 A. Yes.

14 Q. And it wanted to bring an end to disputes and realise
15 its assets, didn't it?

16 A. It did.

17 Q. And indeed, LBHI's chapter 11 plan talked about winding
18 up, selling down and otherwise liquidating, didn't it?

19 A. It did.

20 Q. And essentially, LBHI wanted to cease to exist, to wind
21 itself up.

22 A. Eventually, correct, as any admin or liquidation
23 bankrupt company.

24 Q. Yes, and in that context it made perfect sense for
25 a release to cover not only existing claims, but claims

1 the parties might have in the future so that things
2 didn't come out of the woodwork, agreed?

3 A. No, I do not agree with that.

4 Q. Shall we look at section 801 again of the Settlement
5 Agreement. So we have the UK affiliates' release, and
6 then over the page, the mutual debtors' release.

7 A. Yes.

8 Q. And just looking now again at the terms of 802, you can
9 see, can't you, that the various sets of lawyers
10 involved in this agreement included in the clause
11 a number of categories of claims that were expressly
12 excluded from the release?

13 A. Correct.

14 Q. You will see that?

15 A. Yes.

16 Q. So you accept, don't you, that those drafting the clause
17 obviously turned their mind to the scope of what was in
18 and what was out?

19 A. They did.

20 Q. And do you agree with me that there is no express
21 exclusion of after-acquired claims, is there?

22 A. There is not.

23 Q. And do you say it should be read in, based upon, I think
24 the commercial sense that you explain in your witness
25 statement?

1 A. I believe my witness statement says it is not expressed
2 to have excluded -- to have released, so the opposite of
3 what you said, it does not say it has released after
4 acquired, and being one of the parties to this
5 negotiation and agreements, I know what was being
6 discussed, what the intention was, and then of course
7 all the subsequent activity in the eight years that
8 passed, is overwhelmingly proof that the other parties
9 felt the same way.

10 Q. You think that the words "unforeseeable" don't actually
11 mean unforeseeable?

12 A. I think I explained that earlier, so those --
13 unforeseeable, unknown, unaccrued, all that, are items
14 that existed at the time of the agreements that just --
15 that weren't known, but would have -- we would have
16 released those, not things that would have come on
17 afterwards.

18 Q. What about the words "unmatured" or -- effectively
19 contingent, so they were things that you wouldn't have
20 known existed at the time by definition?

21 A. Similarly, if it was an item that, you know, in the
22 context of the claims that had been put forward, issues
23 that were being resolved, had have been unknown,
24 unmatured, unforeseeable, at that time, but in that pot,
25 they are released.

- 1 Q. So what you say is that those words have to be read with
2 a limitation, that it has to be things that were known
3 about, even though the word says "unknown"?
- 4 A. I say that that release should be read relative to the
5 recitals in it which define the population of what this
6 agreement is about.
- 7 Q. Right, because just looking at this clause, by
8 definition, parties would not usually know what
9 unforeseeable or unknown claims would be, would they?
10 If it is unforeseeable, then you obviously haven't
11 foreseen it, correct?
- 12 A. If it's unforeseeable, I assume that is right, otherwise
13 it would be listed as having been dealt with.
- 14 Q. And by including that language in both the releases,
15 both parties took the risk and received the benefit of
16 a mutual release of unknown and unforeseeable claims?
- 17 A. For items that were in the population of what we had
18 been discussing, debating, quite frankly fighting about
19 for a year and a half, in that -- in that extent, not
20 the world of things that might happen later down the
21 road. That is not part of this.
- 22 Q. But you accept that the clauses, by mirroring each
23 other, provide a mutual benefit, to the extent that it
24 covers what you -- whatever it covers?
- 25 A. Yes, I do accept that.

1 Q. But what you say is that -- and let's go to your witness
2 statement, to be fair to you, Mr Geraghty, if you look
3 at paragraph 48 of your witness statement, you justify
4 here the reason why you say after-acquired claims would
5 not be within this release clause, on the basis that "we
6 would never have agreed to release future acquired
7 claims as it would not have made commercial sense", and,
8 going up, it would have been impossible to put an
9 economic value, essentially, on those claims.

10 But doesn't that apply equally to claims that are
11 unknown and unforeseeable?

12 A. The difference is we spent a year and a half working
13 through populations of trades, issues, so that territory
14 was closed. This territory hadn't been opened yet; that
15 is the difference.

16 Q. Well, just answer the question. If you have got an
17 unknown and unforeseeable claim, how can you put an
18 economic value on it? You cannot, can you?

19 A. We had put an economic value on it, and if it was not in
20 our -- it had no value ascribed in a settlement, we gave
21 that zero economic value, because we had spent the time,
22 that is the difference, going through. We had satisfied
23 ourselves, and so had our other parties to the
24 agreement, that enough work had been done that it was
25 over.

1 Q. I think what you are really saying is that there were no
2 unknown claims, and that is why you felt satisfied with
3 that language?

4 A. I would agree that as we signed it, there were no
5 unknown claims at that time, because otherwise it would
6 have been dealt with, or -- or -- but for items that
7 were in the population.

8 Q. Right, but just hypothetically, let's say despite all
9 your best research, there was a claim out there that you
10 had not factored in, hypothetically. You have given it,
11 you just told the court, a value of zero. In fact the
12 claim has a value of \$300 million; now that wouldn't
13 make commercial sense, would it?

14 A. My Lord, the difference is, you know, when we had spent
15 so much time researching all of this, we were fairly
16 certain, obviously having gone to this conclusion that
17 there wouldn't be that, and if there was that, then that
18 was -- that was our fault. That was a bad trade.

19 Q. Yes, it was a bad deal.

20 A. Yes. The difference being that we had spent the time,
21 and that is why we had the comfort on both sides to give
22 those releases, as opposed to something in the future.

23 Q. On this example, you would have made a mistake or just
24 done a bad deal, the hypothetical example?

25 A. If we had missed something in there that could have

1 gotten us 300 million, I would agree that is a bad deal.

2 Q. And you also say in your witness statement at
3 paragraph 52, if you want to look at it, that the
4 release would effectively amount to a waiver of a claim
5 for no economic value.

6 A. Yes.

7 Q. Do you see that? But we have just established, haven't
8 we, that the value is the reciprocal basis of the nature
9 of the release, isn't it?

10 A. I am sorry, the value ... of what? Can you be more
11 clear?

12 Q. Well, if you have got a mutual release you had value,
13 haven't you, you accepted that?

14 A. There is value in having a mutual release. Also as part
15 of a standard Settlement Agreement, we would have mutual
16 release.

17 Q. Could you go now to bundle B. It is tab 5 that I would
18 like you to go to, please.

19 A. Yes.

20 Q. Now, this is a skeleton argument that has been filed on
21 behalf of LBHI and SLP. Have you seen this before?

22 A. I have.

23 Q. And could you go to page 169, please. It is
24 paragraph 520. Have you seen this paragraph before?

25 A. Yes.

1 Q. And do you see, then, from the first two sentences, that
2 it is suggested that the value of the after-acquired
3 claim in question was 2 billion, you see that, don't
4 you, \$2 billion?

5 A. It says the substance of a circa 2 billion claim; it
6 doesn't say what the value is, it just says it is
7 a claim for 2 billion; the value is unknown.

8 Q. Well, go down to the end of the paragraph:

9 "It is inconceivable that sophisticated parties
10 advised by lawyers would have bargained away a 2 billion
11 claim."

12 I think that is suggesting that it is worth
13 2 billion?

14 A. It is suggesting it has value -- 2 billion -- but
15 I agree it is suggesting it has value.

16 Q. You accept, don't you, that the Settlement Agreement is
17 dated as at 24 October 2011?

18 A. It is.

19 Q. And no-one has suggested that the PLC sub-debt was
20 released in 2011?

21 A. Correct.

22 Q. So we know that the claims under the PLC sub-debt were
23 assigned to LBHI on 19 April 2017.

24 A. Yes.

25 Q. Now can you go now to bundle F9, please.

- 1 A. Yes, I have it.
- 2 Q. And go to page 5241, please. Sorry, 5245.1?
- 3 A. 5245.
- 4 Q. Point 1.
- 5 A. Got it. I see it.
- 6 Q. Do you have it. This is the LBH PLC in administration's
7 report as at 12 October 2016.
- 8 A. Yes.
- 9 Q. Do you have that?
- 10 A. I do.
- 11 Q. And could you go over the page and look at the
12 right-hand column?
- 13 A. Yes.
- 14 Q. And it is the bottom paragraph that I am interested in,
15 where it is suggested that:
- 16 "LBH's unsubordinated, unsecured creditors will have
17 to be paid in full before any distribution can be made
18 to subordinate unsecured creditors. Based on current
19 estimates, the administrators remain of the view that
20 there is unlikely to be any surplus available to pay
21 a dividend to creditors with subordinated claims."
- 22 So that is not suggesting that LBHI subordinated
23 claims under the PLC sub-debt would be worth \$2 billion,
24 is it?
- 25 A. It is not.

1 Q. No. Could you then go, please, to F10.

2 A. Yes.

3 Q. We want page 5439.1.

4 A. 5439 point ...

5 Q. 1. Do you have that?

6 A. I do. Point 10, yes, I have it.

7 Q. No, it is point 1, not point 10.

8 A. I am sorry, yes.

9 Q. It should be the quarterly financial report as

10 of 30 June 2017.

11 A. Yes.

12 Q. This is LBHI's financial report as of that date, so

13 after the assignment of the PLC sub-debt, and if you

14 could turn to page 18, please. Can you see that this

15 table says, and this should be under a heading, "Note

16 8", do you have that?

17 A. I do.

18 Q. And it says:

19 "The following table presents a summary of due from

20 to non-controlled affiliates for debtors as at

21 30 June 2017."

22 Have you got that?

23 A. I do.

24 Q. And if you look down the left-hand column, you can

25 identify an entry for LBIE and also for LBHI2.

1 But there is no entry on that table for the alleged
2 2 billion debt from PLC, is there?

3 A. There is not.

4 Q. And then if you look over the page at the table on
5 page .19, you will see the second table is captioned:

6 "The following table presents on an aggregate basis
7 for debtors and debtor-controlled entities, admitted
8 claims, receivables and collections to date from
9 non-controlled affiliates".

10 And you see about halfway down the page, Lehman
11 Brothers Holdings PLC, and again no entry for
12 a US\$2 billion claim.

13 A. Correct.

14 Q. So that suggests, certainly as at this time, the value
15 being ascribed to this claim was zero, no entry at all?

16 A. Excuse me, my Lord, can I just refresh on the actual
17 transfer date? I know you just mentioned it, counsel;
18 I just wanted to make sure I was clear on it.
19 April 2017.

20 Q. It was, yes?

21 A. Okay.

22 Q. So this postdates that. So can you then go to
23 page 5490.1, please.

24 A. Yes.

25 Q. And what we see here is another report dated as at

1 11 October 2017, correct?

2 A. Yes.

3 Q. If you go over the page, on the second column on the
4 right-hand side, you will see the heading, "Subordinated
5 creditors", and just above that, there is reference to
6 the Waterfall judgment. Do you see that?

7 A. Yes.

8 Q. And what it suggests then is as a result of that
9 judgment:

10 "... the quantum and timing of further distributions
11 remains uncertain, being contingent on the amount of
12 further recoveries being made by the company from its
13 equity ..."

14 And so on and claims against LBHI2.

15 Do you see that?

16 A. Yes.

17 Q. And then under the heading, "Subordinated creditor", you
18 can see the companies received claims from two holders
19 of debt instruments, namely LBHI and GP1. And dropping
20 down:

21 "These claims are subordinated to claims of
22 unsubordinated, unsecured creditors and will only be
23 entitled to receive distribution in those circumstances,
24 but the administrators consider it is possible there may
25 be a surplus."

1 A. Yes.

2 Q. So it was only after the Supreme Court judgment in
3 Waterfall I that the administrators of PLC thought that
4 distributions might be paid on the PLC sub-debt,
5 correct?

6 A. I would say that was a factor, certainly. And I think,
7 I believe back in 2017, it also was starting to come to
8 light that this particular case might come to light.

9 Q. Well, what you see here in the documents is the first
10 time it is suggested that the administrators thought
11 there would be a surplus was following the Waterfall
12 judgment, correct?

13 A. Sure, yes, yes.

14 Q. Could you then look at your witness statement again,
15 please, paragraph 60. What you say here is that:

16 "The release argument runs directly contrary to the
17 treatment of after-acquired claims as between LBHI and
18 the UK affiliates."

19 And you rely at paragraph 61 on a claim schedule?

20 A. Yes.

21 Q. Which you say are all after-acquired claims that would
22 have been released on Deutsche Bank's analysis, but in
23 relation to which distributions have been paid, correct?

24 A. Correct.

25 Q. And I am sorry to keep changing bundles --

- 1 A. No problem.
- 2 Q. -- but if we please go back to F10.
- 3 A. Yes, I have it.
- 4 Q. And you are looking for page 5828, please. Actually, if
5 you start at 5821, then you can see the full document
6 before we go to the relevant page?
- 7 A. Yes, I have it.
- 8 Q. So this is the claim schedule that you are referring to,
9 isn't it?
- 10 A. That's correct.
- 11 Q. And we see in the second column the list of UK
12 affiliates, correct?
- 13 A. Yes.
- 14 Q. And if then you go to the page I mentioned, which is the
15 eighth page, and that is at page 5828; do you have that?
- 16 A. I do.
- 17 Q. So we see there that six of the claims are claims
18 against PLC. Now, PLC is neutral on the release issue;
19 you are aware of that, are you not?
- 20 A. I am.
- 21 Q. And none of the UK affiliates listed in the second
22 column are party to this application, correct?
- 23 A. To the PLC application?
- 24 Q. Correct.
- 25 A. That is correct.

- 1 Q. And none of them have provided witness statements or
2 disclosure in relation to the release issue, correct?
- 3 A. Correct.
- 4 Q. And you have already confirmed that you did not
5 represent any of the UK affiliates in the schedule?
- 6 A. Correct.
- 7 Q. So when you are saying to the court that the release
8 argument runs directly contrary to the treatment of
9 after-acquired claims as between LBHI and the UK
10 affiliates, that is based on your own personal
11 assertion?
- 12 A. It is based on this claims schedule.
- 13 Q. But it is your personal interpretation?
- 14 A. These are facts, these occurred, these claims were
15 assigned, agreed by these UK administrators and paid;
16 that is factual.
- 17 Q. Let me just confirm this, though. You have no direct
18 knowledge of why the UK affiliates acted in the way that
19 you say they did?
- 20 A. Do I have any direct knowledge? Can I clarify the -- as
21 if I had spoken to them to ask their views on it?
- 22 Q. Well, you don't know why they have participated in the
23 way that you say they have. You are not advising them,
24 you are not acting for them?
- 25 A. I am not advising and acting. I want to be careful here

1 because I do work with these folks and do speak to them.
2 So you are asking me if I have ever spoken to them about
3 this, I will answer that question; do you want me to
4 answer it?

5 Q. I am asking whether you were involved in their
6 decisions, let's put it that way, in relation to these
7 after-acquired claims?

8 A. I am not a UK administrator, so I am not involved in
9 their decisions, that is correct.

10 Q. No. And in fact, Mr Geraghty, when it suits you, you
11 say that the conduct of parties to the Settlement
12 Agreement should be irrelevant to the construction of
13 a Settlement Agreement, because we see that in relation
14 to the DBB Settlement Agreement, you say in your witness
15 statement that you don't understand why a separate
16 agreement would be relevant, don't you?

17 A. I do say that.

18 Q. Yes.

19 A. Would you like me to go to that?

20 Q. No.

21 MR JUSTICE SMITH: Just for my note what paragraph is that,
22 Ms Tolaney.

23 MS TOLANEY: My Lord, we will come on to it again, but if
24 your Lordship and Mr Geraghty would like to look at it,
25 the relevant paragraph is 78 and 79. What Mr Geraghty,

1 as he has confirmed, says in paragraph 79 is:

2 "I don't understand why the Bundesbank Settlement
3 Agreement would be relevant ..."

4 Because he says that the fact that they have done
5 something in particular after the event reflects -- was
6 a matter the parties to that particular agreement chose
7 to address expressly.

8 So you accept that parties may have their own
9 reasons for doing things, that you would not necessarily
10 know about if you are not advising them?

11 A. Correct.

12 Q. You say at paragraph 65 of your witness statement that
13 none of the parties to the Settlement Agreement objected
14 to LBHI's participation?

15 A. We are on to the LBIE scheme now?

16 Q. Yes, we are.

17 A. So ...

18 Q. So you say here, nobody objected, correct?

19 "None of the parties' settlement agreements argued
20 that after-acquired LBIE claims were released."

21 Have you got that? It is the last sentence of
22 paragraph 65.

23 A. Correct.

24 Q. But that is not surprising, is it, because all of the
25 scheme creditors that were parties to the Settlement

1 Agreement were unsubordinated creditors of LBIE and were
2 paid in full, weren't they?

3 A. They were paid in full. They were paid in full of their
4 principal, their 8 per cent statutory. Some might have
5 even had additional claims for other interest amounts.
6 Some got that, some didn't.

7 Q. Can we go to F10, please?

8 A. Yes.

9 Q. And it is page 5598. Do you have that?

10 A. I do.

11 Q. So what we can see here is that there was in fact only
12 one subordinated creditor of LBIE at this time, and you
13 can see the definition here, and that subordinated
14 creditor is Wentworth?

15 A. Correct.

16 Q. And the subordinated debt has been assigned to the
17 subordinated creditor, do you see that?

18 A. Yes.

19 Q. Now Wentworth was not a party to the Settlement
20 Agreement, was it?

21 A. It was not.

22 Q. And -- and Wentworth is held through a joint venture in
23 which LBHI has a significant interest?

24 A. Correct.

25 Q. So it is not surprising that Wentworth wouldn't raise

1 the release issue against LBHI, is it?

2 A. That is correct.

3 Q. So given that all the parties to the Settlement
4 Agreement were likely to be paid in full under the
5 scheme, there is no reason why they would object, is
6 there?

7 A. There is. As I -- would you like -- my Lord, would you
8 like me to go through that?

9 MR JUSTICE SMITH: By all means give a full answer.

10 A. So the point in my witness statement, raising the LBIE
11 scheme and the fact that at the time LBHI had
12 approximately £600 million of claims, which was publicly
13 known; it wasn't a matter of reapportioning some of
14 their surplus, had those claims been released to other
15 creditors such as Deutsche Bank; it was voting, there
16 was a -- you know, that scheme got down to classes of
17 creditors voting and some particular issues, and
18 Deutsche Bank was one of the objectors initially, in
19 particular about the way that the post scheme process
20 would work around greater entitlements to interest under
21 certain contracts, namely ISDAs.

22 So it was a very, very sensitive time with
23 Mr Justice Hilliard, in terms of bringing the scheme
24 along with the proper voting majorities, and so the
25 point that I raised in my witness statement was not

1 about a reallocation of surplus. It was the effect that
2 having such a significant creditor, as we were, taken
3 out of the voting, and leveraging the -- what was the
4 negotiation on that scheme. That was my point.

5 MS TOLANEY: But my point is that the scheme paid off all of
6 the parties to the Settlement Agreement, didn't it?

7 A. It certainly did, and that was not what Deutsche Bank
8 was objecting to. They were objecting to how they would
9 be treated in the post scheme world on being able to
10 apply for or claim additional interest, and it was very
11 sensitive wording, how that was going to be handled, and
12 relationship with Wentworth, with the administrator,
13 that was the gist of it.

14 Q. Now, at paragraph 68 of your witness statement, you
15 describe an arrangement by which LBHI2 Financing Limited
16 made a loan to LBHI which was secured on after-acquired
17 claims that had been assigned to LBHI with a principal
18 value of 250 million?

19 A. Correct.

20 Q. Right, and LBHI2 Financing Limited is not a party to the
21 Settlement Agreement?

22 A. Unlike LBHI2, which is a party, and was a party to this
23 financing agreement, HI2 financing is not.

24 Q. We can see that security arrangement in F9 at page 5198.

25 A. Excuse me, counsel, what page?

1 Q. It is 5198.

2 A. Thank you.

3 Q. If you go to page 5204, we can see clause 3.11, which is

4 the assignment of the claims by way of security.

5 A. I am sorry, so we are in page 5204.

6 Q. 5204, clause 3.11, which is right at the top of the

7 page?

8 A. Yes, I can see it.

9 Q. You can see that that clause is assigning the claims by

10 way of security; do you see that?

11 A. Yes.

12 Q. And then if you go back to page 5201, can you see the

13 definition of claims at the top of the page?

14 A. Yes.

15 Q. Which includes the admitted claims listed in part 1 of

16 schedule 1, can you see that?

17 A. Yes.

18 Q. Then schedule 1 is at 5217. Have you got that?

19 A. Yes.

20 Q. And we can see then, starting with claim number 8, that

21 is a claim assigned by Lehman Commercial Paper Inc, do

22 you see that? To LBHI?

23 A. We are on schedule 1, did you say claim 8?

24 Q. Claim 8, claim number; can you see the column on the

25 left-hand side?

- 1 A. Yes.
- 2 Q. And number 8 is the one I am looking at?
- 3 A. I am sorry, I see it now, yes.
- 4 Q. You see it there. And can you see number 5 as well,
5 which is assigned by Lehman Brothers Commodity Services?
- 6 A. Yes.
- 7 Q. Then if you can look at number 4, there is one by R3
8 that's been assigned?
- 9 A. Yes.
- 10 Q. And then, on the next page, you can see a number of
11 claims that are assigned by various JP Morgan entities,
12 so, to give you the numbers, 15, 16, 22, 24, 26 and 27.
- 13 A. Yes.
- 14 Q. Can you see all of that?
- 15 A. I can.
- 16 Q. If you leave that open and go back to bundle E, to the
17 Settlement Agreement?
- 18 A. Yes.
- 19 Q. And if you go to page 498?
- 20 A. Yes.
- 21 Q. Can you see that section 802, the release clause that we
22 are looking at, carves out in (i) the admitted claims?
23 Do you see that?
- 24 A. Yes.
- 25 Q. And in 4 it carves out the excluded items?

1 A. Yes.

2 Q. So those are excluded from the release?

3 A. Yes.

4 Q. You agree?

5 A. Agree.

6 Q. Could you then go back to page 460, please. Have you
7 got that?

8 A. I do.

9 Q. And can you see that admitted claims means collectively
10 the LCPI LBIE claim. Now, that was the one that we saw
11 at clause -- as claim number 8 on schedule 1 that
12 I showed you?

13 A. Okay.

14 Q. You still have that open?

15 A. I do.

16 Q. Then it says the LBCS LBIE claim, that was the one at
17 number 5 that I showed you?

18 A. Okay, yes.

19 Q. And then if you go over to page 463 in the Settlement
20 Agreement --

21 A. Yes.

22 Q. -- you will see excluded items?

23 A. Yes.

24 Q. And if you go over the page to (f)?

25 A. Yes.

1 Q. Can you see the R3 claim and the JPM claim --

2 A. Yes.

3 Q. -- there which are the other claims that I showed you?

4 A. Yes.

5 Q. Now, these are claims that are included in your claim

6 schedule?

7 A. They are.

8 Q. Which you suggested was evidence of the fact that there

9 hadn't been a release because distributions had been

10 made. But what I have shown you is that these ones were

11 claims in which the release was expressly said not to

12 apply, correct?

13 A. True.

14 Q. So the claim schedule that you have put as evidence of

15 claims showing conduct inconsistent with the argument of

16 a release doesn't do that, at least not so far as these

17 claims are concerned, does it?

18 A. My Lord, the issue with using that financing agreement

19 and the entire LBHI2 loan and financing loan is part of

20 the support.

21 So there was the population of claims that were put

22 in as -- you know, that had been transferred that would

23 have been -- that were not excluded items, not excluded

24 claims, as counsel just pointed out. So there is a lot

25 of information on that. The financing agreement to

1 LBHI2, HI2 financing, included those claims and then
2 claims that subsequently were on the excluded list but
3 then got dealt with and got allowed.

4 So it is true to say that those were not part of
5 the -- they were not released, but to -- you know, the
6 point that I was making was putting forward an entire
7 financing agreement. It had the entire set of claims
8 attached.

9 Q. But nowhere in your paragraph 61 do you state frankly to
10 the court that the claim schedule includes claims that
11 you accept would have not been released under the
12 agreements, and so, so far as those claims were
13 concerned, the claims schedule that you rely on doesn't
14 take you anywhere, correct?

15 A. I disagree with that. I think it makes the point that
16 the majority of the claims that were on the schedule, as
17 well as all the other information on the claims
18 schedules, support what would otherwise have been
19 released, based on Deutsche Bank's position.

20 Q. Shall we have a look at what you say in 61, because you
21 have given an explanation now, but that isn't in
22 paragraph 61, is it, of your statement? I mean,
23 paragraph 61 purports to rely on a claim schedule --

24 A. Let me get that.

25 Q. -- including, I am sorry, let me give you the tab. It

1 is tab 7.

2 MR JUSTICE SMITH: Bundle C.

3 MS TOLANEY: Bundle C, tab 7, paragraph 61, page 101.

4 And in that paragraph, you refer to the claim
5 schedule, the total nominal value of those claims.

6 A. Yes.

7 Q. You say there has never been any assertion by the
8 parties listed in the claims schedule that any of those
9 claims were released, and then you talk about the
10 distributions on the claims collectively?

11 A. And the claims that you pointed out in the financing
12 agreements, I don't believe are part of this paragraph,
13 which states 4.2 billion nominal and over a billion
14 paid. I don't believe those claims are in that
15 schedule.

16 Q. Right.

17 A. They are included in the back of this financing
18 schedule, just to give the full breadth of what was
19 going on with that.

20 Q. Now, at paragraph 69, while we are in your statement,
21 you suggest that the LBIE joint administrators
22 acknowledged the assignment and reassignment of assigned
23 claims between LBHI and LBHI2 and you suggest that that
24 demonstrates there had been no release. But there is no
25 evidence from them about what they considered when they

1 Q. And if you go over the page to recital E to G. What we
2 can see is that the Settlement Agreement relates to
3 claims of HQ2.

4 A. Yes.

5 Q. You can pick that up from the discussions referred to in
6 recital C.

7 A. Yes.

8 Q. And then it is recorded that there is an assignment in E
9 of those claims?

10 A. Yes.

11 Q. And the claims are of HQ2 against LBL and they have been
12 assigned to LBHI, pursuant to a claim assignment deed,
13 correct?

14 A. Correct.

15 Q. Now we then see from clause 4.1 at page 5370 --

16 A. Yes.

17 Q. -- that LBL agreed to admit the claims in the hands of
18 LBHI for the sum of 65 million?

19 A. Correct.

20 Q. Of which 30 million was to be subordinated?

21 A. Correct. Slight -- I'll just give priority the
22 relevant. The 25 million was a form of subordination,
23 not fully subordinated, let's say past statutory
24 interest of the administrator, only once principal had
25 been paid to the seniors. Then that claim sort of kicks

1 in and rides along the rest of the way. So it has got
2 a form of subordination until par, then it is not
3 subordinated any more. It may not matter...

4 Q. Well (b) says 25 million shall be admitted as an
5 ordinary unsecured provable claim on the following
6 conditions; the 25 million claim shall be subordinated
7 on the conditions set out therein --

8 A. Yes.

9 Q. And the 5 million claim, (c) will also be secured at
10 subordinated?

11 A. 5 million was equity. The 25 was subordinated until the
12 other senior creditors hit par, as it states.

13 Q. But they were both -- my point is that 65 million
14 included 30 million that is described as subordinated,
15 correct?

16 A. Yes.

17 Q. The face value of those claims was in fact 635 million,
18 correct?

19 A. Yes.

20 Q. And we see that from clause 3E. Sorry, I beg your
21 pardon. We see that from a notice of assignment. Do
22 you want to go to the notice of assignment? That is at
23 F9/5359.

24 A. Excuse me what page, counsel.

25 Q. 5359.

- 1 A. I have it.
- 2 Q. And do you see "E" on that notice of assignment
3 recording what the face value was?
- 4 A. Yes.
- 5 Q. So going back to the agreement we were just looking at,
6 at page 5365, it is fair to say it wouldn't have been in
7 LBL's interest to scupper a deal that gave it
8 a reduction of over 600 million, would it?
- 9 A. I wouldn't -- I wouldn't dare to say what was in their
10 interests. I know that they were fighting that claim
11 extremely hard and that's why we actually put ourselves
12 in the middle of it to try to settle both sides of that.
- 13 Q. So what we can say is that unless any of them come and
14 explain their motivations, you cannot say any further?
- 15 A. What we can say is that a UK administrator admitted our
16 claim or allowed us a claim.
- 17 Q. Well, with a reduction of over 600 million, roughly.
18 Can we turn back to your claim schedule at F10/5823,
19 please.
- 20 A. Excuse me, what page?
- 21 Q. 5823.
- 22 A. Yes.
- 23 Q. My Lord, can I just raise that I am finding the amount
24 of noise to my left incredibly disconcerting. I
25 appreciate there is maybe some panic going on.

1 5823, do you have that page?

2 A. I do have it.

3 Q. Thank you. And claims 18 and 19 are large claims
4 against LBUK Re Holdings Limited which were assigned
5 in November 2015, correct?

6 A. Correct.

7 Q. And if you go to page 4997. Sorry, that is in bundle
8 F9.

9 A. F9?

10 Q. Yes, F9/4997.

11 A. I have it.

12 Q. Thank you. This is the report of the administrator of
13 LBUK Re Holdings Limited dated 13 April 2016?

14 A. Yes.

15 Q. If you go to page 5,000, if you look at the two
16 paragraphs under the heading "Residual Asset
17 Distributions", what you will see there is a reference
18 to:

19 "The administrators and LBHI controlled creditors,
20 being the only remaining creditors of the company,
21 subsequently agreed the terms pursuant to which the
22 ownership of LBUK raised remaining assets is transferred
23 to the LBHI controlled creditors."

24 Do you see that?

25 A. I am familiar with it, yes.

- 1 Q. So by the time of the assignment, in November 2015,
2 there were no non-LBHI parties that would have had an
3 interest in raising the release argument, were there?
- 4 A. Correct. The only one who would have had interest would
5 have been the administrator, so...
- 6 Q. And it doesn't shed much light on interpreting the
7 conduct of the UK affiliates, does it?
- 8 A. It does, actually. Great light.
- 9 Q. Well, let's go back to your claim schedule, shall we, at
10 F10?
- 11 MR JUSTICE SMITH: Perhaps we ought to hear the witness's
12 answer that is going to shed great light. Do enlighten
13 us.
- 14 A. Yes. I am sorry, my Lord?
- 15 MR JUSTICE SMITH: I think you had something more to say and
16 I don't want you cut off.
- 17 A. No, no, I think I -- I think I made it clear.
- 18 MR JUSTICE SMITH: You are fine okay. Sorry, Ms Tolaney.
- 19 A. I have the claim schedule.
- 20 MS TOLANEY: Thank you. At F10, page 5824.
- 21 A. Yes. Yes.
- 22 Q. I am just waiting for his Lordship to have the page.
23 So we are looking at claims 38 to 40.
- 24 A. Yes.
- 25 Q. Have you got those claims?

- 1 A. I see them.
- 2 Q. Now if you go back then to F9, please. We are going to
3 page 4886, so this is the STG Settlement Agreement that
4 we have looked at before.
- 5 A. I am sorry, the page number please?
- 6 Q. It is 4886.
- 7 A. I have it.
- 8 Q. It is a document we have looked at before.
- 9 A. Yes, I have it.
- 10 Q. It is the agreement between LBIE and LBHI.
- 11 A. Yes.
- 12 Q. And it is the 2014 agreement. And we have seen already
13 the release language, but just to go through this.
- 14 LBIE is a party to the agreement and is also a UK
15 affiliate under the Settlement Agreement in 2011?
- 16 A. Yes.
- 17 Q. And looking at clause 5.11, which we have looked at
18 before on page 4900, we have seen the assignment of the
19 admitted claims and the agreed proof creditor claims and
20 an agreement that the releases in the 2011 Settlement
21 Agreement won't apply.
- 22 Now, we can see from F9/4933, so go to page 4933.
- 23 A. Yes.
- 24 Q. That the agreed proof creditors are the same creditors
25 that are listed in your claim schedule at 38, 39 and 40?

- 1 A. They are.
- 2 Q. So we have another example of claims where the release
3 has been expressly said not to apply that are included
4 in your claims schedule.
- 5 A. I don't believe that is what it says. It just says that
6 none of the releases in the 2011 agreement should apply.
7 It doesn't say anything about after acquired claim
8 releases; that is not mentioned at all.
- 9 Q. But your claims schedule is said to demonstrate that
10 there was no release in 2011 because all of these claims
11 are claims that distributions are paid out on, and yet
12 what we see in this agreement is that there is an
13 express carve-out on those three claims?
- 14 A. In the STG agreements?
- 15 Q. That is right.
- 16 A. I thought we covered this, so I wasn't a part of that
17 agreement, my Lord. I spoke to the person who was, he
18 told me what he thought and I am relating that. I don't
19 accept that -- that that carve-out or that provision was
20 needed to -- to not have those claims released.
- 21 Q. Do you not think, Mr Geraghty, that you might have just
22 explained some of these points in your witness statement
23 when you were referring to the conduct, including you
24 put in issue the September Settlement Agreement in your
25 witness statement in paragraph 76, and yet you don't say

1 that in fact some of the claims listed in your claim
2 schedule, which you refer to at paragraph 61, were the
3 subject matter of the STG Settlement Agreement? You
4 didn't think that was important?

5 A. Sorry, your question is: was it important that
6 paragraph 76 should have made reference to -- I am
7 sorry, could you repeat the question.

8 Q. Let me put it slightly differently?

9 A. Sure okay.

10 Q. Paragraph 61 refers to a claim schedule which is relied
11 upon by you as demonstrating that the claims set out
12 therein were not released upon transfer to LBHI, and the
13 point I am making to you in relation to this set of
14 claims, as well as others we have looked at, are that
15 one of the reasons, or we would say the reason, that
16 those claims don't demonstrate the point you are making,
17 is because of the express carve-out relating to those
18 claims in the STG agreement. And you say nothing about
19 that.

20 A. I don't believe those claims were released. I didn't --
21 I was not involved in the drafting or review of the STG
22 agreements, as I have stated now I think for the third
23 time, spoke to the guy who was, he told me his view, and
24 that is what I know. If you are asking me: do I think
25 those claims needed that provision to maintain the -- to

1 maintain the claims, otherwise they would have been
2 released; no, I do not think that.

3 Q. I think what we can say though, can't we, is that your
4 claims schedule needs quite a lot of qualification,
5 doesn't it?

6 A. You would say that. I would not.

7 Q. You are a managing director of LBHI, aren't you?

8 A. Correct.

9 Q. And your particular responsibility is to manage LBHI's
10 remaining claims against its foreign affiliates?

11 A. Correct.

12 Q. So it would be quite embarrassing for you if LBHI had in
13 fact released a claim against a foreign affiliate that
14 might otherwise have turned out to be worth many
15 hundreds of millions of dollars? You are personally
16 invested, Mr Geraghty, aren't you?

17 A. I am not personally rewarded, I am not personally
18 anything, I am just trying to do my job.

19 Q. The truth of the matter is that we are not really
20 talking about the parties' intentions to the Settlement
21 Agreement in 2011; we are talking about what you say
22 your intentions were, correct?

23 A. What we are saying, and as I have stated in my witness
24 statement, my Lord, is that I was a party to the year
25 and a half of settlement negotiations with respect to

1 that, and to the actual drafting of that agreement. As
2 far as I know, I am the only one in this room who was,
3 and I produced evidence that clearly shows an
4 overwhelming intention of the other parties to that
5 agreement. That is all I am saying.

6 Q. And you say that you have spoken to Mr Keen, but Mr Keen
7 hasn't provided a statement?

8 A. That's correct.

9 Q. And the UK affiliates might have been very pleased to
10 have a release of after-acquired claims, mightn't they?

11 A. Pleased; hypothetically at the time or today?

12 Q. Both.

13 A. I don't believe -- it is a hypothetical, that is just
14 not even -- I couldn't say how they would think about it
15 at the time. I know that it was not the intention.

16 Q. If you cannot say how they think about it at the time,
17 how do you know what their intention was?

18 A. You asked me. So.

19 Q. I am just quoting back what you said, Mr Geraghty.

20 A. My evidence is what -- how they performed for eight
21 years. That is all my evidence is.

22 Q. That is all based on your claims schedule?

23 A. Correct.

24 MS TOLANEY: Nothing further from me, Mr Geraghty, thank you
25 very much.

1 Re-examination by MR PHILLIPS

2 MR PHILLIPS: Mr Geraghty, there are two documents, please,
3 that I would like you to be given. The first is in
4 bundle F10 and it is page 5821, and the second is in
5 bundle F9.

6 A. First page?

7 Q. Sorry, 5821.

8 A. Claims schedule, yes.

9 Q. And the second one is in F9/5217, please. You can put
10 everything else aside.

11 A. 5217?

12 Q. Yes. Tell me when you have them.

13 A. I have them.

14 Q. Excellent. Now, starting with 5217, this is the
15 schedule to the initial claims documents, the facility
16 that you were describing?

17 A. Yes.

18 Q. And my learned friend referred you to numbers 4, 5, 8,
19 15, 16, 22, 24, 26 and 27. Yes, do you recollect that?

20 A. Yes.

21 Q. And you can see that there are 29 claims on that
22 schedule.

23 A. Yes.

24 Q. And you will recollect that my learned friend took you
25 to claims 8 and 5, and said that they were admitted --

1 sorry, am I doing this too quickly?

2 A. No, I am fine.

3 Q. You will remember my learned friend took you to 8 and 5
4 and said that they were admitted claims?

5 A. Yes.

6 Q. And she said that the JP Morgan claims were excluded
7 claims, do you remember that?

8 A. Yes.

9 Q. And do you remember that she put to you that those had
10 not been released?

11 A. Correct.

12 Q. Can we look at your claims schedule, please.

13 A. Yes.

14 Q. First of all, if you could look at page 5828 and just
15 remind his Lordship how many claims there are on your
16 claims schedule.

17 A. 87 claims.

18 Q. And are you able to say whether claims 4, 5, 8, 15, 16,
19 22, 24, 26 and 27 from the finance agreement are on your
20 claims schedule?

21 A. I would assume they are not, just knowing what they are
22 and what's on that schedule.

23 Q. Well, your assumption is correct.

24 So we are left with -- and then we are left with the
25 other complaint made by my learned friend, was 38, 39

1 and 40 of your claims schedule.

2 A. Yes. The STG ones, yes.

3 Q. And you say the STG points. So are you able to help his
4 Lordship as to why those are included in your schedule,
5 notwithstanding the STG agreement?

6 A. Because those claims were after-acquired claims that had
7 not been released or excluded in the 2011 agreements.

8 MR PHILLIPS: Thank you very much. My Lord, I have no
9 further questions. I don't know if your Lordship does.

10 MR JUSTICE SMITH: No, Mr Geraghty, I have no further
11 questions either. Thank you for your evidence. You are
12 released.

13 MR PHILLIPS: My Lord, there is one matter that I wish to
14 raise, and I am going to do it as calmly as
15 circumstances permit. My learned friend, at about 12.30
16 today, raised with your Lordship the timing issue that
17 arose from two things: one was the amount of time she
18 needed for Mr Geraghty and the other was that she would
19 not be available after 4.15.

20 MR JUSTICE SMITH: Yes.

21 MR PHILLIPS: And I distinctly recollect saying to my
22 learned friend that Mr Geraghty could be here tomorrow
23 morning if necessary.

24 MR JUSTICE SMITH: Yes.

25 MR PHILLIPS: My learned friend said she would need at least

1 one hour and 45 minutes; she took one hour and 15 or
2 thereabouts. The result of this intervention was that
3 your Lordship quite rightly curtailed the time that
4 I had to cross-examine Mr Katz. I can tell
5 your Lordship that I took out, I think, about 45 minutes
6 of cross-examination. I took out two issues completely,
7 and I reduced the third issue, and I did go faster than
8 was required. And I am -- I don't know quite what the
9 right word is, but I am extremely disappointed that
10 I should have been treated that way by my learned
11 friend.

12 MR JUSTICE SMITH: Mr Phillips, I think the trouble is that
13 until one sees them in the witness box, one cannot
14 assess how brisk or otherwise a witness will be.

15 MR PHILLIPS: Yes, indeed.

16 MR JUSTICE SMITH: I think you got -- I mean this as no
17 criticism of Mr Katz, you got the rougher end of the
18 deal. Mr Geraghty was a rather brisker witness.

19 MR PHILLIPS: He was.

20 MR JUSTICE SMITH: It says nothing about their evidence, it
21 says more about the way they gave their evidence, and
22 I don't think Ms Tolaney can be criticised for not being
23 able to predict Mr Geraghty. It is unfortunate, and
24 I fully appreciate with hindsight, that you have not
25 been able to have what would have been a further half

1 hour, three-quarters of an hour, I quite understand
2 that. And there we are.

3 But I don't think one can criticise Ms Tolaney at
4 all for that.

5 MR PHILLIPS: I was expressing my disappointment.

6 MR JUSTICE SMITH: No. Well, that I think we all share.
7 Speaking for myself, I don't like seeing
8 cross-examination rushed. The fact is we have the
9 timetable that we have, and the American witnesses have
10 been placed where they are, and Mr Katz had a flight --
11 and we are there. It is disappointing, I agree. But
12 I don't think I would want to go any further than that,
13 Ms Tolaney, unless you want to say anything.

14 MS TOLANEY: My Lord, two points, just to correct.

15 I actually took an hour and 25 minutes, just to be sure
16 about that, and I cut out quite a lot of my
17 cross-examination because I got far more concessions
18 without going to underlying documents than I had
19 anticipated.

20 MR JUSTICE SMITH: We don't want to -- I don't think I ought
21 to explore now whether you got concessions or not.

22 I think we will --

23 MS TOLANEY: The second point, my Lord, is -- just to put
24 this on the record. My learned friend gave his
25 estimates. He gave an estimate originally of an hour

1 and a quarter, and then put it up to an hour and
2 45 minutes. Looking at the scope of his
3 cross-examination, even if the witness had not been
4 slower than he might have liked, that seemed an
5 optimistic estimate. So it is not really appropriate,
6 I think, when you have put in that estimate and you have
7 had a lot longer, to then complain.

8 MR JUSTICE SMITH: Well, Ms Tolaney, I think if we stick to
9 the rubric of disappointing.

10 MS TOLANEY: Indeed.

11 MR JUSTICE SMITH: I understand the pressures that all
12 counsel are working to. I am deeply grateful for the
13 efficient way in which all have run the case.
14 Obviously, if we could have used time more efficiently,
15 with hindsight, clearly we could, but I stress that only
16 with hindsight. So there we are.

17 MR PHILLIPS: My Lord, moving on.

18 Tomorrow is the day for the US judges.

19 MR JUSTICE SMITH: Yes.

20 MR PHILLIPS: We have my witness, Judge Gropper, in the
21 morning and my learned friend's witness Judge Smith in
22 the afternoon. And it is as clear-cut as that.

23 MR JUSTICE SMITH: It is. Well, thank you. I have read
24 their evidence, and I have read also the two ProSat
25 cases.

1 MS TOLANEY: I am grateful, my Lord.

2 MR JUSTICE SMITH: I hope I will be up to speed.

3 MS TOLANEY: Would your Lordship also look at paragraph 45
4 of the decision of Mr Justice Hamblen in the BNP case
5 that I referred your Lordship to.

6 MR JUSTICE SMITH: You did refer me to it. I haven't looked
7 at it. I will make sure I do.

8 MS TOLANEY: I am grateful.

9 MR JUSTICE SMITH: Thank you all very much. 10.30 tomorrow
10 morning.

11 (3.35 pm)

12 The hearing was adjourned until
13 Friday, 15 November 2019 at 10.30 am)

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MR BENJAMIN KATZ (affirmed)

Examination-in-chief by MS TOLANEY

Cross-examination by MR PHILLIPS

MR RONALD GERAGHTY (affirmed)

Examination-in-chief by MR PHILLIPS

Cross-examination by MS TOLANEY

Re-examination by MR PHILLIPS

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