CR-2008-000026

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

IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC (in administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS HOLDINGS PLC
(in administration)

- and –

(1) LB GP NO 1 LIMITED (in liquidation)

(2) LEHMAN BROTHERS HOLDINGS INC.

(3) DEUTSCHE BANK A.G. (LONDON BRANCH)

POSITION PAPER OF DEUTSCHE BANK A.G. (LONDON BRANCH)

Introduction

1. This is the position paper of Deutsche Bank A.G. (London Branch) ("**Deutsche Bank**") served in accordance with the order of Mr Justice Hildyard dated 4 May 2023 (the "**Directions Order**")[1], which gave directions for the determination of three applications for directions within the administration of Lehman Brothers Holdings plc ("**PLC**"):

   (1) An application by the Joint Administrators of PLC dated 14 March 2023 ("the **Directions Application**") for directions on five issues (the "**Priority Legal Issues**" and "**PLI 1, PLI 2**" etc….) relating to the correct distribution of PLC's remaining surplus among PLC's subordinated creditors, namely the first respondent ("**GP1**") and the second respondent ("**LBHI**");

[1] Served with this position paper is a bundle of supporting documents ("**DBSD**") which are relied on in this position paper, save for documents which are already exhibited in the evidence served to date.

(2) Deutsche Bank's application dated 27 April 2023 to strike out certain issues in the Directions Application (the "**Strike Out Application**"); and

(3) A further application by the Joint Administrators of PLC dated 25 April 2023 ("the **Distribution Application**").

2. GP1's subordinated claim against PLC is referred to in PLC's administration as "**Claim D**"[2]. LBHI's rival subordinated claim against PLC has been referred to as "**Claim C**"[3]. The relative priority for distributing PLC's surplus as between Claim C and Claim D has already been determined. It was the subject of a previous directions application by the PLC Administrators dated 16 March 2018 [**PDT1, pp.4-6**], which was heard before Marcus Smith J at a trial between 11 November 2019 and 22 November 2019 and was the subject of an appeal heard before Lewison LJ, Henderson LJ and Asplin LJ between 4 and 8 October 2021 (the "**ECAPS 1 Proceedings**"). In its judgment and order handed down on 20 October 2021 ([2021] EWCA Civ 1523 (the "**ECAPS CA Decision**")), the Court of Appeal determined, among other things, that Claim D ranked in priority to Claim C, allowing DB and GP1's appeals. Permission to appeal to the Supreme Court was refused.

3. Deutsche Bank's position on the Directions Application is, in summary that:

(1) PLIs 1, 3, 4 and 5 have either already been determined in the ECAPS 1 Proceedings, or could and should have been raised in those proceedings, such that raising them now is precluded by the doctrine of *res judicata* or because it would otherwise be an abuse of the court's process to litigate them now. This is the subject of the Strike Out Application, the implications of which are addressed further below[4].

(2) In relation to the substantive merits of the issues raised in the Directions Application:

[2] Claim D is defined in the ECAPS 1 Proceedings as "*Claims advanced by GP1 against PLC for monies owed by PLC to GP1 under the PLC Sub-Notes*" (Annex 1, Judgment of Marcus Smith J).
[3] Claim C is defined in the ECAPS 1 Proceedings as "*Claims advanced by LBHI (as the ultimate assignee of the rights of LB Holdings) against PLC for monies owed by PLC to LBHI under the PLC Sub-Debt Agreements*" (Annex 1, Judgment of Marcus Smith J).
[4] PLI 3 was not included in the Strike Out Application but it is clear that it is also precluded by an issue estoppel or it is an abuse of process for that issue to be raised now for the reasons identified below. To the extent necessary, Deutsche Bank will apply to amend the Strike Out Application to include PLI 3.

(i) PLI 1 concerns the relative priority for payment of the statutory interest element of Claim D and the principal amount of Claim C. Deutsche Bank's position is that all of Claim D, including statutory interest, ranks in priority to the principal amount of Claim C.

(ii) PLI 2 concerns the principal amount of Claim D on which statutory interest is to be calculated. Deutsche Bank's position is that statutory interest should be calculated on the full provable amount of the future debt and that no discount is to be applied.

(iii) PLI 3 concerns when statutory interest on Claim D begins to accrue. Deutsche Bank's position is that statutory interest runs from the date on which PLC entered administration.

(iv) PLI 4 concerns whether clause 2.11 of certain guarantees given by PLC (the "**ECAPS Guarantees**") imposes on the "**Holder**" of the ECAPS a trust in respect of any proceeds distributed by PLC. Deutsche Bank's position is that it does not.

(v) PLI 5 concerns the correct distribution of any assets held on trust for and returned to PLC pursuant to clause 2.11 of the ECAPS Guarantees. PLI 5 does not arise on Deutsche Bank's case on PLI 4, but if it did the answer would be that clause 2.11 does not affect the priority as between Claim C and Claim D determined in the ECAPS 1 Proceedings.

4. The issues raised in Deutsche Bank's Strike Out Application logically fall to be determined before the merits of the PLIs. That is because if Deutsche Bank is correct that raising any of PLIs 1, 3, 4 and 5 is precluded by the doctrines of *res judicata* or abuse of process, then that will determine the directions to be given on those issues irrespective of the underlying merits. However, even if the Strike Out Application succeeds, Deutsche Bank accepts that it would be sensible also to determine the merits of each of the PLIs in the alternative, bearing in mind the possibility of an appeal.

5. Deutsche Bank is not a party to the Distribution Application and so does not address that application in this position paper.

6. The remainder of this position paper addresses each of the PLIs in turn, dealing both with the issues raised by the Directions Application and (where relevant) the issues raised by the Strike Out Application.

PLI 1

Deutsche Bank's position is that the ECAPS 1 Proceedings determined that statutory interest payable to GP1 in relation to the PLC Sub-Notes (Claim D) is to be paid in priority to the principal amount of the PLC Sub-Debt payable to LBHI (Claim C), and that this determination is binding on PLC and the other parties to the Directions Application. Alternatively, the Court should reach the same conclusion on the merits of the issue in any event.

Res Judicata

7. In the ECAPS 1 Proceedings, the PLC Administrators sought directions on (among other matters) the question: "*whether LBHI's claims in respect of the [PLC Sub-Debt] rank for distribution before, after or pari passu with any of the claims of [GP1] under [the "PLC Sub-Notes]"*[5].

8. This question was ultimately determined by the Court of Appeal in the ECAPS CA Decision, as follows:

   (1) "*Claim C does … express itself to be junior to the Subordinated Liabilities as defined in Claim D*" (at [83]);

   (2) The definition of Subordinated Liabilities in Claim D is: "*all Liabilities to Noteholders in respect of the Notes and all other Liabilities of the Issuer which rank or are expressed to rank pari passu with the Notes*" (see [87]);

   (3) "*The liabilities in Claim C … fall within the definition of Excluded Liabilities in Claim D. Since they fall within that definition, Claim D does not subordinate itself to Claim C"* (at [89]);

[5] [**PDT1 p.5**]

(4) Therefore Claim C subordinated itself to Claim D, but Claim D did not subordinate itself to Claim C. It followed that Claim D must be paid in priority to Claim C (at [90], [92]); and

(5) This decision was reflected in paragraph 4 of the Court of Appeal's order, which varied the relevant paragraph of the first instance order to read: "*The claims of [GP1] under the [PLC Sub-Notes] rank for distribution in priority to the claims of LBHI under the PLC Sub-Debt*" [**EJM6 pp. 564-565**].

9. These findings are binding on the parties to the ECAPS 1 Proceedings, which are the same as the parties to the Directions Application. These findings also answer PLI 1:

(1) The statutory interest element of Claim D is among the claims of GP1 against PLC under the PLC Sub-Notes, which the Court of Appeal held "*rank for distribution in priority to the claims of LBHI under the PLC Sub-Debt*";

(2) The statutory interest element of Claim D is among the "*"Subordinated Liabilities" as defined in Claim D*" because it is among the "*Liabilities*" under the PLC Sub-Notes, to which the Court of Appeal held that Claim C had subordinated itself; and

(3) That this is correct was determined by the Supreme Court in "*Waterfall I*" ([2017] UKSC 38, at [51]-[56] & [65]-[66]), in which it was held that statutory interest is within the meaning of "*Liabilities*" as defined in identical language used in materially identical subordinated instruments issued by Lehman Brothers International (Europe) Limited.

10. In other words, the ECAPS CA Decision determined the answer to PLI 1, namely that statutory interest payable on Claim D is to be paid in priority to the principal amount payable to LBHI on Claim C. The ECAPS CA Decision therefore gives rise to a cause of action estoppel or an issue estoppel precluding any party to the ECAPS 1 Proceedings from contending that PLI 1 should be answered in any different way.

11. Where a claim raises a matter that is the subject of a cause of action estoppel or an issue estoppel, that element of the claim should be struck out under CPR r. 3.4(2)(b) as an abuse of the court's process or as being otherwise likely to obstruct the just disposal of the proceedings.

12. It makes no difference that PLI 1 (or any of the other issues) is raised by an officeholder by way of application for directions. By Rule 12.1 of the Insolvency (England and Wales) Rules 2016 (the "**Insolvency Rules**"), the CPR (including any related Practice Directions) apply to an administrator's application for directions under Schedule B1 to the Insolvency Act 1986, with any necessary modifications, except in so far as disapplied by or inconsistent with the Insolvency Rules. There is nothing in the Insolvency Rules that is inconsistent with r. 3.4(2) of the CPR, and so the provisions of r. 3.4(2) are to be applied also to these proceedings. Deutsche Bank ought not to be required to relitigate or be vexed by issues which were determined in the ECAPS 1 Proceedings or should have been raised as part of those issues, or in relation to which LBHI now wishes to take a different position to that adopted in the ECAPS 1 Proceedings.

13. Accordingly, Deutsche Bank's position is that PLI 1 should be struck out from the Directions Application, and the administrators of PLC should act in accordance with the directions given in the ECAPS 1 Proceedings that statutory interest payable on Claim D is to be paid in priority to the principal amount payable to LBHI on Claim C.

14. Alternatively, if any party to the ECAPS 1 Proceedings wished to contend that the statutory interest element of Claim D ranked for distribution differently from the principal amount of Claim D, then that is an issue that could and should have been raised in the ECAPS 1 Proceedings. Accordingly:

    (1) It is an abuse of the Court's process now to contend that PLI 1 should be answered to the effect that the statutory interest element of Claim D should rank for distribution differently to the principal amount of Claim D;

    (2) PLI 1 should therefore be struck out under CPR r. 3.4(2) (applied to these proceedings by Rule 12.1 of the Insolvency Rules); or

    (3) Alternatively, the parties to the Directions Application are precluded from contending that the statutory interest element of Claim D should rank for distribution differently to the principal amount of Claim D, and any case to that effect set out in a party's position paper should be struck out on the same basis.

Substantive merits

15. If, contrary to Deutsche Bank's primary case, PLI 1 has not already been determined and it is not an abuse of process now to contend that the statutory interest element of Claim D should rank for distribution differently to the principal amount of Claim D, then Deutsche Bank's position is that the Court should declare that statutory interest payable on Claim D is to be paid in priority to the principal amount payable on Claim C.

16. Deutsche Bank adopts GP1's case in this regard in order to avoid duplication. In particular:

    (1) Claim C is contractually subordinated to Claim D, and payments in respect of Claim C are conditional on the payment in full of all Senior Liabilities as defined in the PLC Sub-Debt, including all amounts "*payable or owing*" by PLC in relation to Claim D;

    (2) Claim C is therefore a subordinated liability of PLC and cannot be proved for in PLC's administration until principal and statutory interest on more senior liabilities have been paid in full: see ***Waterfall I*** at [68] to [72];

    (3) Since Claim C is subordinated to Claim D, it follows that Claim C cannot be proved for until principal and statutory interest on Claim D has been paid in full; and

    (4) Accordingly:

        (i) Claim C is not a "*debt proved*" within the meaning of Rule 14.23(7)(a) of the Insolvency Rules at the time PLC must pay statutory interest on Claim D, and so there is nothing in Rule 14.23(7)(a) that prevents PLC paying statutory interest on Claim D in priority to principal on Claim C; and

        (ii) Nothing in Rule 14.23(7)(b) compels a contrary conclusion. Rule 14.23(7)(b) provides for equal ranking of statutory interest irrespective of whether the debts on which statutory interest is payable rank equally. However, the rule can only apply to debts proved at the time that PLC must pay statutory interest (see (i) above) and in any event does not affect or prevent effective subordination of the right to receive statutory interest as between those otherwise entitled to payment on an equal ranking basis: Waterfall I at [68]-[72].

PLI 2

DB's position is that statutory interest is calculated and paid by reference to the full amount of the future debt

Rule 14.23(7): the right to statutory interest

17. Rule 14.23(7) provides:

"*In an administration –*

(a) Any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date;
(b) All interest payable under sub-paragraph (a) ranks equally whether or not the debts on which it is payable rank equally; and
(c) The rate of interest payable under sub-paragraph (a) is whichever is the greater of the rate specified under paragraph (6) or the rate applicable to the debt apart from the administration."

18. Rule 14.23 is to be treated as operating as a complete and clear statutory code for the recovery of interest on proved debts: Lomas v Burlington Loan Management Ltd [2018] Bus LR 508 ("**Waterfall IIC**") at [16] and [26]. Per the Court of Appeal at [26], it "*contains all that you need to know*".

19. Primary regard should be had to a contextual analysis of the language used in Rule 14.23(7). Per Lord Neuberger in Waterfall I [2018] AC 465 (SC) at [89], the aim is to arrive at "*a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context*". Insofar as the rules address a particular matter (here, the payment of statutory interest), they must be given effect in accordance with the language used: *ibid* per Lord Sumption at [194].

20. The key phrase in Rule 14.23(7)(a) is the reference to "*those debts*" i.e. that:

"*Any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date*" (emphasis added).

21. The reference in Rule 14.23(7)(a) to "*those debts*" is as a reference to the proved debts: Re Lehman Brothers International (Europe) (in administration) [2016] Bus LR 17 ("**Waterfall IIA**") at [206]-[208]. Thus in Waterfall IIC at [27], the Court of Appeal described the operation of the relevant statutory interest provision as being in respect of the "*debts proved*" which "*will include the whole of the principal and, probably in most cases, all outstanding pre-administration interest. The aggregate of those amounts will constitute the "debt" upon which statutory interest for the period since the onset of the administration is payable*".

22. A future debt is proved for its full amount, and ranks *pari passu* with all other debts for distribution purposes: Waterfall IIA at [193], [201]. As such, the debt on which the statutory interest is to be paid is the proved amount of the future debt.

23. There is no other mechanism for quantifying the debt on which statutory interest is to be paid in Rule 14.23 and no need for any other mechanism: as with debts that had already fallen due as at the commencement of the administration, the amount of the debt on which statutory interest is calculated is simply the amount for which the future debt is proved. In particular, Rule 14.23(7) makes no provision for discounting or otherwise reducing the amount of a future debt for the purpose of calculating or paying statutory interest.

24. Rule 14.23(7) makes no reference to Rule 14.44 (see further below). Where Rule 14.44 is intended to apply for the purpose of the operation of another provision of the Insolvency Rules, that is made clear in terms by cross-reference to Rule 14.44: see, for example, Rule 14.24(8) regarding set-off. The lack of equivalent wording is of some relevance, and fortifies the conclusion that Rule 14.23 operates as a self-contained code for the payment of statutory interest: see, by analogy, Briggs LJ's comments in Waterfall I [2016] Ch 50 at [149].

Rule 14.44

25. Rule 14.44 provides a discounting formula applicable to future debts for the purpose of dividend (and no other purpose). It provides:

> ***"Debt payable at future time***
>
> ***14.44.**—(1) Where a creditor has proved for a debt of which payment is not due at the date of the declaration of a dividend, the creditor is entitled to the dividend equally with other creditors, but subject as follows.*

(2) For the purpose of dividend (and no other purpose) the amount of the creditor's admitted proof must be discounted by applying the following formula—

$$\frac{X}{1.05^n}$$

where—

(a) "X" is the value of the admitted proof; and
(b) "n" is the period beginning with the relevant date and ending with the date on which the payment of the creditor's debt would otherwise be due, expressed in years (part of a year being expressed as a decimal fraction of a year)."

26. The language, meaning and effect of Rule 14.44 is clear, such that it cannot be said to be applicable to the payment or calculation of statutory interest under Rule 14.23(7):

(1) Rule 14.44 is only applicable where the creditor has already proved for a future debt (and a debt which remains a future debt as at the date of declaration of a dividend) i.e. "*14.4(1): Where a creditor has proved for a debt of which payment is not due at the date of the declaration of a dividend…*". The operation of the rule is therefore predicated on (i) a creditor having proved for a future debt; and (ii) the amount for which the debt was proved having been its full (undiscounted) amount;

(2) Where Rule 14.44 applies, it operates to discount the amount of the creditor's admitted proof. However, it expressly does so only for the purpose of "*dividend*" (i.e. "*14.44(2): For the purpose of dividend (and no other purpose) …*". Such language has been treated as having a restrictive effect limiting the application of the relevant rule only to matters which are necessary to calculate what is to be paid to a creditor by way of dividend: see for example Re Kaupthing Singer & Friedlander Ltd [2010] Bus LR 1500 (CA) at [34];

(3) Dividend is not given any particular or general definition in the Insolvency Rules. However, as used in Rule 14.44(1) and (2), the reference to "*a dividend*" can only be read as a reference to the dividend payable on the debt proved i.e. the principal debt as referred to in the first line of Rule 14.44(1). All of the references in Rule 14.44 are, and can only be, to "*the dividend*" which would be paid on "*the debt of which payment is not due at the date of the declaration of a dividend*" (see Rule 14.44(1), emphasis added). The language of "*subject as follows*" at the end of Rule 14.44(1) makes clear that the dividend to which reference is made in Rule 14.44(2) must be the same dividend as is addressed in Rule 14.44(1);

(4) The use of dividend in Rule 14.44 to refer only to the dividend payable in respect of the proved principal debt is consistent with the use of "*dividend*" elsewhere in Part 14 of the Insolvency Rules (see, for example, Rules 14.3, 14.7, 14.39);

(5) A distinction is drawn in the language used in the Insolvency Rules between a "*distribution*" and a "*dividend*", the former potentially being wider than the latter (see, for example, Rules 14.26-14.30, 14.40). The notion of a distribution would potentially include a dividend on the proved debts or a distribution *in specie* (in, for example, a members' voluntary liquidation). Rule 14.44 is limited to dividend in the narrow sense of the monetary dividend payable on the proved debt. There is no reference in Rule 14.44 to the wider concept of a distribution, or any language suggestive of its application to statutory interest payments;

(6) There is no reference at all in Rule 14.23 to the declaration or payment of a "*dividend*" in respect of statutory interest (or in fact a distribution). Rule 14.23(1) simply anticipates and refers to the payment of interest out of the surplus; and

(7) There is therefore no basis to characterise any payment of statutory interest under Rule 14.23(7) as a dividend to which Rule 14.44 can apply: Rule 14.23(7) does not refer anywhere to the payment of statutory interest as being a form of dividend, and it would not in any event be the type of dividend to which Rule 14.44 applies (i.e. a dividend paid to satisfy the principal of the proved debt).

Commercial coherence

27. The language of Rule 14.23(7), read in the context of the wider rules, therefore dictates the answer to PLI 2. The language used must be given effect: see Waterfall I (SC) at [123] and [194].

28. The result is entirely commercially coherent (and certainly cannot be said to be commercially unreasonable):

(1) A future debt on which interest is payable at the commencement of the administration (i.e. £1000 payable in 2030, with interest at 9% p.a.) will, if there is a surplus available to pay statutory interest, be entitled to statutory interest at 9% on the full £1000 throughout the period during which the debt has remained outstanding. That is precisely the same interest entitlement to which the creditor

was entitled outside the administration, and leads to an approach consistent with Rule 14.23 whereby the creditor is entitled to statutory interest at the higher of the contractual rate otherwise applicable to the debt, or the Judgments Act rate of 8%. As observed by David Richards J in Waterfall IIA at [209] (in respect of future interest bearing debts, and when rejecting the submission that statutory interest should only be payable for the period after the future debt fell due):

"*it would be particularly extraordinary if a creditor with a future debt bearing interest in the meantime (surely the most common example) who can prove for interest down to the commencement of the administration, would not then be entitled to payment of interest from the commencement of the administration to the date on which the debt would otherwise become due."* (see also [213])

(2) It is correct that the creditor will receive statutory interest calculated on the non-discounted face sum of the future debt, and that the general rationale for payment of statutory interest is to reflect a delay in payment of the proved debt. But it is not possible to extrapolate from the general justification for payment of statutory interest (see further below under PLI 3) an interpretation of Rule 14.23(7) which is consistent with the language used, and only pays statutory interest on the dividend payable in respect of such a future debt. Statutory interest is paid on the proved debt and, as observed in Waterfall IIA, that is compensation for the delay in payment of the proved debt itself. The fact that dividends may be calculated by reference to a discounted amount of the proved debt is irrelevant;

(3) Furthermore, where a future debt becomes payable during the period of the administration and before statutory interest is to be paid on it (i.e. assume an administration which commenced in 2008, with £1000 payable in 2022 and interest at 9% p.a.), there is no possible basis for Rule 14.44 to apply to dividends or statutory interest payable in 2023. That is because Rule 14.44(1) only applies where "*a creditor has proved for a debt of which payment is not due at the date of the declaration of a dividend".* Once the debt (proved as a future debt) has actually fallen due, it is plain that statutory interest can only be paid on the full amount of the proved debt. It would introduce a further bizarre and unprincipled distinction within the rules if a creditor whose underlying future interest bearing debt has not been paid at the time of payment of dividend and statutory interest was subjected to discounting of the principal debt for both the purposes of dividend and payment of statutory interest, but a creditor whose debt fell due shortly before the date of

proposed payment was able to recover the proved debt and statutory interest without any discount being applied at all;

(4) In short, insofar as there are thought to be (or identified) any potential anomalies in the operation of Rule 14.23(7), that is likely to be because it is impossible to draft the Rules in a way that produces a perfect solution in all circumstances (Waterfall IIA at [215]); and the drafting of the discounting provision in the rule has always been problematic: Waterfall IIC at [53]-[55]). But neither reason suffices to rewrite or reinterpret the clear language and effect of Rule 14.23(7).

PLI 3

DB's position is that the applicable period for the purpose of the calculation of statutory interest on Claim D begins on the date on which PLC entered administration

29. Rule 14.23(7) provides:

> (a) "*In an administration Any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date;*" (emphasis added)

30. In Waterfall IIA, David Richards J determined that statutory interest in respect of an admitted future and contingent provable debts as at the date of the administration is payable from the date of the commencement of the administration (Issues 7 and 8 at [185], [213]-[215] and [225]). The Judge held at [225]:

> "*I conclude therefore on Issues 7 and 8 that, in the case of both future and contingent debts, interest is payable under rule 2.88(7) from the date that the company entered administration, not from the date (if any) on which any such debt fell due for payment in accordance with its terms."*

31. In so holding, the Judge emphasised the distinction for the purpose of Rule 14.23(7) (then 2.88(7) of the Insolvency Rules1986) between the underlying debt and the proved debt (statutory interest being payable in respect of the latter and not the former), and that the rationale for payment of statutory interest was (see [207]):

> *"The purpose of rule 2.88(7), as earlier discussed in this judgment, is to provide for interest to be paid to all creditors, irrespective of whether they had any entitlement to*

interest apart from the administration. What they are being compensated for by the payment of interest under rule 2.88(7) is the delay since the commencement of the administration in the payment of their admitted "debts", as ascertained or estimated in accordance with the legislation. It is not, in my judgment, compensation for the non payment of the underlying debt although I accept, as I stated in Waterfall I, that the rationale for the choice of judgment rate as the minimum rate of interest payable is that the commencement of an administration or liquidation" will or may prevent creditors from taking proceedings and obtaining judgment against the company."

32. The conclusion reached in respect of statutory interest payable on a contingent debt (but not a future debt) was appealed. In Waterfall IIC, the Court of Appeal upheld the Judge's decision, and determined that statutory interest in respect of an admitted contingent provable debt as at the date of the administration is payable from the date of the commencement of the administration (Item 5 at [18], and [53]). In so finding, the Court of Appeal held at [53]:

"… Rule 2.88(7) provides the same regime for statutory interest for all provable debts, whether due at the date of administration, due then only in the future, or subject then to a contingency which may, in fact, never occur. All the "periods" in respect of which statutory interest is payable start on the date of administration, and end on each dividend date (in respect of the part of the provable debt then paid). This is of course the case for a debt due at that date, but it is also true of a future debt, as the judge determined, and as to which there is no appeal."

33. In the ECAPS 1 Proceedings, Marcus Smith J at [318] observed that:

"… the policy behind the rules is very clear: provable debts are, in an administration, treated equally in terms of the interest they recover, save as regards rate …"

34. Claim D has at all times been a provable future claim, subject to the subordination provisions contained therein. Payment of amounts in respect of Claim D is therefore conditional on the Issuer being "*solvent*" as defined. The effect of those provisions prevented Claim D from being the subject of proof unless and until the relevant subordination conditions were met: see Waterfall I at [68]-[70]; Lehman Brothers Holdings Scottish LP3 [2022] Bus LR 10 at [24]-[26].

35. One of the issues raised at first instance in the ECAPS 1 Proceedings was the extent to which (if Claim D was treated as a future provable debt) any future interest payable in respect of Claim D under its contractual terms was capable of proof (i.e. consistent with the approach adopted by the Court of Appeal in Re Brown v Wingrove [1891] QB 574). Deutsche Bank argued that Rule 14.23(1) should be interpreted in a manner which was consistent with Brown v Wingrove and permitted future interest payable on Claim D to

be capable of proof. In doing so, Deutsche Bank proceeded on the basis that the relevant scheme for statutory interest provided for statutory Interest payable under Rule 14.23(7) on Claim D to run from the commencement of the administration[6]. In opposing Deutsche Bank's arguments, LBHI proceeded on the same basis[7] and certainly did not suggest that a different approach was warranted in respect of contractually subordinated debt such as Claim D. As a result, this aspect of the statutory regime on payment of interest was understood and treated by Marcus Smith J in his judgment as being common ground between all parties: see [309(2)].

> *"A related question is whether, and if so to what extent, interest is payable on the PLC Sub-Notes* [i.e. Claim D]*:*
>
> *(1) Apart from the insolvency, interest would be payable on the notes in accordance with their terms. However, by rule 14.23(1) of the Insolvency Rules 2016, interest that would otherwise be paid is not provable after the relevant date.*
>
> *(2) It was common ground that statutory interest would be payable from the relevant date to the actual payment of a dividend."* (emphasis added)

36. The issue of whether future interest could be the subject of a proof was determined against Deutsche Bank[8]. It would at the very least be an abuse of process, alternatively precluded by an issue estoppel, for any of the parties to the ECAPS 1 Proceedings, including LBHI, now to argue (contrary to the stance taken when determining the ECAPS 1 Proceedings) that statutory interest on Claim D accrues from any date other than the relevant date i.e. the commencement of the administration.

37. Without prejudice to the above, the position that the Judge understood to be common ground as between the parties to the ECAPS 1 Proceedings was in any event clearly correct:

    (1) Once the subordination conditions were satisfied, a proof in respect of Claim D could be lodged. Once admitted, it is a proof in respect of (what is at this time) still a future debt, which debt existed as a future debt at the date of the administration;

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[6] See, for example, Deutsche Bank's trial skeleton at [275] [**PDT1 p.571**].
[7] See LBHI's Reply Position Paper at [71] [**EJM6, pp. 547-548**] and trial skeleton at [611]-[619] [**PDT1, pp. 375-378**].
[8] See paragraph 9 of the order of Marcus Smith J in the ECAPS 1 Proceedings (24 July 2020) [**EJM6 p. 558**]. Deutsche Bank failed to obtain permission to appeal in respect of this issue: see paragraph 16 of the order of Marcus Smith J in the ECAPS 1 Proceedings (24 July 2020) [**EJM6 p. 559**] and the order of Lord Justice Newey dated 14 December 2020 [**DBSD pp. 3-4**].

(2) Any future provable debt is "*outstanding*" for the purpose of Rule 14.23(7) from the date of the administration until it is paid by way of dividend. The period for which a debt is outstanding is to be measured "*since the relevant date*" which is the commencement of the administration. This is the same approach used for all provable debts, whether current, future or contingent. This approach is the only approach consistent with the Court of Appeal decision in Waterfall IIC, and the rationalization given for the payment of statutory interest by David Richards J in Waterfall IIA i.e. it is aimed at compensating creditors for the time it has taken to pay proved debts since the commencement of the administration;

(3) The fact that the subordination conditions may not have been satisfied until a point after the commencement of the administration (such that GP1 was not contractually entitled to submit any proof at any earlier point, including in respect of a contingent future debt) is irrelevant:

(i) For the purpose of Rule 14.23(7), the contractual subordination provisions are no different to any other terms which determine when, or based on what contingencies, a debt falls due. Per David Richards J in Waterfall IIA, terms which govern when a debt will as a matter of contract fall due do not affect the period for which the proved debt is outstanding for the purpose of Rule 14.23(7);

(ii) Treating the proof in respect of Claim D as "*outstanding*" for the purpose of Rule 14.23 since the date of the administration is the only approach consistent with the hindsight principle. The realization of assets and distribution of proceeds among creditors are treated as notionally taking place simultaneously on the date of the commencement of the liquidation or administration irrespective of whether and when those debts actually fall due or were the subject of proof (see Waterfall IIA at [202], MS Fashions Ltd v BCCI [1993] Ch 425 at [423G]). Applying the hindsight principle, it can therefore be seen that the conditions for payment of Claim D would always be met and that Claim D always was and has been a provable future debt. Once admitted for the purpose of proof, the proved debt is to be treated as having been outstanding since the date of the administration;

(iii) Statutory Interest is then payable by reference to the period between the commencement of the administration, and the actual date of payment of the proved debt through dividends;

(iv) Such an approach is entirely consistent with the approach to delayed or late proofs, or disputed debts, where the actual date of admission to proof does not alter the amount of the dividend in respect of principal or statutory interest payable to such a creditor: see Rules 14.23 and 14.40;

(v) The timing of the contractual "*entitlement*" to submit the proof in respect of Claim D is therefore irrelevant and does not alter the analysis. It does not change the period for which the proved debt has been outstanding because the period is not referable to any entitlement to prove, but rather the period between the commencement of the administration and when dividends are in due course paid such that the proved debt is no longer outstanding. There is no provision in Rule 14.23(7) which refers to the date of being "*entitled*" to prove as relevant, and it is conceptually confused to seek to introduce such a notion.

(4) Any other result is nonsensical, and cannot have been the intended effect of Rule 14.23(7) as applied to debt subject to the subordination conditions applicable to Claim D. The holder of senior subordinated debt would be deprived of statutory interest for the entirety of the period between the commencement of the administration and the date upon which the subordination conditions were met, notwithstanding that (a) the senior subordinated debt remained unpaid throughout that period; (b) the senior subordinated debt carried a contractual right to interest whilst unpaid; (c) the timing of satisfaction of the subordination provisions was wholly outside of its control; and (d) the only beneficiary of such an interpretation would be lower ranking subordinated debt or equity.

PLI 4

Deutsche Bank's position is that PLI 4 should have been raised in the ECAPS 1 Proceedings (if at all) and it is an abuse of process for any party to those proceedings now to contend that clause 2.11 of the ECAPS Guarantees imposes on the "Holder" of the ECAPS a trust in respect of any proceeds distributed by PLC in relation to the PLC Sub-Notes. Clause 2.11 does not in any event impose any such trust.

The issue

38. The genesis of PLI 4 is an argument first advanced by LBHI in correspondence[9] to the effect that sums distributed by GP1 to the Holder of the ECAPS that are ultimately funded by sums paid to GP1 by PLC under Claim D are held on trust by the Holder for PLC pursuant to clause 2.11 of the ECAPS Guarantees.

39. The economic consequences of this argument would be that payment of any sums by PLC in relation to Claim D would ultimately result in those sums returning to PLC for its benefit, thereby and necessarily extinguishing any economic value in Claim D.

Res Judicata

40. In the ECAPS 1 Proceedings, the PLC Administrators sought directions on (among other matters) the following questions:

    (1) ECAPS 1, Issue 2: "*whether LBHI's claims in respect of the [PLC Sub-Debt] rank for distribution before, after or pari passu with any of the claims of [GP1] under [the "PLC Sub-Notes]"*[10].

    (2) ECAPS 1, Issue 4: "*whether any liability of [PLC] which might be established under [the ECAPS Guarantees] rank for distribution before, after or pari passu with each of the [PLC] Sub-Debt and the [PLC[] Sub-Notes.*[11]

41. These issues were raised, disputed and determined in the ECAPS 1 Proceedings on the basis that the holders of the ECAPS would benefit from any distribution by PLC in respect of the claims by GP1 under the PLC Sub-Notes, which was expressly recorded in the judgment of Marcus Smith J at [19]: "*should GP1's claims rank ahead of those other unsecured subordinated creditors, then Deutsche Bank (as well as any other holder of ECAPS) will benefit accordingly*." This finding was not challenged on appeal and formed the basis of the Court of Appeal's judgment: see for example, (1) the conclusion in [91] that there was a commercial reason for Claim D to rank in priority to Claim C because that would have the effect of repaying external investors (i.e., the holders of the ECAPS) before internal ones; and (2) the funds-flow diagram appended to the judgment.

[9] See Weil Gotshal's letters of 6 December 2022 [**EJM6 pp. 650-652**] and 20 January 2023 [**EJM6 pp. 671-672**].
[10] [**PDT1 p. 5**]
[11] [**PDT1 p. 5**]

42. It was determined therefore in the ECAPS 1 Proceedings that distributions on Claim D would benefit the holders of the ECAPS, which is inconsistent with any trust of or obligation to turn over distributions paid under the ECAPS in favour of PLC arising under clause 2.11 of the ECAPS Guarantees. Accordingly, an issue estoppel precludes any argument in favour of such a trust or obligation in relation to PLI 4 and/or adopting such an argument on PLI 4 is precluded as a collateral attack on the findings made in the ECAPS 1 Proceedings.

43. Alternatively, it is an abuse of the Court's process for a party to raise in subsequent proceedings matters which were not, but could and should have been raised in earlier proceedings: Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited [2013] UKSC 46; [2014] A.C. 160, per Lord Sumption at [17].

44. There is no doubt that PLI 4 could have been raised in the ECAPS 1 Proceedings, which were an application for proceedings by the administrators of PLC with the very same respondents as the Directions Application. There is no suggestion (nor could there be) that additional relevant information has come to light since the ECAPS 1 Proceedings, and all parties were aware of the ECAPS Guarantees both before and throughout the ECAPS 1 Proceedings. Indeed, both the administrators of PLC and LBHI relied on the terms of the ECAPS Guarantees to support their positions both at first instance and on appeal and/or addressed the operation of the subordination provisions of the ECAPS Guarantees.[12]

45. Nor can there be any real doubt that PLI 4 (if it was to be raised at all by the PLC Administrators) should have been raised before the conclusion of the ECAPS 1 Proceedings. In particular:

    (1) ECAPS 1, Issue 2, which was the principal issue in dispute in relation to PLC's administration in the Court of Appeal, is irrelevant for all practical purposes if LBHI's position on PLI 4 is correct. This is because the relative priority of Claim D is irrelevant if any sums paid by PLC in respect of that claim are held on trust for PLC and ultimately returned to PLC.

[12] See, for example: PLC's skeleton argument in the ECAPS 1 Proceedings at ¶85.3(e) [**PDT1 p. 416**]; LBHI's Position Paper in the ECAPS 1 Proceedings at ¶41-43 [**EJM6, pp. 450-453**]; and LBHI's Reply Position Paper in the ECAPS 1 Proceedings at ¶16(5) [**EJM6 p. 514**], ¶50(5) [**EJM6 p. 534**] and ¶65-66 [**EJM6 p.544**].

(2) In these circumstances, raising PLI 4 now amounts to a collateral attack on the outcome of Issue 2 in the ECAPS 1 Proceedings.

(3) In so far as PLI 4 is an issue at all, it was incumbent on the administrators PLC to raise it at the same time as ECAPS 1, Issue 2. The administrators should not have permitted ECAPS 1, Issue 2 to be raised and made the subject of costly and time-consuming proceedings at first instance and in the Court of Appeal, if there is an issue as to whether PLC is entitled to the proceeds of Claim D in any event.

46. For the same reasons, LBHI should have raised its case on PLI 4 (if it was to be raised at all) before the conclusion of the ECAPS 1 Proceedings.

47. Further, LBHI's position in the ECAPS 1 Proceedings was that:

(1) The ECAPS Guarantees had "*terminated under their terms*" upon the dissolution of GP1 on 22 June 2010.[13]

(2) Payments in respect of Claim D would be ultimately for the economic benefit of the holders of the ECAPS rather than for PLC and/or LBHI.[14]

48. It is particularly abusive for LBHI now to raise a case that is inconsistent with the position it adopted and relied on in the ECAPS 1 Proceedings.

49. In these circumstances, Deutsche Bank's position is that:

(1) The administrators of PLC are precluded from raising PLI 4, and PLI 4 should therefore be struck out under CPR r. 3.4(2) (applied to these proceedings by Rule 12.1 of the Insolvency Rules).

(2) Alternatively, the parties to the Directions Application are precluded from contending that sums paid by PLC to GP1 in relation to Claim D and used to fund payments by GP1 to the Holder of the ECAPS are held on trust for PLC, and any case to that effect set out in a party's position paper should be struck out.

[13] LBHI Position Paper in the ECAPS 1 Proceedings at ¶43(1) [**EJM6 P. 451**].
[14] For example, LBHI repeatedly asserted in support of its position that Claim C and Claim D should rank for payment *pari passu* that if Claim D were to be paid in priority this would result in an unjustified windfall for the ECAPS holders: see the LBHI Skeleton Argument in the ECAPS 1 Proceedings (High Court) at ¶9 [**PDT1 p. 192**].

(3) Further, or in the further alternative, the administrators of PLC should be directed in relation to PLI 4 that sums paid by PLC to GP1 in relation to Claim D and used to fund payments by GP1 to the Holder of the ECAPS are not held on trust for PLC.

Substantive merits

50. Deutsche Bank's position on the substantive merits of PLI 4 is set out below, without prejudice to its position on *res judicata*.

51. Deutsche Bank's primary position is that the ECAPS Guarantees terminated in accordance with their terms upon the dissolution or winding-up of GP1 with the effect that clause 2.11 no longer subsists and cannot therefore give rise to any trust or otherwise oblige the Holder to turn over any sums to PLC.[15] In particular:

(1) Clause 4 of the PLC Guarantees provides that "*With respect to the Preferred Securities, this Subordinated Guarantee shall terminate and be of no further force and effect upon the earliest of [...] (3) the dissolution of the Issuer*".[16]

(2) The Issuer of each tranche of ECAPS was an English limited partnership of which GP1 was the general partner, namely Lehman Brothers UK Capital Funding LP, Lehman Brothers UK Capital Funding II LP and Lehman Brothers UK Capital Funding III LP (the "**ECAPS Partnerships**").

(3) Clause 16 of each Limited Partnership Agreement for each ECAPS Partnership (the "**LPAs**") provides for the dissolution of the partnership. Clause 16.3 provides in relevant part[17]:

> "*the Issuer shall be dissolved and terminated […] on the occurrence of the following events:*

[15] Deutsche Bank's position that the ECAPS Guarantees terminated in accordance with their terms is inconsistent with the position it adopted in the ECAPS 1 Proceedings. However, if contrary to Deutsche Bank's case, raising PLI 4 is not an abuse of process and LBHI is permitted to advance a case on PLI 4 that is inconsistent with the position it pleaded in the ECAPS 1 Proceedings (that the ECAPS Guarantees had terminated), then Deutsche Bank should also be entitled to adopt a similarly inconsistent position.
[16] [**EJM6 pp. 208, 262, 359**]
[17] [**PDT1, p. 142; DBSD pp. 55, 120**]

(a) an order being made for the bankruptcy, dissolution, liquidation or winding up of the General Partner or a special resolution of the General Partner being passed for its winding up; or

(b) an order for dissolution being made by the English Court (under Section 35 of the Partnership Act 1890); or […]

(d) as set out in sub-clause 2.3 […]"

(4) Clause 2.3 of the LPAs provides: "*The Issuer […] shall continue until the earlier of the date on which the Issuer is dissolved or terminated in accordance with the provisions of this Agreement, and the first date on which there is not at least one general partner […]*"[18].

(5) GP1 was struck off the Companies Register on 22 June 2010, and then restored pursuant to an order of District Judge Hart dated 20 January 2017. That order recorded an undertaking by LBHI to "*immediately upon restoration of the name of [GP1] the Register of Companies take all steps necessary for procuring that [GP1] be placed in Creditors' Voluntary Liquidation*". A resolution placing GP1 into voluntary liquidation was duly passed on 28 February 2017.

(6) By an order of Hildyard J dated 15 March 2017[19], the ECAPS Partnerships were wound up.

(7) Accordingly, the ECAPS Partnerships were dissolved on 22 June 2010, alternatively on 28 February 2017, alternatively on 15 March 2017, and the ECAPS Guarantees terminated on that date.

52. Alternatively, if (which is denied) the ECAPS Guarantees continue to be in force, Deutsche Bank's position is that they by their nature are not capable as a matter of law of imposing a trust over sums received by the Holder or an obligation on the Holder to return any such sums to PLC. In particular:

(1) Each ECAPS Guarantee was executed as a unilateral deed poll by PLC; and

[18] [**PDT1 p.123; DBSD pp. 35, 120**]
[19] [**DBSD p. 154-156**]

(2) A unilateral deed poll is not capable of imposing obligations on a non-party, including the Holder of the ECAPS.

53. In the further alternative, if (which is denied) the ECAPS Guarantees continue to be enforced and are capable of imposing obligations on a Holder of ECAPS, then Deutsche Bank's position is that clause 2.11 thereof is not engaged in relation to funds paid by the ECAPS Issuers to the Holders of the ECAPS in discharge of the Issuers' obligations under the ECAPS. In particular:

(1) Clause 2.11 is in the following terms:

> *"In the event of the winding-up of the Guarantor if any payment or distribution of assets of the Guarantor of any kind or character, whether in cash, property or securities, including any such payment or distribution which may be payable or deliverable by reason of the payment of any other indebtedness of the Guarantor being subordinated to the payment of amounts owing under this Subordinated Guarantee, shall be received by any Holders, before the claims of Senior Creditors have been paid in full, such payment or distribution shall be held in trust by the Holder, as applicable, and shall be immediately returned by it to the liquidator of the Guarantor and in that event the receipt by the liquidator shall be a good discharge to the relevant Holder. Thereupon, such payment or distribution will be deemed not to have been made or received."*[20] *(emphasis added)*

(2) The Guarantor was defined to mean PLC.

(3) Clause 2.11 is therefore engaged only in relation to "*any payment or distribution of assets of [PLC] … received by any Holders*".

(4) The structure of the payments at issue in relation to PLI4 is as follows:

(i) PLC will in due course make payments to GP1[21] in its capacity as the general partner of the ECAPS Partnerships in relation to Claim D ("**Payment 1**"); and

(ii) The ECAPS Partnerships will in due course make payments to the Holder of the ECAPS in relation to their liability under the ECAPS ("**Payment 2**").

[20] [**EJM6 pp. 208, 262, 359**]

[21] It is understood that Payment 1 could be made directly by PLC to GP1, but in practice Payment 1 is likely to be made via the clearing systems and the Bank of New York in its capacity as custodian for GP1 and the ECAPS Partnerships as the ultimate beneficial holders of the PLC Sub-Notes. The precise flow of funds between PLC and GP1 does not affect the analysis for the purposes of PLI 4, and so reference is made to Payment 1, as defined, for convenience.

(5) Payment 1 is a payment by PLC to GP1 and, although it is "*a payment or distribution of assets of the Guarantor*" it is not a payment that is "*received by any Holders*". Clause 2.11 is therefore not engaged in relation to Payment 1. Indeed, there is no suggestion (nor could there be) that the proceeds of Payment 1 are held on trust by GP1 for PLC.

(6) Payment 2 is a payment by GP1 in its capacity as the general partner of the ECAPS Partnerships. It is a payment out of the assets of the ECAPS Partnerships. It is not a "*payment or distribution of assets of the Guarantor*". Clause 2.11 is therefore not engaged in relation to Payment 2 either.

(7) It is irrelevant whether or not some or all of the sums received by the ECAPS Partnerships under Payment 1 are ultimately applied to fund their liability to make Payment 2. This is because the proceeds of Payment 1 are the property of the ECAPS Partnerships, and PLC has no proprietary claim (or any other claim) to those sums in the hands of the ECAPS Partnerships.

54. Further, or in the further alternative, the reference in clause 2.11 to "*any payment or distribution of assets of the Guarantor*" includes only a payment or distribution by PLC in its capacity as Guarantor under the ECAPS Guarantee, and does not include payments or distributions made by PLC in its capacity as a debtor under the PLC Sub-Notes.

PLI 5

Deutsche Bank's position is that PLI 5 does not arise because distributions paid under the ECAPS are not to be returned to PLC in light of Deutsche Bank's position on PLI 4. Even if PLI 5 did arise, it would not affect the priority for payment established in the ECAPS 1 Proceedings, namely that Claim D has priority over Claim C, which would lead to an absurd situation of an infinite circularity of payments.

55. The operation of clause 2.11 of the ECAPS Guarantees cannot disturb the relative priority for payment by PLC of Claim C and Claim D. This is because:

(1) The Court of Appeal's Order in the ECAPS 1 Proceedings that Claim D is to be paid in priority is binding on PLC and gives rise to a cause of action estoppel and/or an issue estoppel in that respect binding all parties to these proceedings; and

(2) There is in any event no legal basis on which clause 2.11 of the ECAPS Guarantees could affect the contractual priority agreed in the terms of the PLC Sub-Notes and the PLC Sub-Debt.

56. It follows that (1) PLI 5 should be struck under CPR r. 3.4(2) (applied to these proceedings by Rule 12.1 of the Insolvency Rules); alternatively, (2) the answer to PLI 5 is that the priority as between the PLC Sub-Notes and the PLC Sub-Debt is unaffected, and the PLC Sub-Notes are to be paid in priority to the PLC Sub-Debt.

57. There is an additional question (not strictly within the scope of PLI 4 as drafted) as to whether the original payment by PLC in respect of Claim D (referred to as Payment 1 above) would discharge PLC's liability under Claim D such that if the distributions under the ECAPS were returned to PLC, PLC could use those sums to pay Claim C (notwithstanding that Claim D has priority over Claim C).

58. The answer to the additional question is that if Deutsche Bank is wrong on PLI 4 and clause 2.11 of the ECAPS Guarantees requires the Holder to hold on trust and return Payment 2, then that can only be because Payment 1 and Payment 2 are made with monies to which PLC has some proprietary interest (such that both payments can be characterised as being "*any payment or distribution of assets of the Guarantor*" for the purposes of clause 2.11). In those premises, Payment 1 would not discharge PLC's liability under Claim D because Payment 1 would not be made beneficially to the ECAPS Issuers, but would remain fixed with PLC's proprietary interest.

59. This would result in an absurd situation in which: (1) PLC is obliged to pay Claim D, (2) the ECAPS Issuers are obliged to use the proceeds of Claim D to pay the ECAPS Holder, (3) the ECAPS Holder is obliged to return those proceeds to PLC, which (4) is obliged to pay Claim D again, and so on in perpetuity. The result does not benefit Claim C or LBHI and is so absurd that it lays bare the impossible construction being advanced by LBHI in relation to clause 2.11.

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30 June 2023