

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

APPLICANTS

AND

(1) LB GP No. 1 Limited (in liquidation)
(2) Lehman Brothers Holdings Inc.
(3) Deutsche Bank A.G. (London Branch)

RESPONDENTS

POSITION PAPER OF THE JOINT ADMINISTRATORS OF
LEHMAN BROTHERS HOLDINGS PLC

INTRODUCTION

1. This paper sets out the position of the joint administrators of Lehman Brothers Holdings plc (the **JAs** and **PLC** respectively) on the following applications:
 - a. The JAs' application dated 14 March 2023 for directions pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 on certain legal issues which are relevant to the priority of future distributions to be made to PLC's subordinated creditors (the **Priority Directions Application**).

- b. The JAs' application dated 25 April 2023 for directions regarding their entitlement to declare a dividend and make a distribution in respect of the debt of LB GP No. 1 Limited notwithstanding its failure to submit a proof of debt in relation to that debt (the **Distribution Directions Application**).
 - c. The application issued by Deutsche Bank AG for an order striking out certain issues in the Priority Directions Application, dated 27 April 2023 (the **DB Strike-out Application**).
2. The above Applications are to be heard at a substantive hearing on 9-13 October 2023. By Order dated 4 May 2023, (the **May Directions Order**), Mr Justice Hildyard directed that the parties should exchange Position Papers, limited to 25 pages each, by 4pm on 30 June 2023.

BACKGROUND

3. Each of the Applications is concerned with distributions from the PLC estate.
4. The various interested parties are:
 - a. The JAs.
 - b. Lehman Brothers Holdings Inc (**LBHI**).
 - c. LB GP No. 1 Ltd (**GP1**).
 - d. Deutsche Bank AG (**DB**).
5. The relevant context is that PLC has discharged 100% of its unsubordinated principal debt admitted to proof (£1,074.7 million) plus 44.6% of the statutory interest on that debt (£354.1 million). There remains unpaid statutory interest of £439.8 million ranking ahead of PLC's subordinated creditors¹. The JAs are now in a position to pay (or otherwise deal with) the remainder of that statutory interest and to make a first distribution on the subordinated debt.

¹ These figures are subject to the "partial discharge" point raised by Alston & Bird, referred to below.

6. As an intermediate holding company within Lehman's UK group structure, PLC had a role in the provision of capital to other group companies (Macnamara 6/16). PLC's subordinated debt comprises the following:
 7. The **PLC Sub-Debt**, sometimes also referred to as **Claim C** (Macnamara 6/27(a)):
 - a. These are liabilities of approximately US\$1.9 billion under 3 subordinated loan facility agreements dated (in two cases) 30 July 2004 and (in one case) 31 October 2005.
 - b. The original lender under the PLC Sub-Debt was Lehman Brothers UK Holdings Ltd, but the debt is now held by LBHI (Macnamara 6/29-34)².
 8. The **PLC Sub-Notes**, sometimes also referred to as **Claim D** (Macnamara 6/27(b)):
 - a. These are liabilities with an aggregate face value of approximately €790 million under subordinated note issuances pursuant to offering circulars dated 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006. The notes were issued, variously, to one of three limited partnerships, Lehman Brothers Capital Funding LP, Lehman Brothers Capital Funding II LP and Lehman Brothers Capital Funding III LP (the **Partnerships**). The General Partner of each of the Partnerships is GP1, now acting by its liquidators (Macnamara 6/37-39).
 - b. The PLC Sub-Notes were long-dated instruments, falling due in 2035 or 2036. The Court has confirmed (see further below) that these obligations are future debts which are subject to discounting under IR r. 14.44 (Macnamara 6/40). On the JAs' current calculations, discounting reduces the claim on the PLC Sub-Notes to £188 million.
 - c. The PLC Sub-Notes were funded by external investors through the issue by the Partnerships of further sets of securities through 3 separate offering circulars. Some of those securities were entitled Enhanced Capital Advantaged Preferred

² This is subject to the query as to LBHI's title to the PLC Sub-Debt raised by Alston & Bird, referred to below.

Securities, and they have all been referred to generally as **ECAPS** (Macnamara 6/41).

- d. Under this structure, the economic interest in the PLC Sub-Notes lies in the ECAPS. DB is (as understood by the JAs) the beneficial owner of a quantity of ECAPS. In the previous Court proceedings described below (the **ECAPS1 proceedings**), DB participated as an informal representative of the beneficial owners of the ECAPS and the JAs are content for them to continue to do so. It is for this reason that DB has been joined as a respondent to the Priority Directions Application.

9. The **ECAPS Guarantees**, sometimes also referred to as **Claim E** (Macnamara 6/27(c)):

- a. The offering circulars for the ECAPS made reference to the provision of a subordinated guarantee to be given by PLC to the Holder of the securities (Macnamara 6/43).
- b. Two executed versions of the ECAPS Guarantees have been located. The third has not been located, notwithstanding an extensive disclosure process in the *ECAPS1* proceedings, though the JAs have no reason to believe that the guarantee was not in fact executed (Macnamara 6/44-45).

THE ECAPS1 PROCEEDINGS

10. The *ECAPS1* proceedings concerned two applications for directions: (i) an application by the joint administrators of LB Holdings Intermediate 2 Ltd (**LBHI2**) as to the relative priority of the subordinated debt in the LBHI2 estate; and (ii) an application by the JAs as to the relative priority of the subordinated debt in the PLC estate. The applications were heard together because of the commonality of issues and parties.

11. LBHI2's subordinated creditors were (i) PLC under 3 subordinated debt agreements (the **LBHI2 Sub-Debt**, sometimes referred to as **Claim A**); and (ii) Lehman Brothers Holdings Scottish LP3 (**SLP3**, an LBHI entity) under a subordinated note issuance (the **LBHI2 Sub-Notes**, sometimes referred to as **Claim B**). There was a single issue for determination by the Court, namely as to the respective priority of these debts, within

which SLP3 also advanced a claim for rectification. The initial parties to the application were the joint administrators of LBHI2, SLP3 and PLC. By Order dated 24 July 2018, Mann J permitted the joinder of DB, on condition that DB bore its own costs of participating and avoided duplication of submissions.

12. PLC's subordinated creditors, as above, arise under the PLC Sub-Debt, the PLC Sub-Notes and the ECAPS Guarantees. It was common ground, and ultimately ordered, that the PLC Sub-Debt and the PLC Sub-Notes were senior to the ECAPS Guarantees. The parties to the application were the JAs, LBHI, GP1 and DB. The application sought the determination of the issue of respective priority between the PLC Sub-Debt and the PLC Sub-Notes, together with a number of further issues which had been raised by the parties.

13. Following the Judgments of Marcus Smith J ([2020] EWHC 1681 (Ch)) and the Court of Appeal ([2021] EWCA Civ 1523), and the refusal of the Supreme Court to grant permission to appeal, the answers provided to the issues on the *ECAPS1* proceedings were as follows:

- a. In the LBHI2 estate, the LBHI2 Sub-Debt is senior to the LBHI2 Sub-Notes (and there is no rectification).
- b. In the PLC estate, the PLC Sub-Notes are senior to the PLC Sub-Debt and both the PLC Sub-Notes and the PLC Sub-Debt are senior to the ECAPS Guarantees.
- c. Also in the PLC estate:
 - i. The PLC Sub-Debt has not been released under the terms of a Settlement Agreement within the Lehman estates entered into as of 24 October 2011.
 - ii. The PLC Sub-Notes are future debts, subject to discounting under rule 14.44 of the Insolvency (England and Wales) Rules 2016 (**IR**).
 - iii. The value of the PLC Sub-Debt falls to be partially reduced to the extent that guarantee payments were made (by LBHI) on that debt.

THE PRIORITY DIRECTIONS APPLICATION

Application Notice dated 14 March 2023

*Sixth Witness Statement of Edward John Macnamara dated 14 March 2023 (**Macnamara 6**)*

14. By the May Directions Order, the parties are permitted to rely upon witness statements served and documents disclosed in the *ECAPS1* Proceedings. The JAs have not been notified of any particular statement or document from the earlier proceedings which is intended to be relied upon by any other party and so this Position Paper does not address any such matter.
15. The purpose of the Priority Directions Application is to resolve certain legal issues (the **Priority Legal Issues**) which affect the order and quantum of distributions to subordinated creditors out of the PLC estate, once all payments to unsubordinated creditors have been paid or otherwise taken into account.
16. The Priority Directions Application identifies 5 Priority Legal Issues, as follows:
 - a. Priority Legal Issue 1: Whether the principal amount of the PLC Sub-Debt (Claim C) falls to be paid in priority to statutory interest payable on the claim in respect of the PLC Sub-Notes (Claim D), or whether statutory interest payable on Claim D falls to be paid in priority to the principal amount of Claim C.
 - b. Priority Legal Issue 2: Whether statutory interest payable on the claim in respect of the PLC Sub-Notes falls to be calculated by reference to the face amount of the PLC Sub-Notes, or by reference to the discounted sum payable on that claim in accordance with IR r. 14.44.
 - c. Priority Legal Issue 3: Whether the applicable period for the purposes of the calculation of statutory interest on the claim in respect of the PLC Sub-Notes begins with the date on which PLC entered administration, or on the date on which, in accordance with the subordination provisions of the PLC Sub-Notes,

the holder of the PLC Sub-Notes became entitled to submit proofs of debt in PLC's administration in respect of that claim (and, if so, what that date is).

- d. Priority Legal Issue 4: Whether clause 2.11 of the ECAPS Guarantees imposes upon the Holder (as defined therein) a trust in respect of any proceeds which have been distributed by PLC, which takes effect on receipt of those proceeds and requires such proceeds to be turned over to PLC. If so what are the circumstances in which such trust arises and in respect of what proceeds.
- e. Priority Legal Issue 5: If PLC makes distributions on the PLC Sub-Notes but proceeds are thereafter turned over to PLC by the Holder pursuant to clause 2.11 of the ECAPS Guarantees, what is the resultant order of priority, as between the PLC Sub-Debt (Claim C) and the PLC Sub-Notes (Claim D), in respect of such sums received by PLC?

17. The JAs have raised these issues in correspondence with the economically interested parties, and expressed their preliminary views on them (Macnamara 6/68 and EJM6/644-647). However, for the purposes of the Priority Directions Application the JAs adopt a neutral position on each of the Priority Legal Issues, and intend to take no adversarial role at the hearing in respect of the matters in dispute, but seek the directions of the Court in order to facilitate the ongoing process of distribution out of the PLC estate (Macnamara 6/90). Therefore, the sections which follow do not advocate for a particular outcome on the issues, but are limited to an explanation of the relevance of each of the Priority Legal Issues, and the JAs' understanding of the points of dispute. On the latter point, the JAs' understanding is principally derived from correspondence exchanged by the parties, through their legal representatives, prior to and shortly after the issue of the Priority Directions Application, and the JAs are therefore in a position to provide no more than a high level summary. The positions of the economically interested parties on each of the Priority Legal Issues will be set out more fully in their respective Position Papers. The JAs will aim to provide such assistance to the Court as it requires.

Priority Legal Issue 1

18. As noted above, the Court of Appeal has already found that the PLC Sub-Notes are senior to the PLC Sub-Debt. However, there is disagreement over whether the principal amount of the PLC Sub-Debt should be paid in priority to the statutory interest payable on the PLC Sub-Notes. The JAs require directions from the Court on this issue because it is anticipated that the funds available within PLC's estate for distribution will be insufficient to discharge both the PLC Sub-Debt and the statutory interest on the PLC Sub-Notes in full.
19. The economically interested parties take opposing views on this issue. In broad summary, the JAs understand their respective positions to be as follows:
- a. LBHI contends that the principal of the PLC Sub-Debt falls to be paid in priority to the statutory interest on the PLC Sub-Notes.
 - b. GP1/DB disagree (and also contend that the point is precluded by estoppel or amounts to an abuse of process).
20. The point is likely to turn on the construction of IR r. 14.23 and the application of decisions in previous Lehman judgments including:
- a. *Re Lehman Brothers International Europe* [2014] EWHC 704 (Ch), [2015] EWCA Civ 485 and [2017] UKSC 38 (**Waterfall I**) in which it was held (by reference to subordinated loan agreements in substantially the same form) that statutory interest on unsubordinated debt was "payable" "in the insolvency", for the purpose of clause 5(2)(a) of the relevant agreements and it thereby enjoyed priority over the subordinated debt.
 - b. *ECAPS1* in which (as explained above) it was held that the PLC Sub-Notes rank ahead of the PLC Sub-Debt.
21. IR r. 14.23 provides in its material parts:

"(7) 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;...”

22. LBHI's position (as the JAs understand it) is that:

- a. In *ECAPS1* it was held that the PLC Sub-Debt is subordinated to all claims other than those that are junior to it.
- b. IR r. 14.23(7)(b) requires statutory interest on both the PLC Sub-Notes and the PLC Sub-Debt to rank equally.
- c. IR r. 14.23(7)(a) provides that statutory interest is not payable until after payment of the debts proved.
- d. Therefore, statutory interest payable on the PLC Sub-Notes is “junior to” the principal payable on the PLC Sub-Debt, and it follows that the PLC Sub-Debt is not subordinated to statutory interest on the PLC Sub-Notes.

23. The JAs understand GP1 and DB to contend that:

- a. Following the decision of the Supreme Court in *Waterfall I*, statutory interest on Senior Liabilities, as defined in the PLC Sub-Debt agreements, is payable in priority to the PLC Sub-Debt.
- b. Following the decision of the Court of Appeal in *ECAPS1*, the PLC Sub-Notes are Senior Liabilities, as defined in the PLC Sub-Debt agreements.

24. DB further contends (and is supported by GP1 in its contention) that, in any event:

- a. *ECAPS1* determined that the PLC Sub-Debt had subordinated itself to the Subordinated Liabilities as defined in the PLC Sub-Notes.

- b. The definition of Subordinated Liabilities in the PLC Sub-Notes includes statutory interest on the PLC Sub-Notes, as confirmed by the Supreme Court in *Waterfall I*.
- c. Hence, Priority Issue 1 has already been resolved by the Court of Appeal in *ECAPS1*. LBHI is precluded by cause of action estoppel or issue estoppel from arguing a contrary outcome, alternatively this is an abuse of process.

Priority Legal Issue 2

- 25. This issue is concerned with the quantification of the statutory interest payable on the PLC Sub-Notes. As explained above, it was held in the *ECAPS1* proceedings that the PLC Sub-Notes are future debts, subject to discounting under IR r. 14.44. The question which arises is whether statutory interest on the claim in respect of them should be calculated by reference to the face amount of the PLC Sub-Notes, or by reference to the discounted sum.
- 26. This issue arises because (and subject to the answer on Priority Legal Issues 1 and 3) the amount of statutory interest payable on the PLC Sub-Notes will or may impact on the balance available for distribution on the PLC Sub-Debt.
- 27. Again, the economically interested parties take opposing views on this issue:
 - a. LBHI contends that statutory interest should be calculated by reference to the discounted sum.
 - b. GP1/DB contend that statutory interest should be calculated by reference to the face amount of the PLC Sub-Notes.
- 28. The point is likely to turn on the construction of IR r. 14.23 and the application of decisions in previous Lehman judgments including *Re Lehman Brothers International Europe*, [2017] EWCA Civ 1462 (***Waterfall IIA***) in which it was held (by reference to the first instance decision at [2015] EWHC 2269 (Ch)) that:

“More fundamentally, we agree with the principled basis for the judge’s analysis, which treats the debt as the provable debt rather than the underlying

claim, and the application of the pari passu principle to all debts as from a single cut-off date. Statutory interest is compensation for dividends on account of provable debts having to be paid after (sometimes long after) that cut-off date, and does not depend upon there being any right to interest under the underlying claim, even though the rate of interest may do...” [57]

29. The relevant provisions in IR r.14.23(7) are set out above.

30. As the JAs understand it, LBHI’s position is that, in the case of future debts which are subject to discounting:

- a. Following *Waterfall IIA*, statutory interest compensates a creditor for the delay in payment of dividends.
- b. A future creditor receives a dividend which is calculated (pursuant to IR r. 14.44) by discounting the admitted proof.
- c. In order to compensate the future creditor for late payment of the value of that dividend, statutory interest should be calculated by reference to the discounted sum.
- d. This is the effect of IR r.14.23(7), where the reference to “*payment of the debts proved*” is a reference to proved debts, as discounted.

31. GP1 and DB on the other hand contend that statutory interest should be calculated by reference to the undiscounted value of the PLC Sub-Notes and that that is what the language of IR r. 14.23 requires.

Priority Legal Issue 3

32. This is the third issue concerned with the statutory interest payable on the PLC Sub-Notes, namely the applicable period in respect of which such statutory interest is payable.

33. This issue arises because it will affect the quantum of the statutory interest payable on the PLC Sub-Notes which again (and subject to the answer on Priority Legal Issues

1 and 2) will or may impact on the balance available for distribution on the PLC Sub-Debt.

34. Reflecting their respective positions on Priority Legal Issues 1 and 2:

- a. LBHI contends that the applicable period begins with the date (which in this event would itself need to be determined) on which GP1 became entitled to submit proofs of debt.
- b. GP1/DB contend that the applicable period begins with the date of administration.

35. Again, the point is likely to turn on the construction of IR r. 14.23(7)(a) (set out above) and of the subordination provisions in the PLC Sub-Notes and the application of decisions in previous Lehman judgments including:

- a. *Waterfall I*, in which the Supreme Court held that:

“it would not be open to LBHI2 to lodge a proof in respect of the subordinated debt until the non-provable liabilities have been paid in full, or at least until it is clear that, after meeting that proof in full and paying any statutory interest due on it, the non-provable liabilities could be met in full.” [70]

- b. *Waterfall IIA*, in which (as explained above) it was held that statutory interest compensates a creditor for the delay in payment of dividends. Further, as David Richards J said:

“A single date for the ascertainment of claims, even though account may be taken of subsequent events through the hindsight principle, is essential for a pari passu distribution. The date chosen by the legislation is the commencement of the administration.” [201]

36. LBHI’s position is that:

- a. Following the decision in *Waterfall I*, at the administration date subordinated creditors have no entitlement to dividends. That entitlement arises only when they are permitted to lodge a proof. Subordinated debts should be distinguished from future and contingent debts in this regard, because such debts can be proved for at any time.
- b. As statutory interest compensates a creditor for the delay in payment of dividends (*Waterfall IIA*), it should be calculated from the date on which the creditor became entitled to lodge a proof.
- c. This is consistent with IR r. 14.23(7)(a) which states that statutory interest is payable on “debts in respect of the periods during which they have been outstanding since the relevant date”. A subordinated debt cannot be outstanding at a time when the subordinated creditor has no entitlement to dividends.

37. GP1 and DB, on the other hand, adopt the position that the approach of David Richards J in *Waterfall IIA* should be followed and that statutory interest should run from the date of the administration.

Priority Legal Issue 4

38. The question of whether clause 2.11 of the ECAPS Guarantees imposes a trust over any sums distributed by PLC to the ECAPS Holder has been raised by LBHI.

39. Whilst Priority Legal Issue 4 is of a different order to Issues 1-3, in that it is not directly concerned with the priority of distributions between competing creditors, it materially affects the conduct of the JAs in respect of such distributions and the ultimate rights of the parties. If (as LBHI contends) the effect of clause 2.11 is to require the ECAPS Holder to turn over to PLC any payments received as a result of a distribution by PLC to GP1 in respect of the PLC Sub-Notes, those funds would be returned to the estate and become available for distribution.

40. The primary issue is one of construction of clause 2.11, which is in the following terms:

“In the event of the winding-up of the Guarantor [ie PLC] 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.”

41. The ECAPS themselves were issued by way of Global Notes and are held in the clearing systems, registered in the name of BNY Depository (Nominees) Ltd (**BNYM**), on behalf of the common depository. The JAs understand that, at least for some purposes, BNYM may be the “Holder” of the notes. BNYM has confirmed, by a letter sent by Bank of New York Mellon London Branch on behalf of BNYM and other related entities, that, subject to certain conditions, it agrees to be bound by the outcome of the Priority Directions Application, but does not consider it necessary to be joined to the proceedings at this stage. The Court will be updated as to the position at or ahead of the October hearing as appropriate.
42. The JAs understand LBHI to contend that the effect of clause 2.11 is that any sums which are paid by way of distribution from PLC to GP1 on behalf of the Partnerships, and which are then distributed by GP1 or the Partnerships to the ECAPS Holder, will be held on trust by the ECAPS Holder and returnable to PLC, as constituting *“any payment or distribution of assets of the Guarantor of any kind or character”*.
43. It is contended by LBHI that this reflects the fact that the ECAPS Holder was intended to have an economic return on liquidation equivalent to that of a holder of non-cumulative preference shares in PLC, and that clause 2.11 is a backstop, drafted in

broad terms, to ensure that the ECAPS Holder does not recover more than its intended economic entitlement.

44. LBHI further contends that, for the purposes of clause 2.11, it is a “Senior Creditor” because its claim under the PLC Sub-Debt takes priority over any claim under the ECAPS Guarantees (per *ECAPS1*).

45. GP1 and DB deny that this is the correct construction and effect of clause 2.11.

46. DB further contends (and is supported by GP1 in its contention) that, in any event:

- a. *ECAPS1* determined the respective rankings of the PLC Sub-Notes, the PLC Sub-Debt and the ECAPS Guarantees.
- b. Priority Issue 4 (and Priority Issue 5) are ultimately concerned with the respective priority of the PLC Sub-Notes and the PLC Sub-Debt, which issue has been conclusively determined by the Court of Appeal.
- c. LBHI’s case has the purported effect of negating or rendering futile the Court of Appeal’s findings in *ECAPS1*. The status of the ECAPS Guarantees was squarely in issue in those proceedings and, if there was any relevant priority issue deriving from clause 2.11, it could and should have been raised at the time.
- d. LBHI’s case is an abuse of process because the alleged effect of clause 2.11 could and should have been raised in the *ECAPS1* proceedings. Depending on how the argument is advanced, LBHI’s case may also be precluded by cause of action estoppel or issue estoppel.

Priority Legal Issue 5

47. This issue follows on from Priority Legal Issue 4, and is concerned with the resultant order of priority as between the PLC Sub-Debt and the PLC Sub-Notes (in the event that monies are turned over to PLC in accordance with LBHI’s interpretation of clause 2.11). It seems likely that this will turn on the construction of the clause.

THE DB STRIKE OUT APPLICATION

Application Notice dated 27 April 2023

First Witness Statement of Phillip D Taylor dated 27 April 2023 (Taylor 1)

48. The targets of the DB Strike Out Application are Priority Legal Issues 1, 4 and 5, which (DB says) engage issues of cause of action estoppel, issue estoppel and abuse of process (Taylor 1/4).
49. The DB strike out application is purportedly brought pursuant to CPR 3.4(2)(b). As a matter of form, this would seem problematic. CPR 3.4(2) permits the Court to strike out a “statement of case”, which is defined at CPR 2.3(1) as meaning “*a claim form, particulars of claim where these are not included in a claim form, defence, counterclaim or other additional claim, or reply to defence*” and also including further information. This does not, on its face, include an Insolvency Act application notice.
50. Further, by the Priority Directions Application, the JAs merely seek directions from the Court pursuant to paragraph 63 of IA Schedule B1. It is not clear how it can be contended that an office holder’s request for directions can itself be subject to estoppel or an abuse of process, in circumstances in which the office holder makes no claim, and indeed advances no position, against which those doctrines can bite.
51. In response to correspondence in which the DB Strike Out Application was threatened, Hogan Lovells International LLP (HL) (on behalf of the JAs) pointed out that:
- “... in circumstances where well advised parties were asserting reasoned, opposing positions on legal issues which bear upon substantial sums, it was entirely appropriate for our clients to seek directions on such issues rather than simply proceeding, only later to face criticism or the potential of a claim from a party who disagreed with whatever approach had been taken.”* (Letter from HL dated 24 March 2023, Exhibit EJM7/472)
52. It may or may not be the case that a contesting party, in this case LBHI, is estopped from running any particular argument on the relevant Priority Legal Issues, but (i) this

is a different matter to whether the JAs should be seeking directions from the Court on these issues, and (ii) in any event, this is something which can be determined by the Court as part of the Priority Directions Application. As the DB Strike Out Application has now been listed for hearing at the same time as the Priority Directions Application, it seems likely that the need for it has fallen away.

THE DISTRIBUTION DIRECTIONS APPLICATION

Application Notice dated 25 April 2023

*Seventh Witness Statement of Edward John Macnamara dated 25 April 2023 (**Macnamara 7**)*

*First Witness Statement of Bruce Mackay dated 15 June 2023 (**Mackay 1**)*

53. The JAs have the funds to make, and wish to make, a further distribution out of the PLC estate. On 31 March 2023, the JAs issued a Notice of Intended Distribution pursuant to IR r. 14.29, the last date for proving being specified as 28 April 2023 (Macnamara 7/52).
54. It was anticipated that the distribution would include a substantial distribution on the principal amount of the PLC Sub-Notes, and so the JAs sought a proof of debt from GP1. Initially, GP1 contended that it was not able to lodge a proof of debt until all senior creditors had been paid in full (the relevant correspondence is summarised at Macnamara 7/53-57).
55. In the light of GP1's perceived refusal and/or failure to submit a proof, the JAs issued the Distribution Directions Application (Macnamara 7/58), by which they sought an order that:
- a. The requirement for GP1 to submit a proof of debt to the JAs under IR r. 14.3(1) be dispensed with;
 - b. The JAs have permission to make a distribution to GP1 in respect of the principal amount of the PLC Sub-Notes, or any part thereof, in accordance with the Notice of Intended Distribution.

56. However, on 28 April 2023 GP1 submitted a proof of debt. It did so under protest and without prejudice to its position that the JAs should not make any distribution to GP1 until the Court has ruled on Priority Legal Issues 4 & 5.
57. At the hearing on 4 May 2023, Hildyard J ordered that the Distribution Directions Application should be listed for hearing at the same time as the Priority Directions Application. It follows that Priority Legal Issues 4 and 5 will be determined (at first instance, at any rate) at the same time as the Distribution Directions Application.
58. The JAs have since issued a letter postponing the intended dividend pursuant to IR r. 14.34(1) (Mackay 1/3.1).
59. In the event that Priority Legal Issue 4 is resolved in GP1's/DB's favour, the JAs will seek an order granting permission for a distribution to be made to GP1. Although there are some outstanding claims which rank ahead of the PLC Sub-Notes, all senior claims will have been paid, provided for or otherwise taken into account before any distribution is made to GP1.
60. In the event that Priority Legal Issue 4 is resolved in LBHI's favour, and subject then to the determination of Priority Legal Issue 5, the question will arise whether there should nevertheless still be permission to distribute to GP1. The JAs reserve their position on this question, which may be more appropriately addressed once the substance of any Judgment on Priority Legal Issues 4 & 5 is known.

THE ALSTON & BIRD LETTER OF 30 MAY 2023

61. By letter dated 30 May 2023, sent to the legal representatives of the JAs, LBHI and GP1, Alston & Bird on behalf of DB set out what they described as certain "*unresolved estate issues*" within the PLC estate. These included questions as to (a) the impact of the decision of the Court of Appeal in *ECAPS1* in respect of partial discharge on the claims of other creditors of PLC who have been in receipt of guarantee payments; (b) the admission of unsubordinated claims against PLC; and (c) LBHI's title to the PLC Sub-Debt. These queries are in the course of being considered and responded to. It is not presently clear whether any of the queries will require the intervention of the Court

or, if so, what process that will involve and when it can be accommodated. To the extent necessary or relevant, the JAs will update the Court as appropriate.

ADRIAN BELTRAMI KC

KATE HOLDERNESS

HOGAN LOVELLS INTERNATIONAL LLP

30 JUNE 2023