Tuesday, 5 October 2021

(10.30 am)

Submissions by MR PHILLIPS (continued)

LORD JUSTICE LEWISON: Yes, Mr Phillips.

MR PHILIPPS: Thank you. Good morning, my Lords, my Lady.

I want to address you for 15 minutes on three short topics.

The first is the judge's 'so what' conclusions.

The second is two points made by my learned friends on intention, one of which specifically addresses the points raised by your Lordships yesterday about Mr Grant's tax sensitivities email.

And thirdly, two points on outward expression of accord, one which completes an answer that I gave to my Lord, Lord Justice Lewison, yesterday.

So starting with 'so what', when I left off yesterday I had been addressing your Lordships on the judge's 'so what' conclusion, and the short point is that it is inconsistent with the evidence of both Ms Dolby and Mr Grant. I showed you yesterday Ms Dolby's evidence that if the effect of the amendments was to alter ranking then SLP3 would have need to consider it properly.

If I could ask you to take up the judgment, which is at C2/22, page 431, in relation to Mr Grant. I wanted

to go if I may to page 431 and to footnote 229. It's a footnote to the sentence that you see in D:

"The point is that no one focused on the question of relative subordination. The point was not raised."

And the footnote records:

"It's important to understand the evidence of Mr Grant in this light."

And he refers to a paragraph in Mr Grant's evidence where he said:

"It was important when making the amendments that they did not prejudice the subordination of the Sub-Notes, so I needed to be mindful of that when addressing the tax comments, simply stating that the insolvency condition did not operate on a winding up, would have solved the tax concern but potentially undermined the subordination.

"I accept this evidence, but Mr Grant was referring to the importance of ensuring for regulatory capital purposes that LBHI2 Sub-Notes remained subordinated to the unsubordinated creditors."

And with respect, that's not Mr Grant's evidence. And if I could just take you to supplemental bundle 1, at tab 1, page 19.

LADY JUSTICE ASPLIN: 19?

MR PHILIPPS: 19, my Lady, yes.

LADY JUSTICE ASPLIN: Thank you.

MR PHILIPPS: This is Mr Grant's statement. And he says:

"The amendments were intended to refer to the same point in the Waterfall --

LORD JUSTICE LEWISON: Where are you reading from?

MR PHILIPPS: Paragraph 53 my Lord, bottom of the page:

"The amendments were intended to refer to the same point in the Waterfall as the original drafting. There was intended to be no difference in where the LBHI2 Sub-Notes ranked or how much they were paid, whether assessed on a going concern or a gone concern basis."

Then over the page:

"The drafting was intended to preserve the status quo but used different wording in order to assist the tax analysis."

And that is not a statement about the LBHI2 Sub-Notes remaining subordinated to the unsubordinated debts, which is the point that the learned judge took in his judgment; it is a statement about the Sub-Notes staying in the same point in the Waterfall for ranking purposes. In Mr Grant's words, the drafting was intending to preserve the status quo.

So that was the 'so what' point. If I may move on to the second point, which is two points that arise out of my learned friend's submissions. If your Lordships

take bundle C1, tab 8, and if you could go to page 131 and paragraph 92.

It's a point which we touched on, which is that they rely on what they describe as the commonplace situation where commercial parties are content to agree changes proposed by their lawyers on the understanding that the amendments carry the meaning which the law attributes to them.

In our submission, that cannot be correct where an amendment includes a fundamental legal change that the lawyer was not instructed to make, which was never specifically flagged to the client and which was not intended by the relevant lawyer. But in any event, contrary to PLC's case, Ms Dolby's evidence was not that she would have just gone along with anything that A&O drafted; she would have had to discuss it with her colleagues. And I think I showed that to you yesterday.

LORD JUSTICE LEWISON: Yes.

MR PHILIPPS: For your notes that's at Day 3, 91, line 22, to 92, line 8.

It's also relevant in the context of Mr Grant's tax sensitivities email. My Lord, Lord Justice Henderson, put it to me yesterday, and it's at page 165 of the transcript, that as a result of the tax sensitivities email the tax issue was sufficiently flagged to the

Lehman Group, who did not enquire further into what the amendments had done in relation to unspecified sensitivities, and that Lehman were happy to make necessary changes to address tax sensitivities.

My Lord, Lord Justice Lewison, sets out very early, in our submission, on rectification that if the wording which was inserted to deal with the particular problem was all removed then that would leave the particular tax problem unresolved. And my Lord, that was on page 117 but I'm sure your Lordship remembers.

There are three short points, short but important points, that we make in relation to that. The first point is that Ms Dolby was already satisfied that the notes were tax deductible. This was because PwC had already provided a detailed opinion on the unamended notes and said that Lehman would get their tax deduction.

If I can show you in supplemental bundle 1 at tab 4, and it's at page 56, my Lords. This is a transcript of an interview conducted by all the parties with Ms Dolby, which is also referred to in the evidence but I want to show this to you. Can I pick it up on page 56, which is internal 21 at line 33, where she's talking about the tax deductability of the notes, and she said:

"Potentially, but I guess -- not I guess; we would

have gone and got a tax opinion on the whole structure before we implemented it. So we would have been happy that we should get a tax deduction from this. So it probably wasn't A&O's call. We would have gone and done our due diligence --"

LORD JUSTICE LEWISON: Sorry, I'm behind you. Where are we?

MR PHILIPPS: I'm so sorry, my Lord. I started at line 33 on page 56 which is internal 21.

LORD JUSTICE LEWISON: Yes.

MR PHILIPPS: I'm so sorry. She says:

"But I guess -- not I guess; we would have gone and got a tax opinion on the whole structure before we implemented it. So we would have been happy that we would get a tax deduction from it. So it probably wasn't A&O's call. We would have gone and done our due diligence on that before we even started the structure side."

And then:

"Yes, but if there was, we would have gone and spoke -- I can't even remember who we used [we know it was PwC] but we would have gone to an external adviser and said 'we need a tax deduction for this'. They would have gone through: is this equity? Is this debt? If it's equity you don't get a tax deduction."

Mr Lawford(?) then says:

"I think it was PwC. That would have been done before the LBHI2 Sub-Notes were issued?"

"Yes, it we'd have done all that -- all the -- we'd have got an opinion before we implemented the structure."

So it's put to her:

"You wouldn't have asked or wanted A&O to consider that question?"

"A&O weren't my tax advisers."

So the point is, this wasn't within A&O's remit at all.

LORD JUSTICE LEWISON: Would that take you very far? If it wasn't within A&O's remit, I would have expected Ms Dolby, faced with the Grant email, to say, "What do think you are doing? You are not our tax advisers. Why are you changing the wording to deal with tax sensitivities? PwC are advising us about tax". But she didn't.

MR PHILIPPS: Which comes on to the point I'm about to make, which is that the advice was that there was no problem. That's really quite important.

LORD JUSTICE LEWISON: That's another reason she might have said, "Why should I accept these amendments? There isn't a problem".

MR PHILIPPS: Yes, and in her evidence she says: I can't

understand why I didn't pick that up, but I didn't. That was her --

LORD JUSTICE LEWISON: Is there a finding that there was no tax problem?

MR PHILIPPS: No, but I'm about to explain that to your Lordships.

LORD JUSTICE HENDERSON: There is a further point, isn't there, though, because A&O are obviously highly experienced solicitors, so whatever the precise scope of their remit, I mean, if they perceive there is a potential tax problem surely it's only natural and indeed right and proper that they should draw attention to it?

MR PHILIPPS: Yes. And you have seen the evidence in relation to the limited -- it was very limited. They didn't explain it. They didn't -- or anything of that sort --

LORD JUSTICE HENDERSON: Well, it all seems to have gone slightly(?) by default, but it seems unfair to me to criticise them for actually raising a point which obviously was taken by them in good faith.

MR PHILIPPS: And it was a non-point, which is the point that I'm about to deal with.

So the points that you need to bear in mind -- and with respect, this is important -- are number 1, Lehman

thought these notes were tax deductible. They had had advice from PwC that these notes were tax deductible.

Number 2, these were not --

LORD JUSTICE LEWISON: In their unamended form?

MR PHILLIPS: In their unamended form, yes, my Lord. And when I get to point 5, I will draw something important out of it.

These were not necessary amendments from Lehmans' perspective at all. They were not intended to make changes, the drafting. It was only to preserve and reinforce the status quo. You have seen that from Mr Grant's evidence. They did not in fact make changes to the tax status. And in light of that -- if the wording were removed it would have no substantive effect on the tax position and there would be no tax problem left unresolved, which goes back to my Lord Mr Justice Lewison's question at the start. The tax problem was illusory. It wasn't real.

And this is the final point: if that tax problem was real, it exists and existed in relation to every standard form subordinated debt used for capital purposes. It existed on every standard form that used conditionality, which of course you have seen and you know they all did.

LORD JUSTICE LEWISON: What was the point that the tax

problem was illusory, argued before the judge? Did he make any findings about that?

MR PHILIPPS: No, and one of the reasons for that is that it's very much a question that's come up.

Your Lordship --

LORD JUSTICE LEWISON: Well, how can we decide without --

MR BELTRAMI: I'm not going to interfere with my learned friend's 50 minutes, but this was not argued before the judge. It is not in the notice of appeal. I don't think there is any evidence before the court about it at all. It's a total surprise to me. So I'm not quite sure why --

MR PHILIPPS: I'm surprised my learned friend is surprised.

But your Lordship asked a question. This is the answer to the question. So your Lordship asked the question: you would leave a tax problem unresolved? The answer to is that question is, no, you wouldn't.

LORD JUSTICE LEWISON: I'm not sure that we can just brush it aside like that without either any evidence or any finding.

MR PHILIPPS: Well, my Lord, I've given you materials and your Lordships will deal with the materials. I was responding directly to a question your Lordship asked, because the point that I wouldn't want your Lordships to have in mind is that there is a tax problem that would

be left unresolved if we took the language out.

LORD JUSTICE HENDERSON: I mean, there was a perceived tax problem. That's really as far as we can take it, isn't it? You say there was no substance to it. It's not for us to begin doing an independent investigation of our own about the merits of the point.

MR PHILLIPS: No, I understand, my Lord. What I can say in relation to that is that Mr Dehal(?) perceived there was a tax problem. And Allen & Overy did not know -- and there is evidence to this effect -- that PwC had already advised on the tax issues. Yes.

LADY JUSTICE ASPLIN: I have to say that I'm still slightly lost about the effect that that has on the intention of Lehmans and Ms Dolby, because she received that email from Mr Grant and saw what was in it, and everyone proceeded on the basis of the draft. So they intended the wording which was inserted.

MR PHILIPPS: My Lady, with respect, that's putting it too high, because you have Jackie Dolby's direct evidence that all she was intending to do was to defer the interest. We have seen that mass of evidence and I'm not going to repeat it all.

LADY JUSTICE ASPLIN: No, okay.

LORD JUSTICE LEWISON: We have your points.

MR PHILIPPS: Exactly. I think you have the point.

Can I just deal with the second point because, I'm sorry, that took me slightly out of course. PLC and Deutsche Bank both say that the mistake is not one of legal effect but one of commercial consequences. And I just make three short points:

The distinction between legal rights and commercial consequences is very clear from the case law -- and I won't take you to FSHC.

Secondly, on the judge's finding and on PLC's argument the effect of the amendments was to subordinate the debts to all debts including UT debt, save for the debts using the preference share mechanism. We went through that yesterday. And that is a significant legal change. That is not a commercial consequence.

And the third point is to remind you of AMP: rectification may still be available even if the parties had quite deliberately used the wording in the instrument. And one must not lose sight of that point.

Yes, there was wording in the instrument. Yes, there was a reference to tax sensitivities. But against all of the other material, we would respectfully submit that that does not take you to the point and say, they just said we will accept this language, and it's the commercial consequences of that language.

Can I then just deal with outward expression

of accord. You will have picked up from the judgment in paragraph 268 his conclusion that flowed from his finding that there was no subjective continuing common intention.

We say the judge erred in two respects: first, he was wrong to find there was a requirement to prove an outward expression of accord. Secondly, even if there was such a requirement we say it is made out on the facts. No requirement for outward intention.

Your Lordships are familiar with the pensions cases. Where an agreement is being amended by a mechanism, consensus or consent suffices and there is no need for an outward expression of accord.

And your Lordships have AMP but, for your note, 64 to 66 deals with converging intention sufficing in pensions cases. I showed your Lordships condition 12A of the notes yesterday. And we say that that brings this case in line with the pensions cases.

Now, there's one point of correction of myself. My Lord, Lord Justice Lewison, asked whether the amendments could be made in whatever form, your Lordship will remember, from the Issuer, with the consent of 100 per cent of the noteholders. And in my answer I referred to the fact that they were listed, which you will see in 146 of the transcript.

That answer was incomplete, and I should have made the more important point, which is that these notes were regulatory debt, and with LT2 status, and they could only be amended with the FSA's consent.

And there are two documents, if I may just show you. The first is in supplemental bundle 2 at tab 35, which is on page 501. What this is is the LT2 opinion in the amended June 2008 note. It refers to the original opinion. And if I can just show you the second paragraph:

"At the time of the issue of the notes you asked us to confirm whether the notes would qualify for inclusion as lower tier 2 capital resources under GENPRU. We provided this confirmation in a letter to you dated 1 May.

"You intend to ...(Reading to the words)... the amendment to allow the Issuer to defer payments on the notes. Following such amendment, the conditions will be in or substantially in the form of annex 1. On the basis of the foregoing, we confirm ...(Reading to the words)... and effect in relation to the notes after the amendment."

And then if you could just go forward to tab 39 which is the emails passing between Lehmans and the FSA on this point. It's on page 516. Starting at the

bottom, Mr Edgy(?) of the FSA says:

"We confirm that there is no reason for us to object to this change in the terms of lower tier 2 instrument."

One email. Clare Redwoods of Lehmans:

"You asked for a little more detail on the rationale for making the change ...(Reading to the words)... is designed to provide Lehmans with flexibility around its US tax planning."

I'm not sure I made that clear: the tax problem that they were deferring interest for was a US tax planning point.

"For tax purposes, any deferral of cash payment of interest on the notes will result in tax deduction for interest being deferred until the cash payments are actually made. This is purely a US tax planning initiative and would have no net impact on UK tax."

You can see, there is Lehmans telling the FSA that they did not intend to have any UK tax impact.

So that is more important: if they wanted it to remain LT2 debt, they would always have needed the FSA's consent. And of course, you know there is a history of the standard forms which could be amended with consent.

LORD JUSTICE LEWISON: Yes. The question I think I asked you was whether they could agree as a matter of contract.

MR PHILIPPS: As a matter of contract, absolutely, my Lord, yes. But in the context of regulatory LT2 debt, there are constraints.

Finally on outward expression on the facts, we have addressed in our skeleton -- can I make two short points because I haven't covered it:

The intention only to defer the date for payment of interest was communicated through the Lehman Group and to third parties. And your Lordships have seen the evidence of Ms Dolby of her discussions with Mr Rush and her correspondence with Mr Triolo. We also say that it is significant that the same individuals in the cross-departmental group, including Ms Dolby, acted on both sides of the transaction, such that what was known by one party was also known by the other party and therefore communicated between them, which is how intention and knowledge crossed the line, if, of course, it is necessary for us to show that it did. But you have the other point.

Finally, and then I will sit down, may I answer your Lordship's question on Mr Justice David Richards. You asked me the question at transcript page 33. And the answer in terms of page references of where Mr Justice David Richards dealt with the point is paragraphs 65 to 69 of Waterfall 1.

But I want to show you paragraph 122(2) of the learned judge in this case's judgment, which is C2/22 at page 381, because he explains that it is the subordination that means you cannot prove it after the senior debts. It does not turn on whether you have a clause like clause 7.

So do you mind if I just show your Lordships the judge's reasoning, because I respectfully agree with the learned judge.

LORD JUSTICE LEWISON: Paragraph 122.

MR PHILIPPS: 122(2), my Lord. What the learned judge said was:

"Both David Richards and the Supreme Court held that the reason the proof could be not lodged by the subordinated creditor was because that would breach ...(Reading to the words)... the agreement between the debtor and the subordinated creditor."

He then refers to clause 7, which is the point that your Lordship was making to me:

"... of the agreement before the courts ...(Reading to the words)... provision that may or may not [and that is important] be replicated in other subordination agreements.

"However, as it seems to me, where there is a provision actually subordinating a debt, ie a case of

simple contractual subordination, then such a provision must be stating that the subordinated debt itself ranks below other obligations that would ordinarily themselves be below it in the legal Waterfall.

"It would render such a subordination provision entirely futile if, contrary to the subordination provision, the subordinated creditor nevertheless prove. Therefore it seems to me that any effective clause of this kind, subordinating one obligation to another, must render the creditor unable to prove at least until the obligations prior to that debt have been satisfied in full."

And with respect, that is entirely right and it flows not least from the fact that it is the right to payment that is subordinated and in the liquidation the right to payment is and can only be the right to proof.

LORD JUSTICE LEWISON: Yes.

MR PHILLIPS: My Lords, I have gone over my time. I apologise. I did try. Unless your Lordships have any further questions, those are my submissions.

LORD JUSTICE LEWISON: Thank you very much.

Submissions by MR BELTRAMI

MR BELTRAMI: My Lords, my Lady, in the time I have available, the structure, just to indicate where I'm going:

First, I have a few introductory comments. Then I want to say something about the subordination analysis in general. Then ranking by reference to the amended notes. Then going back to ranking by reference to the unamended notes. And then rectification.

So that is the sequence, I think pretty much following from what Mr Phillips did too.

Introductory comments. And some are straightforward and some are a bit more intricate:

First, and rather obviously, the issue between Mr Phillips and myself is as to the relative ranking of these two instruments. That is an issue of contractual interpretation and contractual application -- and they are slightly different, as we will see going through -- to which all the normal rules apply, and there is no credible suggestion that the judge made an error in his approach to interpretation or application.

Second, there's no special rule when interpreting an amended agreement. The task is to interpret the agreement as at the date it was concluded, namely the date of the amendment. And that is straightforward too.

However, I mention that because it's wrong to approach the question -- and at trial and to some extent yesterday Mr Phillips sought to approach the question -- by construing the pre-existing contract and asking: was

there an intent to change it?

That is the wrong approach, because that leads into subjective intention and factual matrix problems et cetera. One has to construe this agreement on its face as at the date of the amendment, without a prior assumption as to what the pre-existing contract did or whatever the intention was in relation to it.

Third, these contracts fall to be interpreted largely by their words and the contractual context rather than by reference to any wider factual matrix. As your Lordships and Ladyship will now be aware, the Sub-Debt agreement took a standard regulatory form pursuant to the IPRU(INV) rules, which required Sub-Debt agreements to have a fixed term. It's in the bundle and we don't have to turn it up, but there were standard forms and these were those standard forms under rule 10.

So the scope for factual matrix is inherently attenuated for a standard form agreement. Equally, so far as the Sub-Notes are concerned, by the time the Sub-Notes came to be created in 2007, IPRU(INV) had been replaced by GENPRU. And under GENPRU, the General Prudential sourcebook, no standard form was required. They did away with standard forms. All that was required was that the content sufficed to satisfy GENPRU.

We don't need to turn up the details because that I think is common ground.

In fact, and this was explored in the evidence, the precise scope of the template for the Sub-Notes was never identified. Nevertheless, by their terms they were transferable to third parties and therefore, as my Lord, Lord Justice Lewison, indicated yesterday, that in itself also narrows down necessarily the scope of factual matrix in relation to those contracts.

SLP3 has maintained the case as they put it that there was never any intention to transfer the notes out of Lehman. But as I think the discussion went yesterday, that's a resort on the face of it probably subject to intent, it is certainly a resort to factual matrix, and it is not, we submit, relevant to this question, which is that when working out how to construe the notes one has to see on the face what they objectively said. Objectively, these were negotiable instruments and therefore one has to construe them as such, and therefore the scope of a factual metric is necessarily limited because of that objective analysis.

In fact, for what it's worth -- and I won't go to the detail -- the evidence supporting the idea that there wasn't any intention to transfer out of the Lehman Group was rather thinner than has been suggested. The

evidence in fact was that there is no present intention to transfer out of the Lehman Group. Ms Hutcherson indicated there were tax considerations every day of the week, frankly, in Lehman, and one day you might do one thing and the next day you might do something else.

So it was only at best a present intention to keep it within Lehman Group and no one would know what would happen in the future and what tax whizz would be identified at a later date. It didn't happen. So the evidence is rather limited anyway, but it is not, we submit, as a matter of law, relevant.

The fourth introductory point: there was a lot of focus at trial and yesterday or some focus yesterday on the regulatory position. We do accept that the regulatory position is in theory factual matrix for the construction of these instruments, because they were issued in the context of the regulatory regime. So in theory that is an exception to factual matrix and in theory it's available.

However, the only relevance of the regulatory position in this case to the ranking issue between these parties is that the regulatory regime was not concerned at all with relative ranking of subordinated debt. That was a finding of the judge. At paragraph 61(3)(c) of his judgment, he noted that as far as the regulator was

concerned this was not an issue. The regulator's concern was that all subordinated debt be subordinated to all unsubordinated debt. And one can see that, in fact --

LORD JUSTICE LEWISON: Well, we have that finding.

MR BELTRAMI: We have that finding. So it was no part of the regulatory regime to specify layers of regulatory finding and therefore there was no requirement or preference of pari passu, as a matter of regulation.

Yesterday, Mr Phillips made reference, you will remember, to the Basel Working Paper which made a passing reference to pari passu. He didn't really explain, with respect, what he sought to derive from it.

There's no evidential case in relation to that. There's no context for it. It just is a document for what it says for what it says, and there is no challenge to the judge's finding about the regulatory position anyway. It wasn't transferred into GENPRU that there was any pari passu preference. So whatever the Basel Working Paper may or may not have said about pari passu for whatever reason and whatever it meant does not dislodge the primary position, which is that as a matter of regulation this is not a relevant consideration.

The fifth introductory point is that SLP3 has sought, at trial and on appeal, to place reliance on

a supposed market expectation or custom of pari passu ranking between regulatory capital of the same tier.

LORD JUSTICE LEWISON: I don't think it's put as high as custom in the legal sense of it.

MR BELTRAMI: Well, some form of expectation -- well, expectation I think is certainly --

LORD JUSTICE LEWISON: Certain notorious et cetera et cetera, you need to show for custom.

MR BELTRAMI: Maybe even they can't go that high, perhaps, but it's sought to be suggested that there is some relevance in a market expectation of pari passu. The judge made no reference to that and he was, we say, right, and certainly entitled to do so.

It derives, so far as it derives at all, from the evidence of Mr Miller, which I will take you to in a second. But the background to that is that SLP3 had asserted some form of market practice in support of pari passu distribution in its position paper. So there was an origin to this point. There weren't pleadings in this case; there were position papers which essentially took the form of pleadings, albeit a bit fuller.

If I can turn up core bundle 2, please, page 525. It's paragraph 24(6)(ii). This is the SLP3 position paper. And at subparagraph 6(iii) it was asserted that regulatory context and market practice --

[overspeaking] --

LORD JUSTICE LEWISON: 125.

MR BELTRAMI: 525(6)(ii). I think it's mainly the second sentence:

"... no regulatory need for one instrument to rank differently from another."

Which is the reverse point of there was no regulatory concern about it.

"And ordinary market practice was for dated subordinated debts to rank pari passu."

So they kicked off with an assertion of practice. The response to that is -- sorry to take this through but it is still relied on -- if you go to 642, which is tab 62. This is the PLC response, 48(vi)(d).

LORD JUSTICE LEWISON: Sorry, where are we now?

MR BELTRAMI: 642 --

LORD JUSTICE HENDERSON: That may be the wrong reference.

MR BELTRAMI: Sorry, just give me one second. (Pause). In any event, the response was that that submission would need expert evidence if you are going to advance it.

I have been given 560.

LORD JUSTICE LEWISON: So we are in a different document.

MR BELTRAMI: Yes, I do apologise for that. This is our position paper. 560(d), where we say this would require expert evidence. Reserve position until we see

admissible evidence. We don't need to go through the next reference. SLP3, when it came to the CMC, expressly declined to seek expert evidence. They said, we are not seeking expert evidence on that point. So there was no order for expert evidence in relation to it.

What then happened is that Mr Miller was called as a witness of fact. He had been involved in the drafting of the notes. So he was called as witness of fact and in fact most of his evidence is probably inadmissible anyway, but he was called as a witness of fact and he was the one who spoke of some form of expectation about pari passu. And that's why we submit the judge was right not to take it into account. When he said to the judge this is purported expert evidence, which isn't expert evidence because it's opinion evidence, it isn't evidence that he can properly give.

In any event, what he actually said was again rather weaker than has been asserted. If you go, please -- sorry to go to the next bundle -- to supplemental bundle 2, tab 53, page 559. In the top left quartile, page 21, letter 18 from the judge's question:

"To be clear, the last sentence ...(Reading to the words)... a description of the default that would pertain absent a contrary provision in the instrument.

"That would be right. That would be the convention or default setting."

Then if you go down to the left-hand quartile from letter 12, Ms Hilliard was asking:

"What you were saying, Mr Miller, as far as you were concerned, you know, you would expect instruments in lower tier 2 and 3 to rank pari passu.

"As a general matter, yes.

"You would also accept that ultimately it depends on the terms of the agreement itself, doesn't it?

"Yes, yes, it does."

So what he was saying is what we would expect (him?) to be saying was it depends on the terms of the contract. So we would submit it doesn't again help that evidence, even if admissible, and even if the judge wrongly didn't have regard to it, it wouldn't help really in terms of a factual matrix argument.

The sixth introductory submission is that a focus of SLP3's case is on Insolvency Rules 14.12, the pari passu principle. And to be clear, we do not seek to diminish the importance of that principle in the insolvency regime. We accept that that's the default rule. And whether you say it's the starting point or the end point is a matter of terminology. It's the default rule absent a contractual provision to the contrary.

We accept, as per Golden Key which Mr Phillips took you to, that the existence of the rule may be said in some sense to be part of factual matrix, for what that's worth. But the judge found that the contracts displaced the pari passu rule. And we submit he was right to do so. So we never actually get to the pari passu rule because as a matter of contractual interpretation that was displaced.

Where we take issue with SLP3 on this point is their attempt to elevate the pari passu rule into some form of principle of construction. The way it's put in my learned friend's skeleton is -- we don't need to turn it up -- at paragraph 47 he says:

"In the absence of clear and unequivocal language to the contrary, the judge should have applied the default rule."

And that, we submit, puts the matter far too high. There is no such principle of interpretation that requires, quote, "clear and unequivocal language" to displace pari passu. The rule simply yields to contrary intent. And one can see --

LORD JUSTICE LEWISON: I think that's what Lady Justice Arden said in Golden Key, that it doesn't evince a different intent.

MR BELTRAMI: Exactly, and that's the question. So one

doesn't get a leg-up, if you like, by the existence of the rule. One has to interpret the contract.

Now, the sixth point: SLP3 also focus throughout the argument on a question as to whether and when a creditor can prove for the debt. We accept also -- don't seem to diminish that -- that the proof-of-debt process is a necessary part of an insolvency regime. We also accept that in some priority disputes it may matter whether a debt is provable and, if so, when. And a prime example of that, as we'll have a look at I'm afraid, is Waterfall 1, where it mattered. It doesn't matter here.

The issue here is between the relative ranking of two provable debts, as a matter of contract. The outcome of that ranking issue may or may not have an impact on when the debts can be proved. But that's a matter of insolvency process for the next stage. What you can't do is answer the ranking issue by trying to ask when the debt can be proved, because you are going the wrong way round. This issue is not an insolvency issue per se; it's a contractual issue.

So those are my introductory points. If I can move on to subordination analysis, and perhaps pick it up, if we can, by going back to the judgment, at core bundle 2 tab 22 page 368. This is where the judge identified

what he regarded as three mechanisms to achieve subordination:

Trust subordination, contingent debt subordination and simple contractual subordination. As a description of common mechanisms by which subordination can be effected, this was, we say, uncontroversial and plainly right. It accords with the analysis that we see in Fuller, if you pick up --

LORD JUSTICE LEWISON: The quotation at paragraph 88?

MR BELTRAMI: Well, there's rather more to it in the actual judgment, in the actual passage itself. If we can just pick up the authority at authorities bundle 4, tab 70/2359. What Mr Fuller explains is, 1156, he speaks of contingent debt subordination. Your Lordships can see that. But more significantly, as we'll see going through, he identifies two ways to achieve what he calls contingent debt subordination:

"The junior creditor agreeing that in a winding up he's only entitled to what he would have received had he been the holder of a first ranking preference share."

So it's a preference share mechanism.

And the second mechanism is a solvency test:

"... taking account of the senior debt and any other subordinated debt intended to rank ahead of the junior debt but excluding the junior debt or a combination of

the two."

So two potential mechanisms to achieve what he calls contingent debt subordination, the preference share mechanism and the insolvency mechanism. And if you go down to 1158 over the page, he says:

"There do not appear to be any cases specifically upholding the validity of contingent debt subordination. Thus trust subordination and simple contractual have both been held valid. It seems inconceivable that contingent debt subordination is not also valid."

So that's what Fuller said about mechanisms. And it's also consistent, we say, with what my Lord, Lord Justice Lewison, said in Waterfall 1. Apologies for jumping round again. It's in authorities bundle 3, tab 53, at page 1603. This is paragraph 38.

LADY JUSTICE ASPLIN: Page --

MR BELTRAMI: 1603, paragraph 38. And clearly anything we say here is with deference to my Lord, but as we read paragraph 38 what your Lordship was doing was merely setting out mechanisms by which subordination could be achieved, including in the second one the right to repayment as being contingent on the satisfaction of conditional conditions."

The judge picked up Fuller and your Lordship's descriptions of how you can do it, which in our

submission is not controversial. It is important to appreciate that there's no particular magic or significance to those categorisations identified by the judge and there are no special words required to achieve subordination.

And nor are the categories necessarily mutually inconsistent. In a sense they are all contractual. They all have a contractual bit. So there is no real magic to any of that. They are merely contractual methods by which the outcome of subordination can be achieved. There's no reason why it can't be done provided it doesn't interfere with any policy.

Of course, there was a debate as to whether it did interfere with the policy before, but that debate has been resolved after Maxwell and subsequent cases.

And that's why we submit that your Lordship's descriptions in paragraph 38 aren't controversial. And we don't understand SLP3 to be challenging them as descriptions of methods, and in particular that subordination can be effected by conditionality tests. We don't understand that to be an issue.

Now, one possible error from the judge, as we have indicated in our skeleton having set out the various categories, is that he may have treated the categories as rather too rigid, because, as we know, he decided

that by reference, for example, to clause 5.1 of the Sub-Debt there were two distinct forms of subordination within the single clause, what he called simple contractual and what he called contingent debt.

And he saw them as distinct and he interpreted the word "accordingly" meaning "and also" or "in addition". So there were two.

We submit it's not impossible to end up there, but it's a rather uncomfortable conclusion and it appears to be an unlikely conclusion because you may end up with two potentially inconsistent subordination clauses in the same agreement and therefore they might produce different and inconsistent ranking outcomes. Therefore the better approach as a matter of interpretation is to strive for a single subordination provision out of that clause as more likely to reflect the commercial intent, because conflicting subordination provisions are not likely to reflect the commercial intent.

LORD JUSTICE LEWISON: I think yesterday Mr Phillips said that "accordingly" meant "in consequence" or something along those lines.

MR BELTRAMI: Your Lordship put to him that it meant "in consequence", and he said yes. That is in a sense what we say it means. I shall explain that in a minute. But we are happy with "in consequence". In terms of how you

interpret this clause, it doesn't, in a sense, really matter how it is achieved provided the clause is applied as a whole.

And what it means critically -- and this I think is the big difference or one of the big differences between us -- is that the application of the conditions may themselves inform the content of the definitions. You don't go through the definitions, find your answer and then say, well, do the insolvency conditions affect that? You apply them together such that the application of the conditions itself informs or may inform the definitions.

Now, as to how to achieve that, we submit -- and maybe it's best to pull it up. I know your Lordships have seen it probably too often already, but it's at core bundle 3, tab 38, page 678.

We can do it by reference to this one but obviously we apply both set of instruments. What we submit is that the better approach, starting from a position where one has to read them as a whole, is to read the first clause, ie the bit about "the rights of the lender are subordinated to the senior liabilities and accordingly", before we get to "accordingly", as in a sense confirmation that the debt is subordinated debt, which is important for regulatory purposes, of course

that that has to be the starting point.

That is the intent. These are going to be subordinated instruments.

The second clause after "accordingly" is the mechanism by which that subordination is achieved. And what the mechanism does is it lays out a practical test which can be applied whenever a payment comes to be made, in order to see whether it can be made in priority to other payments.

And that is, of course, one of the Fuller contingencies we looked at, exactly the way he identified it.

That is why we read "accordingly" -- well, we suggested "and therefore", but I think "in consequence" is essentially the same. I think your Lordships put it this way, or one of your Lordships or Ladyship put it this way: there is a general principle and the consequences.

And that is what we say works here. The general principle of subordination and the mechanism to implement it.

It's also consistent, we say, with the way these provisions have been considered or at least have been commented on. If we can go back, please, to the authorities bundle. Keep out volume 3 because that has

the agreements. Authorities bundle 3, tab 54, page 1662. Tab 54.

This is, just so you have it, at page 54 another Lehman Brothers -- one of the many Lehman Brothers debates. This is my Lord Mr Justice Henderson as he then was, again considering the same instrument. So it has been before the court a number of times.

But if you go to 1662, again I don't think I can hold your Lordship to this because I don't think it really matters for the purposes of the case. But just the way it's expressed is consistent, we say, with the way it ought to be expressed. If you go to paragraph 17 at the bottom of that page, having set out the provisions in clause 5.1, what your Lordship says is:

"In order to give effect to the principle of subordination, payment of any amount by LB UK H in respect of the loan is then made conditional upon the matters set out in subparagraph 5.1(a)."

I don't think I can hold your Lordship to it.

LORD JUSTICE HENDERSON: I don't recollect there being any issue. That was really my attempt to express in words what I think I understood from a reading of the clause, which very much accords with how you are putting it.

MR BELTRAMI: That is the only reason I am putting it there. We would say it's the natural way -- once one accepts

one reads it together, it's the natural way to put the two together, the statement of intent and then the mechanism that gives effect to that statement of intent. And that, we say, is the legitimate and appropriate way to construe these.

Mr Phillips said yesterday that PLC attach no weight to the definitional wording. He also said that on our case conditionalities have a freestanding effect regardless of the definitional wording."

Neither is correct. To be clear, we are not seeking to avoid the definitions. The definitions are clearly part of the clause. But we are seeking to apply the definitions by reference to the mechanism. That's where they interact.

Now, having sought to give your Lordships a road map ahead to approach the clause, I'm afraid I have to deal with a point of we say complete irrelevance to your Lordships but, as such a long time has been spent on it as before the judge, I have to deal with it, I hope briefly.

It was pushed before the judge and the Court of Appeal. Frankly we don't think we are in the same battlefield here. That is the relevance in this case of Waterfall 1. We submit that Mr Justice David Richards' judgment has a background relevance insofar as

he sets out the regulatory position and therefore that's of great interest in terms of the background even to this case.

The Court of Appeal judgment has relevance in describing those mechanisms for subordination paragraphs 38. Other than that, we submit there's nothing of any assistance in Waterfall 1, because the issues in that case are entirely different.

At the end of Mr Phillips' exposition of the various cases, as, if you like, the conclusion, he submitted yesterday that the Supreme Court had decided that clause 5(1)(b) of the Sub-Debt agreement does not create a contingent debt. That was, your Lordship may recollect, where we got to after the exposition.

Now, we submit that that's wrong, or at least that's not what the Supreme Court decided, but we advance no case as to whether or not those were "contingent debts." That is a concept relevant to insolvency, which may be of relevance to timing of proofs, may have relevance to value of proofs, but those are the issues. It's a term of art which is irrelevant(?) in the insolvency context. It has no relevance to the contractual ranking issue.

SLP3 don't deny that subordination can be achieved by conditionalities. So whether ultimately the conclusion is that you can describe this as a contingent

debt or not is again the next stage, not this stage.

The argument really goes no further, we submit, than Mr Justice Vinelott in Maxwell. And if I can ask you to turn up, please, authorities bundle 1, tab 17, page 317.

Page 317. Your Lordships and your Ladyship will recollect from yesterday that this was the first case that gave a green light for subordination provisions and the absence of a conflict with pari passu.

Now, 317G, having gone through the cases, Mr Justice Vinelott said:

"I have some doubt whether in English law a subordinated debt is accurately described as a contingent liability."

That comes from the South African case of ex parte Villiers. So again, he is talking about a term of art, whether, if you do have a subordinated debt, whether you get into that particular term.

The next paragraph below at H:

"However, nothing turns on the question whether a subordinated debt is aptly described as a contingent claim. The essential feature pointed to by Goldstone J. A. is that it is a debt payable only to the extent that there is a surplus after meeting the claims of other creditors."

The same applies here, my Lords and my Lady.

Nothing turns in this case on whether either of these debts is accurately described as a contingent debt or not. The only question is what is the priority of these debts.

Let me just say just five minutes on Waterfall 1 just to suggest what that was about, it's nothing to do with what your Lordships are concerned with. In Waterfall 1 the timing, with deference, the timing of the proof was, unlike this case, a potentially relevant issue. That was because the priority issue was entirely different. It wasn't a matter of contractual ranking between two subordinated debts. It was as between a subordinated debt on the one hand and different categories of debt, namely statutory interest and non-provable debts, and that gave rise to issue as to the Waterfall.

Because if we can go to Waterfall 1, David Richards, authorities bundle 3, tab 51 page 1480, this is David Richards, this is Mr Justice David Richards' judgment in Waterfall 1. At paragraph 13 he sets out the famous Waterfall from Nortel. One can immediately see, and the issue arose between 5, 6 and 7 because number 5 in the Waterfall is unsecured provable debts, 6 statutory interest and 7 unprovable liabilities, and the real question was whether these subordinated debts were

unsecured provable debts, in which case it would come in at number 5, or wherever they were themselves subordinated to the statutory interest and non-provable liabilities. One can easily see why provable was a relevant point there because on the face of the Waterfall, if it was provable, it came in at number 5. Of course the decision was it didn't, it came in at number 7 or 8 or 9 or whatever. But that was context of debate in Waterfall 1 and the need to determine the question of provability.

The argument from the creditors' point of view is that because it was provable it should go ahead of 6 and 7. In addition to relying upon the Waterfall they also relied upon Insolvency Rules 2.887. If you go to 1481, the next page, C, this is the provision in the Insolvency Rules, there is something similar in the Act under section 189 in relation to winding up. But 2.887 on face of it in relation to statutory interest says:

"Any surplus remaining after payment of the debt proved shall before being applied for any purpose be applied in paying interest."

So again on the face of it statutory interest arose after payment of the debts proved. So again the creditors say: well, here you are, it must come after these debts even though they were subordinated. So

these were more technical requirements that gave rise to the provability question.

As to the ranking itself, there were various construction issues on clause 5(1) precisely what the solvency condition meant it didn't mean and that had to be resolved. The relevant bit for our purposes I think, if you go to paragraph 54 in this judgment, is that Mr Justice David Richards also refers to clauses 7(d) and 7(e) of the Sub-Debt agreement. Clause 7(d) said that the creditor couldn't attempt to obtain repayment otherwise in accordance with the terms of the agreement. And (e), it couldn't take or omit to take action whereby the subordination of the subordinated liabilities might be terminated or adversely effected.

So that was sought to be, as it turned out to be, a very relevant point, as we'll see. If you go to 58 --

LORD JUSTICE LEWISON: This is the Supreme Court now.

MR BELTRAMI: No, still in this judgment.

LORD JUSTICE LEWISON: I see, paragraph 58.

MR BELTRAMI: Paragraph 58. Then 59, this is arguments available. If you go to 59 about six lines down:

"The relevant provisions of the applicable insolvency regime are, for present purposes, the provisions in the Insolvency Rules for the proof of debts and the provision of rule 2.88 as they apply to

statutory interest."

That was point being raised in relation to 2.88. But the answer to that and the answer to the Waterfall point as well as given by Mr Justice David Richards in paragraph 68 on page 1491:

" ... I do not consider that the terms of rule 2.88(7) and section 189(2) [that is the winding up equivalent] provide the support for which Mr Trace and Mr Isaacs contend."

It setts it all out. Then:

"The answer to this point lies in my judgment, as Mr Trower for the administrators of LBIE submits, in the provisions of clause 7(d) and (e). I have earlier quoted these provisions. The expression 'the debts proved' means all of those debts admitted to proof by the administrator, because it is only those debts which will be paid out of the available assets. In my judgment, the lodging of a proof in respect of the subordinated loan debts coupled with an attempt to require the administrator [conflicts with the clause]."

So what Mr Justice David Richards said was that by reason of clause 7 (d) and (e) you can't prove, so you don't count as a provable debt, therefore you go back to the end of queue.

LORD JUSTICE LEWISON: That was point of disagreement

between and him and the Supreme Court and me.

MR BELTRAMI: Yes, exactly. Can I just -- your Lordship has given me the answer but I'm glad -- if we now go back to the Court of Appeal. Tab 53/1603. What your Lordship was considering, we looked at 38, 39 --

LORD JUSTICE LEWISON: Which paragraph was it?

MR BELTRAMI: It's 39 on 1603. You say: well, 7(d) is neutral. Therefore the question for 7(e) does it affect subordination, ie it only prohibits lodging of a proof if the lodging of the proof would by itself impact in subordination. And what your Lordship said was it doesn't impact on subordination, because if you do submit a proof it's valued at nil. Therefore the conclusion your Lordship came to is it's irrelevant whether you lodge a proof or not, because either you don't and you don't get anything and if you do it's valued at. Therefore it's not a breach of clause 7(e) because it makes no impact on subordination.

That is the conclusion your Lordship came to at 62 on page 1608:

"I conclude, therefore, that the subordinated debt is repayable on contingencies that include (a) payment of statutory interest and (b) payment of any non-provable liabilities. Any valuation of the contingent debt must take account of both contingencies.

In that way the lodging of a proof will not adversely affect the subordination."

So the lodging of proof point was irrelevant on your Lordship's judgment and that was the point that Lord Neuberger disagreed with.

Moving onto the Supreme Court, tab 58, page 1839, volume 4.

LORD JUSTICE LEWISON: Yes.

MR BELTRAMI: We can start at 37. 37 is where his Lordship deals with the ranking issue. That was the contractual issue, what does clause 5(1)(b) mean and how is it applied in relation to statutory interest, non-provable debts et cetera. That was the primary argument about what the ranking question was. That took his Lordship all the way down to 67, which concluded on the ranking issue. These were, if you like, ultra subordinated even below statutory interest and that was a matter of construction of the agreement clause 5.

He then went on, in a sense almost by way of aside, from 68, when can they lodge a proof and it essentially didn't matter at that stage, he only decided the ranking issue but as it was still up for grabs, he then went on to decide the proof point and his concern with your Lordship's analysis was that even on a contingent basis if you lodge a proof it's not necessarily valued

at nil. So you can't, if you like, get out of clause 7(e) by valuing it at nil because it might not be valued at nil, it might be valued at something else and if you value it at something else you are undermining subordination.

That's paragraph 68. That's why he then reverted to Mr Justice David Richards' analysis, which would be the logical conclusion if your Lordships' assumption were wrong about the valuation, that 7(e) does interfere with subordination and therefore by reason of 7(e) they couldn't lodge a proof. That was how he dealt with that issue in that case.

He then went on to discuss the question at 70, or he raised the issue whether these were provable debts at all. And that issue, as I understand it, is a matter of great debate in insolvency circles that has not been resolved, but again it's not for now, but that was a different question again. But the narrow proving of debt question turned on clause 7(e) as between all the judges and the particular disagreement between Lord Neuberger and your Lordship was whether if you submit a proof on a contingent debt basis it's valued at nil or not. He wasn't even saying it's not a contingent debt, by the way, he was simply saying you don't necessarily value it at nil. That was the source of

disagreement.

So, sorry for doing that. But that's how we interpret those judgments. All of that, to be clear, is a long way away from anything your Lordships and Ladyship have to deal with here because for the reasons I explained none of this arises on our case.

Can I now move on eventually to ranking under the amended Sub-Notes. Just to say at the outset, we submit there are two principal errors and I flagged them already from SLP3 in the interpretation I gave your Lordship and your Ladyship yesterday in relation to the amended notes. The first is that all the submissions are continually infused with the concept of change. The persistent case before the judge was you start with the unamended notes and then ask whether there intent to change.

My Lord, Mr Justice Lewison, sort of pushed Mr Phillips off that point by saying let's go straight to amended notes, in which case the argument in a sense really couldn't begin but throughout the submissions he kept coming back to the point, kept saying, well, this hasn't been altered, that hasn't been altered, therefore this makes a difference. All that is swept away in terms of the analysis. One is not concerned with what has been altered or not, one is concerned with what the

agreement actually says. So that's the first error.

The second error, as I flagged earlier, although SLP3 criticised the judge for his twin subordination analysis and say repeatedly, as Mr Phillips said, they have to be construed as a whole, they don't really live up to that promise because their approach is to derive the subordination outcome from the definitions and then to say, well, the solvency condition can't change that. The words used there: their identity can't be changed. At page 54 on the transcript yesterday what Mr Phillips said:

"The conditionalities do not alter the legal characteristics of senior creditors."

The way he put it. To which we say: well, why not? Why do the conditionalities not assist in defining the characteristics of senior creditors? On Mr Phillips' approach you set the list in Aspick(?) by looking at the definitions and then say: well, the conditionalities can't change that. That's not interpreting this clause as a whole, it's doing worse than the judge, it's only interpreting the first half.

We say that's a fundamentally erroneous approach. It only looks at the definitions. But it also misunderstands, we submit, what purpose the definitions serve in the agreements. These agreements when they

refer to senior creditors and senior liabilities, they don't contain a list of all senior creditors and all liabilities. It's not a matter of identity, they don't list them and say A to E are qualified, these ones aren't. Instead the definition is merely a test, the application of which will determine who is and who isn't a senior creditor in any given situation. So you don't change the definition, no one is changing the defence, it's in the application of the definition. And the application of the definition is perfectly capable of being changed by the solvency condition.

We submit that in order to give effect to solvency decision one must at least be open to the possibility that that can change the application of the senior creditors' population. But that is what SLP3 steadfastly refused to do. They cast the senior creditors definition in stone as if it is a list but it isn't, it's to be construed together, and that's why I said earlier one starts with the statement of intent, one looks at the mechanism. Now, the real question is does that mechanism amount to an expression of juniority? Because if it does, you can then apply that to the test. That's the real issue for the court, in my submission.

On the judge's approach, he addressed the amended

notes, he concluded that the provisions were, as he described it, unequivocal and that they had a very clear meaning. He did describe the process that led to the amendments, that was just essentially by way of background and I don't think anyone is suggesting that makes a difference to this. We submit that his judgment on construction was clear and correct.

If one goes to the amended notes now at core bundle 3 tab 42, as we know it's clause 3, what the amended -- I'll just call it the notes in fact, but what the notes achieve after setting out the initial statement of intent of subordination is to provide a mechanism of subordination in two scenarios. The first scenario is outside a winding up. And in that scenario the payment in the notes is subject to a solvency condition. I may come back to that in due course.

In the second scenario, inside a winding up the solvency test is disapplied and is replaced by a regime which ranks the Sub-Notes at the level of notional preference shares with certain specific characteristics, which we'll look at. Those characteristics closely defined the ranking of the Sub-Notes. And specifically, we say, placed the Sub-Notes below all other debt, other than any debt of the notional holders, of which there

are none.

We submit that that was the judge's approach and we submit he was plainly right for the following reasons. First, the creation of the two scenarios is what the words actually say. What the words say is there was a conditionality by reference to insolvency, and then the conditionality shall not apply where there's a winding up and therefore a different scenario. So there's a test outside an informal insolvency and a test inside an informal insolvency and the two regimes are necessarily mutually exclusive. That is what the words say.

Second, it's plain, we submit, that both scenarios are concerned with and address the ranking of the Sub-Notes. The subject-matter of clause 3 is status and subordination. That's what the clause is about. The wording introduces the operative -- the word "accordingly", as we submitted earlier, introduces the operative provisions which implement the subordination. And they use the very techniques described by Fuller in his passage that we looked at. There are two techniques that he refers to and there are two techniques that he used in different regimes: solvency conditions and preference share valuation, the very things he describes are being used to subordinate instruments.

Third, this specific drafting technique of ranking debt at a preference share level was used by Lehman in other instruments which were before the court and I think are now before this court.

LORD JUSTICE LEWISON: How does that help to construe this instrument?

MR BELTRAMI: Only to say this, my Lord: that technique has been recognised by all these parties as effective for that purpose. So it was common ground on the other instruments using the same technique or similar technique that it achieves subordination by reference to the preference share concept.

LORD JUSTICE LEWISON: To borrow a phrase from the judge, so what?

MR BELTRAMI: Well, okay. I won't push that point.

Fourth, now third, the use of the technique, we submit, carefully calibrates the ranking position by reference to the type of instrument concerned. And thereby it inherently creates, by reference to my Lady's point yesterday, both a floor and a ceiling for ranking purposes. Because we know whenever there's a distribution in a winding up there is a waterfall and that waterfall reflects, absent contractual differences, the type of instruments involved. And we know by the reference to the waterfall that creditors and

shareholders extend different positions in the waterfall and it's very clear that shareholder level, including preference shareholder level, is below debt level. One knows that from Waterfall.

The preference share fix into the waterfall above ordinary shares but below debt. And therefore inherently, my Lords and my Lady, this provides a ceiling and a floor because it ranks notionally the recovery on this Sub-Debt equivalent to a preference share with those characteristics. And by doing so it necessarily places a brick in the wall -- I'm mixing my metaphors I'm afraid -- a ceiling and a floor because that is inherent in the characteristic of a preference share.

So far as relevant, because there were some points floating around, we don't say that it turns the debt into preference shares, it clearly doesn't. It's a deeming provision for the purpose of ranking. We don't say that deemed ranking is the same as ordinary preference shares, because it's not. It says that. We do say that it necessarily deems the Sub-Notes below all other possible forms of debt, other than notional holders. But of course there aren't any notional holders so it's a bit of a red herring, the notional holder point. We do say it clearly and explicitly deems

the Sub-Note necessarily to rank below all forms of debt other than notional holders.

LORD JUSTICE LEWISON: Does the assumption that the notional preference shareholder is entitled to a 100 per cent return on principal and interest necessarily rank the notional preference shareholder above real preference shareholders?

MR BELTRAMI: No. The 100 per cent -- my interpretation of the 100 per cent is they needed to put 100 per cent in because these were ultimately debts. So they weren't preference shares, they were debts. Therefore it needed to ensure that even though they were ranking at a preference share level they were still talking about the value of the debt. So the amount to be proved would be 100 per cent.

LORD JUSTICE LEWISON: I follow that. But if they were to rank equally with, as it were, real preference shareholders, they might have to share pari passu with whatever's left after everything else has been paid.

MR BELTRAMI: Yes.

LORD JUSTICE LEWISON: But the deeming provision, one might think, says: well, no, they haven't got to muck in with all the real preference shareholders, they are above them because they are notionally entitled to 100 per cent return.

MR BELTRAMI: The deeming provision makes it clear that there is a layer of preference shareholding for ranking purposes. There is, if you like, an ordinary commoner gardening preference shareholding and they fit in normal place. What they call notional holders, if there are any, they fit in just above them. And there are these things which they fit in just above them. So they're never competing with the real preference shareholders, they are only competing -- well, they're not competing with anyone in fact, they are competing only when this is money left after the full debt has been made.

LADY JUSTICE ASPLIN: It's just a means of placement.

MR BELTRAMI: It's a means of placement. but, importantly, it's not a means of placing a floor, it must be a means of placing a floor and a ceiling because the concept of a preference share does that. Because the Waterfall tells you it does that. That was the critical point, we submit, from the judge' point of view, that you can't have a halfway house, you can't have a one-way ranking, it's -- the concept is both ways. There is no difficulty in the ranking of the preference shares versus the notional versus these things. Equally there's no difficulty with these things versus other subordinated debts because all have a place, there is infinite number of ranks you could have and these notes

place very precisely the ranking position of these instruments.

LORD JUSTICE HENDERSON: And the whole purpose of the deeming, to state the obvious, is to provide an answer to ranking question, if you like.

MR BELTRAMI: Yes.

LORD JUSTICE HENDERSON: I say that because there's a lot of authority, as I'm sure you are aware, on the construction of deeming provisions in statutory contexts. So the general test which emerges is you only press the deeming as far as on an interpretation of the statute as a whole it's intended to go, which is perhaps a statement of the obvious. But here on any view the deeming for which you contend is absolutely central. Its purpose, I'm sorry, is absolutely centrally to achieve a ranking outcome.

MR BELTRAMI: Yes, absolutely. It's the only thing it can do.

LORD JUSTICE HENDERSON: It's the only thing it can do and it's the only reason for having it in the first place. There is no possible argument that this is somehow outside the scope of the deeming or anything of that nature, I find it hard to see how that argument would run.

MR BELTRAMI: As your Lordship and Ladyship may be aware,

I think it's a point we come on to later, at other times Lehmans did convert debt into preference shares, so they did take the step of saying these are now preference shares and that would have had a consequential impact, obviously, on ranking too. But these weren't converted into preference shares, but they simply and could only, as you say, rank them as preference shares, and that's, we say, the plain and obvious purpose, the objective purpose of the words used.

LORD JUSTICE LEWISON: Does that produce or at least potentially produce a different ranking according to whether you apply the solvency test or the insolvency test? That was one of the points Mr Phillips made yesterday and he said that would be a quite irrational outcome.

MR BELTRAMI: Yes. I was going to come to that. Let me just take that out of --

LORD JUSTICE LEWISON: You come to it in your own time.

MR BELTRAMI: I will come to it. Because there are a number of points in response to it, so I was going to come back to those particular points that you raise.

LORD JUSTICE LEWISON: Yes.

MR BELTRAMI: What one then does when one appreciates, we submit, what this clause does is one then plugs that into the agreements, because we submit that a ranking at

preference share level, if it means what I submit it does mean, it amounts to an expression of juniority over other subordinated debt, because that is the consequence of that deeming provision. Leaving out notional holders, they weren't in any way, what that clause does is say these notes are subordinated to other subordinated debt.

Therefore, when one goes back to the instruments, one plug -- when I said earlier interpretation application, the interpretation doesn't change, the application may change -- one goes back to the Sub-Debt Agreement, was this an excluded liability? It's an excluded liability if it contains an expression of juniority. We submit the solvency condition in the Sub-Notes were an expression of juniority for the purposes of the Sub-Debt and therefore they were an excluded liability for the purposes of the Sub-Debt.

That is the key critical difference, that cracks this nut. Because we know, and the judge found and there's no challenge to it, the Sub-Debt agreements contain no expression of juniority. As a result of that, if you go back to Sub-Notes, the Sub-Debt Agreements were senior creditors because they had no expression of juniority in their insolvency condition and therefore you have a perfect match. You have this

call it Claim B, the Sub-Notes were excluded liabilities for the purpose of the Sub-Debt because they contained an expression of juniority. The Sub-Debt were senior creditors in the Sub-Notes because they contained no expression of juniority. That's why I said earlier one meshes the definitions together and applies them.

What do SLP say about all this? Leaving aside the intend to change point, which I've mentioned, the primary argument seems to be, as I said earlier, that you get all you need from the definition of senior creditors. But we submit that simply begs the question, because you can't apply that definition without asking the question: does this solvency condition amount to an expression of juniority? So they are asking the wrong question and therefore coming to the wrong answer.

But beyond that they make various attacks on the conditionality itself and I have to deal with those, clearly, as to what it means.

The first point, and I think this came up through a number of the arguments, is that the preference share wording sets just a floor and not a ceiling by use of the word "over" in particular. But we submit that is simply an impossible construction of what this agreement does.

First, it doesn't reflect the words used. The words

simply don't say you are entitled to return over X, Y, Z, they say entitled to a right of payment as if the holder of a class of preference shares. That is a critical bit of ranking, we submit.

Secondly, as I said earlier, preference share has a clear and recognised place in the insolvency waterfall. So there's no doubt about where it fits.

Third, we submit it would be -- it's written down here commercially absurd but I suspect that is going to put it too high -- let me just say strange to have a one-way ranking provision, which is my learned friend's case I think, ie you simply set out all these provisions about preference shares for the purposes of defining the floor, but no statement of a ceiling. We would submit that would be a strange outcome of interpretation. No reason is given why someone would want to do that. And it's not enough to say the definition does that for you because then you run into the problem about not applying the definition versus the test.

But fourth, moving on from that, on SLP's argument that this is all about a floor, the entire drafting exercise would have served no purpose, because absent all this wording of course the debt ranks ahead of preference shares. So if they're saying this is just to

clarify that it ranks ahead of preference shares, it's absolutely meaningless. There would have been no purpose at all to do that. Maybe it helps, I don't know, under rectification but there would be no purpose at all in setting a floor which is already set. The only objective purpose of this, consistent with the concept of preference share, is floor and ceiling.

Even more strange, fifth point, when the alternative regime, and I will come on to that alternative regime in a minute, does have a floor and a ceiling through the solvency condition. It would be very strange, even more strange if you like, to have two regimes, one with a floor and a ceiling and one with just a floor. There is no, we submit, logic or purpose in that submission, which places far too much weight over the word "over" and doesn't actually reflect what the clause actually says.

The second argument, and I think now I can deal with my Lord's point, or try to, is the suggestion that it then produces different regimes inside and outside a winding up. The first answer to that is, to paraphrase: so what, if that's what the clause actually says? Because, as I say, there are two regimes set out in the clause. But I think I can say a bit more than that because it's not in any way unusual, we submit, to

have different tests for ranking in and out of a formal insolvency.

Even if one goes back to the Sub-Debt agreement, core bundle 3, tab 38, page 678, clause 5(1), that's two regime. Different tests. So under 678 under 5(1)(a) there a particular test in an insolvency by reference to -- sorry -- outside of an insolvency by reference to financial resources requirements, which are a reference to the regulatory regime. And (d), a solvency test to apply to all of them. So even on face of the Sub-Debt there is at least potential for there to be different ranking outcomes in and out of insolvency when on the face of it there is different test which has to be applied in and out of insolvency.

But even more than that, subordination provisions are often triggered only in a formal insolvency, which necessarily means that at least in concept the ranking can change by reason of an insolvency. If one goes back, I'm afraid, to authorities bundle 1 and tab 13, page 304, which is Maxwell again.

LORD JUSTICE LEWISON: Back into Maxwell.

MR BELTRAMI: Back into Maxwell. In a sense an obvious point, but the subordination provision at the bottom of 304 in Maxwell was triggered on insolvency. So last line:

" ... constitutes an unsecured and subordinated obligation of the guarantor in that in any case of any distribution of assets by the guarantor, whether in cash or otherwise, in liquidation or bankruptcy of the guarantor ..."

Then there's the payment out conclusion. Very often these subordination provisions only take effect in insolvency. The consequence being that notionally at least ranking changes in insolvency. Because pre-insolvency they haven't triggered. So there's no difficulty in concept in having a different regime before and after insolvency; indeed that's inherent in some of these clauses, which are only operative on insolvency.

Nor, we submit, is it surprising or relevant because it's only really in a formal insolvency that ranking matters. Outside insolvency, if you have the money to pay, the ranking issue is -- it may be of academic interest but it's not of any practical interest if you can pay all your creditors. It becomes relevant in insolvency.

LORD JUSTICE LEWISON: Mr Phillips disagreed. He said that where you are in the ranking in the event of an insolvency greatly affects, effectively, the market value of whatever it is that you have.

MR BELTRAMI: What I think he was saying about that is that the fact that there is an insolvency trigger may affect your perception of the instrument before insolvency. But what he's not saying, I didn't think he was saying, is that the ranking issue otherwise is of any relevance before insolvency because the ranking issue, it doesn't matter. It's only relevant insofar as insolvency is an outcome. But before insolvency, we submit, the fact that there are two regimes isn't a difficulty. Equally, one could also say, it's also right, that it's the insolvency trigger that is relevant for regulatory purposes.

If you go please to authorities bundle 2, tab 36/891, a decision of Mr Justice Blair Kaupthing, Singer & Friedlander. This was a subordination issue in a regulated context. So it had slightly more relevancy, I suppose, so far as any of this is relevant. If you go to paragraph 5, and you can see the subordination provision in that instrument, the bits underlined again indicate that the subordination provision is triggered in the event of a winding up. So once again no subordination pre-winding up, but subordination in winding up. So you have again inherently two regimes. The reason why one sees these regimes, or at least appears to be the reason one sees these regimes, is if

you then move to paragraph 11, the judge at paragraph 11 explains that:

"It is because such subordination provisions are effective in an insolvency that subordinated debt can qualify for inclusion in the capital of the issuing bank for regulatory purposes."

That's what matters. The reason, or at least the support for that, is at paragraph 12, is a reference to the EC Directive following the, I think, Val I(?) I suspect, and you see the quote, the requirement for subordinated capital is that:

" ... binding agreements exists under which, in the event of the bankruptcy or liquidation [there's subordination]."

So there's no point here that you can have different regimes before and after insolvency. On the face of it lots of subordination provisions do have different ranking regimes before and after insolvency and for regulatory purposes what matters is if you have a post insolvency subordination regime. So we do submit one goes to the words of clause 3 and the consequence that that might give rise to different regimes is not a consequence that displaces the words, at the very least.

As it happens, we also submit, and I will come on to

this on the unamended notes point, that certainly in this case there's no actual difference because of course we say on the solvency condition the same conclusion obtains. So I'm not saying in a different scenario on different facts you might have a different conclusion. On the facts of this case we submit, and I'm going to argue this, that under the solvency condition, ie pre-winding up under the amended notes or in all case under the unamended notes, Claim B still subordinates to Claim A. So there's no actually difference between the two.

LORD JUSTICE LEWISON: That may or may not be so but if we are looking at the interpretation of the instrument we can't confine it to a particular set of facts.

MR BELTRAMI: Of course it has to be considered in the round. That's why we submit in the round: so what, for the reason I've mentioned.

The third submission by SLP3 against my interpretation is that it leads, it was said, to some inconsistency with the definition of senior creditors in the Sub-Note, because the definition of senior creditors in the Sub-Note contemplates that the Sub-Notes might be senior to other subordinated debt. Your Lordship will recognise this point. There's a potential for layering of debt in the Sub-Notes and they say: well, hang on

a minute, if you are subordinating to the bottom of queue you are inconsistent with the contemplation that these Sub-Notes might be higher than something else.

LORD JUSTICE LEWISON: Might be higher, might be lower.

MR BELTRAMI: Might be higher, might be lower and we've got the notional holders. On the face of clause 3 there is a theoretical at least subordinated debt above which the Sub-Notes will sit. So there's no inconsistency in the definitions of subordinated creditors. It's merely a contemplation that there could be layering and if there is a contemplation that it could be layering above, that is catered for too. I would submit that that sort of argument wouldn't not matter because it's so remote but I've got a sort of neat answer for it, that it's actually catered for, as it happens, through the notional holder regime.

More generally we do submit, and the argument comes in once or twice, that when construing these instruments we submit it's not helpful, not immensely helpful, to speculate about what some other instrument might or might not say that might or might not be inconsistent with what this instrument says. And the example has been given against me is: well, how can the Sub-Notes subordinate to the preference share level, what would happen if another subordinated debt had a contract that

said we are subordinated to the Sub-Notes? You would have another contract that expressly contradicted what I say this agreement says. We sat that is not particularly helpful, it's not really a matter of interpretation, one interprets the agreement that goes to application. Theoretically it's possible, it didn't happen but it's possible I suppose, because of this cross-referral technique another instrument could cross-refer inconsistently. It does not, we submit, change the interpretation of what the agreement says but it's possible that in some world or other somebody might put a spanner in the works.

If that were to happen, we would submit that it's a matter of application, how do you then apply these together through that cross referral technique, and you might end up somewhere where the judge has ended up, saying, well, it doesn't work and therefore you revert to parrying(?) or something, there might be a outcome outside the contract. But it's not help, we submit, in construing what the words say to say: well, something else might come into play which might make that a difficult application because, that's a different question, it's about application of an inconsistent contract as opposed to the proper interpretation of this contract. So we submit that that isn't especially

helpful.

The fourth submission, I think, was that somehow the explanatory note helps your Lordship and Ladyship in the construction. The judge was right in his treatment of this note, we submit. He saw it equivalent to a recital. We say it was something of that order. It's an operative term, it doesn't give performance obligations but some indication of intent, I suppose, and that's why it's something similar to a recital. But it doesn't have the weight, it's not irrelevant but it doesn't have the weight to change the interpretation of the actual words used.

It's certainly wrong to approach the exercise, as submitted to you yesterday, by starting with the recital and then proceeding on the basis that must be right therefore everything else has to bend to its construction. That can't be the right approach.

In any event we submit that the recital isn't inconsistent with our submission and, if anything, it's consistent with it.

Do you need to turn it up or do you have it? It's tab 42. It confirms that amendments are concerned with ranking number 1. It confirms that the effect of ranking is the winding up, number 2. It's intended to ensure that the notes rank above any upper tier 2. The

expectation, we submit, on the face of the contract is that the upper tier 2 will be the notional holders. The upper tier 2 notional holders could be put at a preference share level. It's a reasonable inference, we submit, that had the draftsman intended to provide a deemed preference share was to rank pari passu with a debt, in a sense I know of course that's not the best approach to interpretation so I say that with a bit of a tin hat. But we do submit one doesn't get anything out of this, it says no more than the actual words say themselves in the operative terms.

LORD JUSTICE LEWISON: Tier 1 capital would be shareholders.

MR BELTRAMI: Tier 1 would be shareholders.

LORD JUSTICE LEWISON: What about upper tier 2?

MR BELTRAMI: Upper tier 2 can be shareholders or undated subordinated debt. And what we submit reading the clauses together, and I can't for the moment revert to the rectification evidence, but there we are, but reading the two together the expectation is that the upper tier 2 shareholders would be the notional holders because the notional holders are debt who are ranked at a preference share level.

So we submit that when one reads those two clauses they fit absolutely precisely. The wording of the operate terms confirms that even though they are ranked

at preference share level, they are nevertheless ranked above notional holders. And notional holders are debt holders ranked at a lower level of preference share. We submit reading the two together certainly there's no relevant inconsistency, that when he refers to upper tier 2 holders as being below this instrument, what is being contemplated in this explanatory note insofar as one can ring any meaning out of it is upper tier 2 shareholders could become notional holders. There's no other category of debt referred to in the instrument.

So we submit it's entirely consistent. But we're a long way away from the suggestion it's so inconsistent that this document interrupts the meaning of the words.

The fifth submission, I think we dealt with this briefly, was the point of the 100 per cent, that somehow that interfered with the analysis. I think that is a throw over to the point which is being made: it's not a real preference share. Of course it's not a real preference share but it's a notional preference share. As part as the drafting process it was clearly thought necessary to ensure that because it was still a debt there was a value to be put on the debt which could be proved. So it would be proved for the value of the debt but ranked a preference share. That's all that does.

The last point on this is by reference to my learned friend's skeleton which I shall deal with briefly. At paragraphs 82 and onwards he makes some points about the factual matrix in the interpretation of this instrument. For the reasons we submitted earlier, the factual matrix being the supposed purpose within Lehman of the amendments, and we submit for the reasons your Lordships are aware that that isn't going to be relevant or helpful. In fact there's a lot that could be said about the purpose of these instruments and if one actually has to get in there the purpose will be the purpose objectively apparent on face of the agreement and the purpose of this agreement, we submit, in relation to clause 3 was to deal with status and subordination within the meaning of the term. I'm not sure that is factual matrix anyway but we submit that doesn't assist your Lordships.

That's where we get to on the amended notes. We submit interpretation given by judge is right and I have sought to explain how that fits in with the two clauses.

Can I now move back in time to the unamended notes but first in order to do so to identify the potential relevance of that. You may have picked up from the judgment there was bit of debate as to whether it was necessary to go into any of that at all and I think

your Lordship's question was one raised by judge is: why am I dealing with something from history? But I suppose it's relevant to the rectification case so we have to deal with it.

LORD JUSTICE LEWISON: I see that. If there was in fact no change in ranking between the unamended notes and the amended notes then there's no relevant mistake.

MR BELTRAMI: So we have to deal with that focus. Yes, that's of relevance, I think. The judge concluded in his judgment on this issue, the unamended notes, that Claim B ranked ahead of Claim A. Both parties agree he was wrong about that. Although we disagree as to how far he was wrong. Mr Phillips said it ought to have been pari and we say he ought to have held Claim A in priority over Claim B.

We can deal briefly with the judge's error. He sought to apply the cross-referencing provisions in the two sets of definitions and but, we submit, misapplied them on his own reasoning and there was in a sense a rather clear error one can see in the reasoning. It's set out in our skeleton at 32 to 36. I don't want to spend a long time on it because there are more important things to deal with but if you go top judgment, CB2/22 page 401. In fact it's the page before, it says table. But the table sets out the process of reasoning and of

course the process of reasoning involves the cross-referring to the other instruments that we are now familiar with.

LORD JUSTICE LEWISON: The table starts on page 400.

MR BELTRAMI: Yes, it starts on 400, paragraph 158, but if you go to page 401 it's his letter 4D, where he sets meat of it. Your Lordship can read it but if I can indicate where the problem arises. He's in the Sub-Note for the moment. He says:

"Senior creditors are defined as subordinated creditors other than those whose claimed the rank or expressed rank is pari passu."

In other words excluded from the definition of senior creditors are those whose claimed rank or expressed rank is pari passu."

So you exclude that:

"This in turn requires reference back to the provision sin the Sub-Debt which is claimed."

He says:

"PLC claims do not fall within this definition. [We agree with that]. They are on their own terms subordinated and are not expressed to rank pari passu or junior to SLP's rights."

So far so good.

LORD JUSTICE LEWISON: Therefore you say they are not within

the exclusion, therefore they are senior creditors.

MR BELTRAMI: Yes, exactly, but that's the mistake. On the judge's approach the Sub-Debt ought to have been senior creditors in the Sub-Notes. The Sub-Notes ought to have been senior liabilities in the Sub-Debt. You have the impasse on the judge's approach. How you then solve that impasse is not part of my submission because we submit there is no impasse. I can quite see pari passu might be the answer one way or the another but that's not the matter of our case because we say there's no such impasse. But assuming there was that error, it's at least pari, put it that way.

However, the critical distinction which the judge didn't apply when he undertook his exercise was the material difference in the solvency conditions between the two sets of instruments: the Sub-Debt and the unamended Sub-Notes.

If we can go back please to the Sub-Debt at core bundle 3, tab 38. Page 679 has the solvency test at clause 5(2), and the solvency test, there's a single solvency test, I'm trying to work out whether you call it a cash flow or a balance sheet. It's a bit of a mix of the two but it's a solvency test by reference to the concepts within the definition. So it's by reference to, as we see, senior liabilities, subordinated

liabilities et cetera. So it's a single solvency test which plugs in the definitional terms.

To make the obvious point, in so doing makes no overt -- contains no expression of juniority over anything else because it simply applies the definitions and goes to the definitions, the judge has already found there is no expression of juniority in any of this.

If one then goes to the unamended Sub-Notes, which are at tab 41, there is a solvency test at page 723 in materially different form. Specifically, there are two distinction solvency tests in clause 3(b). A cash flow test and something that looks like a balance sheet test, if those are the right terms to use. By clause 3(a) the solvency condition must be satisfied before any payment can be made, the two limbs are joined by and, and the judge held and it's not disputed that these are cumulative, ie they both must be satisfied. There is no challenge to that finding, judgment 171 subparagraph (2).

Under the first one, which is the one we wish to focus on, the cash flow condition, the precondition of payment, and remembering about Fuller, this is how you achieve subordination, by calibrating where you've set the insolvency test, the pre-condition of payment is it must be paid "if debts" as they fall due.

We submit two elements to consider in those words, how one applies them. First, the meaning of its debts. That wasn't expressly considered by the judge in his judgment. But we submit it could only really have one meaning. I will come back on the submissions against me in a minute but we say it must mean all of its obligations to all other creditors, ie its debts means all of its debts and therefore including its other subordinated debts there is no route, we submit, as a matter of interpretation or reason to place a limitation on the words used, for example to mean it's unsubordinated debts. Because that's not what the words say.

LORD JUSTICE LEWISON: You are using the word debts, are you, in the insolvency sense? So include, for instance, claim sounding in damages, which are within the insolvency concept of debts but wouldn't normally be thought of as debt at common law.

MR BELTRAMI: I don't think I need to go that far. I'm only concerned in debts in terms of genuine common law debts, but I see no reason why it wouldn't have that wider connotation.

We submit that is in a sense the easy bit of -- we submit that there can only be one answer to that. The second question which the judge did deal with is

whether -- or it's a question of when you apply this test, ie is it whenever another debt actually becomes due, so that it's not satisfied on that date, it can never be satisfied, it's a one-off trigger; or is it to be applied whenever a payment comes to be made, you ask: can you now pay your debts as they are currently due, a sort of running test, and by reference to all debts due and unpaid.

The judge concluded it wasn't a one-off trigger. But it had to be tested from time to time when a payment comes to be made. And we submit -- I think both would suffice for my purposes, but we submit he was plainly right in so doing, that it comes to be applied whenever a payment under the notes falls to be made, the question is: can they now pay all these debts presently due?

That's what we say those terms mean.

The problem from the judge's analysis in his judgment is that having reached that point in analysis about debts presently due he kind of ignored this bit of it. He didn't give effect to this solvency condition, he then jumped to the second solvency condition and started talking about that. He didn't as you will see (inaudible) judgment deal with the effect of this cash flow condition. What we submit --

LORD JUSTICE LEWISON: Just give us a couple of paragraph

references. No need to take us to them about where in the judgment does he deal with this?

MR BELTRAMI: It's 171. If you go to page 396 -- this is 171, he's dealing with the solvency condition in the Sub-Note. At 171(3) which is on page 396, this is where he deals with the 'its(?) debts' point, and this is where he concludes the time to time -- you see 171(3)(d), that is the conclusion time to time. He then says, turning to the second limb of the solvency test, and he says something about that. We don't get any more. What he doesn't do, he doesn't plug that into the analysis.

We submit, taking the same technique I advanced in relation to the amended notes, that the solvency condition when properly interpreted is a further expression of juniority in the Sub-Notes, because it's necessarily an expression of juniority to all other debts as and when they fall due. Therefore again, same process, one goes back to the Sub-Debt, there is an expression of juniority, therefore the Sub-Notes are an excluded liability. Conversely the Sub-Debts were a senior liability.

So the key in both these analyses is to identify the solvency condition as amounting to an expression of juniority over the other Sub-Debt. We submit

a cash flow condition in these terms, in these broad terms, is an expression of juniority over all other debt including all the Sub-Debts.

I can deal with these submissions against that position. Apologies, I haven't got it all written down. But the first submission, is a general point which comes across all these submissions, is that the whole thing is answered by the definition of senior creditors. In our submission that's is only half the exercise, one has to see if the solvency condition affects that definition, your Lordships have that point.

The second submission more particularly on this point, which is that it's debts doesn't mean it's debts, but only its debts owed to senior creditors. So it's a submission on interpretation that one qualifies those words for the purposes of the cash flow test. We submit that would be an erroneous interpretation of the words. First, it's not what the words say. They don't say it's debts owed to the senior creditors.

Secondly, all the more so when the clause draws a distinction, we submit an overt distinction, in the two tests between its debts at (d) in (i) and (ii) which refers back to the definitions. (ii) refers to assets, refers to liabilities and refers to senior creditors. So there is an overt contradistinction in the two

clauses between the two concepts being used. We submit that where the clause specifically uses different language to deal with different concepts it would be wrong to construe them as if they mean the same thing because that is SLP3's argument.

The third point advanced -- I think this was advanced -- is that it might be suggested, if you go back to the clause, the bit in parenthesis at the end should qualify both tests. I can say no more than it is a matter of interpretation. We submit that would be a very curious interpretation of this clause when the bit in parenthesis expressly uses the words "Liabilities" and "Senior" creditors, and we submit qualifying the words "Liabilities", as opposed to something of a different nature in (i).

I can't say as a matter of language it couldn't be possible to read that parenthesis as qualifying both, because I think the punctuation permits it, but I would submit as a matter of ordinary interpretation it would be the wrong approach and that the right approach is to read that qualification as applying to the "Liabilities" which it's actually talking about.

The fourth point is a point that I think I have already covered, which is that this is an equivalent point covered which is that -- actually that's

an entirely different point; I misread that. If you have these two tests they are different and therefore they might result in different outcomes, because you might have a cash-flow problem or a balance sheet problem and they might produce different outcomes, and therefore might have a different conclusion of ranking.

In a sense, if they result in the same thing there would be no point having them. They had put in, we say correctly, cumulatively necessarily they are referring to different things, and the process of subordination ensures, we submit -- or the right approach to this is that the consequences of these notes are very, very far subordinated, if you like.

LORD JUSTICE LEWISON: Even in an ordinary insolvency situation you might be cash flow insolvent but your assets exceed your liability, conversely your liabilities may not exceed your assets but you can pay your debts as they fall due. Either way you are insolvent.

MR BELTRAMI: Either way you are insolvent, exactly. Two tests means there can be two different ways of getting there. Equally here two tests means there could be two different ways of ensuring subordination. The end result is to ensure as much subordination as they could. Well that's the effect of this artifice. By having two

different tests both must be satisfied therefore there's a greater chance that these notes come to the end of the queue. So there's no difficulty in having different tests, indeed that is the essence of the clause.

And the last point on I think this construction issue is a similar point to -- which is that well, how would this work if another instrument subordinates itself to this? Again same problem, you have a potential conflict down the line with the hypothetical instrument. It could in theory exist, it doesn't but it could, but that would be a problem of application not interpretation. Same reason as said before. So the rogue instrument which interferes with this isn't in my submission a reason to change the interpretation of what the clause says.

That is what I understood to be the response to that.

Can I now deal with the additional points made in my learned friend's skeleton -- I'm not sure I have fully covered them -- on the unamended notes ranking issue. Can I ask you to turn up the skeleton at CB1, tab 7, page 71. From paragraph 45 onwards there is what I understand to be SLP3's positive case on the construction of these instruments. Having said the judge got it wrong, which we are in agreement about,

there is then the positive case they advance why pari passu ought to be the answer. And just in passing, they don't deal with the solvency condition in this analysis so it's a bit of a side wind, we say they missed the point, if you like, but let's deal with what they have said. There are two aspects to it. The first aspect, if you look at 47, is the pari passu preference which I have already dealt with. As a matter of approach that's the wrong approach.

The second aspect, slightly more intricate, begins from 48, which -- your Lordships have read it so I won't ask you to read it immediately. It essentially involves framing the question, a rather different question, as to whether the Sub-Debt and the Sub-Notes are subordinated to the "same senior creditors". This featured very much in the argument before the judge, and having framed that question they give the answer -- in fact you can see the answer at 45, the last sentence:

"They are subordinated to the same senior creditors such that they are not subordinated to each other."

So the argument was well you can ask, are they subordinated to the same set? and if they are that gives you the answer.

There are various references to the clauses being symmetrical and looking at the same sort of thing and

1 therefore having the same set of creditors. We have
2 already submitted this is an unhelpful approach for the
3 court below and for your Lordships. Essentially it's
4 seeking a shortcut which doesn't really work, through
5 a bit of ambiguity in the language. And as we said in
6 our skeleton it produces an answer which is either
7 irrelevant or unfounded. Because one has to qualify
8 what one means by saying -- the question is: do they
9 have common senior creditors? The answer is yes. All
10 the unsubordinated creditors are common senior
11 creditors. So to that extent yes, fine, but that
12 doesn't help us in ranking inter se.
13 If the answer is well do they have exactly the same
14 senior creditors? the answer is well, we look at the
15 contract to see what it says, you can't get the answer
16 by saying they have the same senior creditors and that's
17 the problem with the analysis. Your Lordships can refer
18 to the skeleton if you want
19 LORD JUSTICE LEWISON: 39,000 people didn't win the London
20 Marathon, doesn't mean they all came second.
21 MR BELTRAMI: We have sought to pick up the problem --
22 your Lordship is already ahead of me. It's paragraph 21
23 of that skeleton, page 62.
24 LORD JUSTICE LEWISON: Your skeleton?
25 MR BELTRAMI: No, my learned friend's skeleton.

LORD JUSTICE LEWISON: Where do we go? Paragraph 21?

MR BELTRAMI: Page 62, paragraph 21. And it's the syllogism, and this is the essence of their case. It says:

"For two subordinated extra ranked ...(Reading to the words)... subordinated to the same senior liabilities. If A subordinates his debt to C and B subordinates its debt to C, A and B will prove at the same time and will rank pari."

Your Lordship will see the gap in that.

That assumes that they rank at the same level. So it assumes classically what it seeks to prove. So all the stuff you see in my learned friend's skeleton about symmetry and same creditors and all the rest of it doesn't answer the question we have to deal with, which is ranking.

My Lord, that's all I wish to say about the unamended notes. I can flag but not deal with the residual point, just to mention it, as you will probably recollect from the judgment. The judge also considered separately a ranking issue as between or equal claims A(i), (ii) and (iii). That created a lot of problems in its application, because potentially it impacted on the solvency condition, which was resolved eventually by the judge.

The problem, of course, in those instruments is they do say the same thing. So that can't be correct on the question of how you find the answer(?). And he found the answer that as a matter of law they revert to pari. We suggest that -- no one disputes the answer. We suggest it may be possible to find an implied term to deal with that, but it doesn't really matter in the sense it doesn't impact on anything we have to concern ourselves with.

The knock-on point was, if they do revert to pari passu but not otherwise excluded liabilities, how does that impact on the solvency condition? The judge dealt with that as what I will say is as a matter of law it doesn't. We don't disagree with that. We think there may be a better answer through an implied term but it's in our skeleton and I don't think I need to trouble your Lordship because no one is arguing what he decided was a wrong conclusion. But what he decided wasn't relevant to the issue I'm arguing, so I thought I would mention it but not otherwise deal with it.

That takes me in good time on to the question of rectification.

LORD JUSTICE LEWISON: And for the purpose of this part of your argument, we assume that you are wrong in your interpretation of the unamended notes and that either

they rank pari passu or alternatively they outrank (inaudible word). It doesn't really matter which for this purpose, does it?

MR BELTRAMI: They were changed, yes. The claim advanced, as your Lordship and Ladyship are aware at trial, was a rectification on the ground of mutual mistake. For over 30 lines of the amended notes, essentially the whole of the new clause 3A, subject to small little bits that were left. We do submit, therefore, that this case was misconceived at trial and there is really no prospect ...

I have four points to run at, any one of which kicks this out. I will (not?) deal with all of them, but the points are these:

First of all, there was no evidence at all about the intention of the actual decision-makers. That's my respondent's notice point but it logically comes first and it frames the other questions so I will have to deal with that first if the court will forgives me. So no evidence about the intention of the actual decision-makers.

Second, there was no mistaken intention on the part of Ms Dolby or Ms McMorrow who were alleged to be the decision-makers.

Third, no objective manifestation of accord.

And the fourth point, my Lord Lord Justice Lewison began with yesterday, the case is structurally impossible and collapses under its own weight because what they seek to rectify can't on any view of the facts be available for rectification. Because it's plainly wrong. That was a point which had been raised by the judge, and then as you say what your case is, it's a narrower bit of rectification is what you are actually after, but no such case was ever advanced. They always went for a jackpot which is everything and it simply can't work on the evidence, but I will come on to that in due course.

So if I can briefly recap on the factual material, so far as I think relevant, just to put it in context.

As your Lordship and ladyship are aware, sub-notes are issued in 2007. By 2008 it was perceived there might be a US tax benefit by deferring the payment of interest under the notes. The process was started on 2 June 2008. And if you can turn, please, to supplemental bundle 2, page 416.

It starts off, just so your Lordships and your Ladyship are aware, with personnel. Ms Dolby worked in the European tax department of Lehman UK and she is emailing at the middle of the page Ms McMorrow, who is an in-house lawyer at Lehman UK. Ms Dolby gave

evidence. Ms McMorrow didn't give evidence. The instructions went to A&O and were assigned to Mr Grant, who did give evidence.

Moving on to 417, as you have seen, on 5 June Mr Grant sent what we referred to as draft 1, and said in the terms of the email that he was going to have them blessed by Amrit -- that is the fourth paragraph -- who was the tax associate at A&O.

So far as draft 1 is concerned, if you move, please, to page 421, which is that draft, there was no change to clause 3 on page 421, which remained unaffected. There was a change to clause 4(f) on page 422 which permitted the deferral of interest.

So the original instructions and intent were achieved in draft 1 by clause 4(f) and that was as far as that bit of it was concerned, that wasn't -- there were some consequential amendments as well but that was never changed. That was done in draft 1 by 5 June.

At or around that time, Mr Grant, on the evidence, spoke to Mr Dehal, who identified a different -- Mr Phillips was right, there were two -- a different tax related issue around the solvency condition at clause 3, and he proposed that the solvency condition be removed on a winding up.

I think it may be best to have both supplemental

bundles out rather than anything else for the moment. Let's carry on and see how we get on.

That suggestion from Mr Dehal led to an internal drafting exercise by Mr Grant. And still in this bundle, if you go to 433, on 11 June, this is an email he sent. I think Mr Thomas was a trainee. This was an internal email of his then current thought process.

What he had done in this, if you like, intermediate draft is, if you then go on to page 437, he had made an amendment -- this didn't get to Lehman; this is an internal version -- an amendment to 3(a) which simply removed the solvency condition on the winding up. So that in a sense dealt with Mr Dehal's concern that the existence of a solvency condition might create a tax problem. So the immediate response was to remove it.

Just to note on that, this on its face was an overt change to the subordination provision, responsive to the tax concern. And by doing so that created a two stream process, ie in and out of insolvency.

This change was not directly related to the deferral of interest, because the problem arose on the original notes anyway. Now, I say "the problem"; there's been no finding there was no problem. It wasn't even argued there was no problem. The problem arose in the original notes.

What Mr Grant said, and this is where we have to go to bundle 1, I'm afraid.

LORD JUSTICE LEWISON: Supplementary 1.

MR BELTRAMI: Supplementary 1, tab 1, page 15.

Paragraph 35. He said in the second line:

"The concern about tax deductibility did not relate to the new provisions. The potential issue would also have arisen in the original notes, although the proposed interest deferral could potentially have exacerbated the problem."

So his evidence, on which he wasn't challenged, was that there was a link between the tax concern and the interest deferral proposal. That issue wasn't explored any further. That's what his evidence was. In any event we saw the intermediate draft. So it removed the insolvency condition.

That then led to a further concern within A&O. By that stage the draft had been circulated to Mr Grant's superior and Claude Mozel the partner in charge and to Jeff Fuller the structured finance specialist. And somebody realised -- and obviously Mr Grant could not remember how it emerged -- but somebody realised that if you remove the solvency condition you are removing subordination, or you might be removing subordination. And that might create a regulatory issue by taking

subordination away.

And you can see that if we go back, I'm sorry, to supplemental 2, page 548. This is Mr Grant's evidence about coming up with identifying this new problem. Top left-hand corner, 117, line 7. His problem was:

"If the language had stayed in the form that we last saw it ..."

That's the --

LORD JUSTICE HENDERSON: Hang on a minute. I'm not with you yet.

MR BELTRAMI: Supplemental 548, top left, page 117.

LORD JUSTICE LEWISON: Page 117.

MR BELTRAMI: Line 7. He says:

"If the language had stayed in the form that we last saw it [that is the intermediate one we just looked at] it would have said the notes were subordinated senior creditors but wouldn't have included a mechanism for that subordination to be effective."

Then the risk of flouting the rules, he said it certainly wouldn't have been a typical way to achieve subordination:

"Simply saying that something has subordinated senior creditors wouldn't commonly be used, and wouldn't at that time ...(Reading to the words)... be commonly used for subordination. ...(Reading to the words)...

another effective tool to achieve it. And having removed the solvency condition, by that time I'd realised we needed to find another way of achieving effective subordination for security."

So his perception anyway was that the conditionality effected the subordination, and if you remove the conditionality you risk at least moving the subordination. So we needed to find another way. And that is how draft 2 evolved. So the first concern was to facilitate the deferral of interest. The second concern was to remove the solvency condition to solve Mr Dehal's tax problem. And the third concern was to find another way to deal with subordination having removed the solvency condition. And the purpose of the amendments was to do them all(?).

Mr Grant, as you then remember, produced what we call draft 2 to deal with the tax and subordination concerns. And that was sent to Lehman on 12 June at page 448, which you have of course seen and much been talked about it.

This is where he expressly flagged that there were no changes for tax reasons. And to be clear, as we said, the original draft dealt with deferral interest. So that all had been done and dusted. This was a new draft with new changes which were -- it's expressly to

deal with tax sensitivities arising out of the issues raised. So no question that this is somehow -- I'm not sure it really matters -- that this was somehow overlooked or behind the scenes. It was on the face of the email.

As to what then was sent -- I'm being told to see who it was sent to. It was sent to everybody, Jackie Dolby, Harold Davay(?), who was a lawyer, Emily Upton, who you will see later was one of decision-makers, Ms McMorrow, who was in-house counsel, Anne-Claude Mozel, partner, and Sophie Tomlinson (inaudible).

As for what was sent, if you go to 458 --

LORD JUSTICE LEWISON: This is in the form that we now see, isn't it?

MR BELTRAMI: In unamended form, yes. This bit of it, yes. There was a further -- a different point later on. What they were sent, having been told these new amendments dealt with tax considerations, they were then sent this. And on page 458 there is a whole new chapter of section 3 set out in blue, which identified the new changes to deal with the new issue. And that introduced, we submit -- well, if I'm right in this argument we have got to this point -- a whole new subordination regime in a winding up by reference to

preference shares. But if I'm wrong on the argument about construction we don't need to -- so in the same way as you assume that I am wrong on the unamended notes, you have to assume I'm right on the amended notes.

So on face of it this produced a whole new regime by reference to the deemed preference share. Now, just in passing, this was the product of collaboration between A&O. It was specifically, on Mr Grant's contemporaneous record, to deal with ranking.

If you go to page 499, towards the bottom of page 499, an internal email from Mr Grant, I think on 11 June and 12 June while he was trying to work out how to do this. Near the bottom is internal email from Mr Grant and Claude Mozel discussing a meeting:

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

So no question that what he was seeking to do was address ranking in these amendments. And we know that the way he did that was by using the preference share technique which we discussed as a reference point for subordination.

Then if you go back, please, to 548, what he did -- I think that's the bit he examined -- was that he was

looking for a different reference point. And he found one through the preference share technique.

LORD JUSTICE LEWISON: You are on page 118, are you?

MR BELTRAMI: Yes. 118. He talks about the solvency condition. And then he talks about his drafting tool. And we submit that was specifically done to achieve a ranking position. And it was, even in his mind, intended to achieve, if you like, above and below in terms of ranking. So his intention was somehow to put a floor on it. That was contrary to his evidence.

If you go to supplemental bundle 1 again, to tab 1, page 17. This is for the purposes of rectification about the explanatory note, but at 117, this is Mr Grant's witness statement. We pick it up at 42 and he is explaining how he got to the process he got to:

"The new drafting adopted a tried and tested approach which had been used for upper tier 2 subordinated bonds."

So the preference share technique had been used by him as the means for subordinating upper tier 2.

Then 43:

"The method was traditionally used for undated subordinated debt which would occur(?) at upper tier 2."

That is how we get notional holders.

Then 45:

"The typical upper tier 2 did not change the debt into equity. It just stated that it ranked immediately above all issued equity."

So that is what the typical upper tier 2 preference share subordination provision holds, just above equity. Then he says he was doing this for lower tier 2. That's what he calls a bespoke solution to deal with the issue. But if you then go back to 45:

"The typical upper tier 2 did not change the debt into equity ...(Reading to the words)... above all issue. The formulation I used for drafting amendments sought to apply and extend the notional preference share concept to lower tier 2 security."

That's fine. But he then says at 46 over the page:

"The wording differed from the usual form of upper tier 2 securities. Rather than ranking as if the noteholder held a notional share which had a preferential right to return of assets of a holders of all class of issued shares, the noteholders themselves also ranked above the holders of notional shares."

So he's identifying the notional holder bit. He then concludes, if you go further to page 19, on the last sentence of 52:

"Whereas before the amendments conditions only described what ranked above the LBHI2 notes, the amended

conditions described what ranks above the LBHI2 notes and also what ranks below them."

So even his subjective intention in placing the preference share concept was to rank these notes above and below.

LORD JUSTICE LEWISON: Is that a convenient moment, Mr Beltrami?

MR BELTRAMI: My Lord, yes.

LORD JUSTICE LEWISON: If I say 2.00 rather than five past two, would that inconvenience anybody?

MR BELTRAMI: 2.00.

(1.05 pm)

(The short adjournment)

(2.00 pm)

LORD JUSTICE LEWISON: Yes, Mr Bell.

MR BELTRAMI: My Lords and my Lady, I was just working through the factual piece before we go on to the arguments.

We had stopped at 12 June where Lehman sent draft 2 with the flagging, and we looked at that. There was then a period of time when Allen & Overy produced an updated regulatory letter and there was contact with the FSA and further internal consideration was given within Lehman as to whether, given their ranking, the notes were still debt rather than equity.

So the specific ranking point hadn't been resolved or at least hadn't been concluded. If you can turn, please, to supplemental bundle 2, tab 41, page 520, it's an email on page 520 of 28 August 2008, so several months after the draft and just before in fact it was signed off. It's from Clare Homer from Lehman, addressed to number of people. And the context of this was I think Mr Grant had said, well, can you just check that, with the amendments to the notes, they still remain debt rather than equity, and therefore as to whether it was a tax point.

It went to Clare Homer, who I think was an expert in the regulation of tax, and as you will see halfway down, as part of her consideration at that stage even in August she was giving thought to the seniority of the notes and ranking position --

LORD JUSTICE LEWISON: Sorry, where are you?

MR BELTRAMI: Sorry, under the heading, "Terms of floating rates ...(Reading to the words)... subordinated notes". The fourth bullet point.

LADY JUSTICE ASPLIN: I'm sorry, I am at the wrong page. 520 -- 518?

MR BELTRAMI: Sorry.

LADY JUSTICE ASPLIN: Was it 43?

MR BELTRAMI: No, it's entirely my fault. It's a bad start.

It's 518. I do apologise.

LADY JUSTICE ASPLIN: Thank you.

LORD JUSTICE LEWISON: 518, under UK GAP --

MR BELTRAMI: Just above that.

Under that heading, "Terms of floating rate ... subordinated notes", she was considering whether, pursuant to the amendments, they retained status as debt or equity. And one of the specific considerations given by Lehman at that stage was as to their seniority under the amendments.

So even at that stage Lehman were still actively considering what the ranking position was pursuant to the amendments.

The idea from Mr Phillips that it was all decided months ago is simply wrong as a matter of fact. The idea that it was ignored is wrong as a matter of fact. Even at this stage, they were looking at these notes to try to work out what the ranking was. That was for tax purposes.

That was the end of August. Then, as I think you have been shown but can I just finish off the piece, if you go to 524 we then have the resolutions and agreements authorising the amendments. And at 524 there's the resolution of LBHI2, and you will see that it is a board minute with Mr Rush and Mr Jameson.

Mr Rush was Ms Dolby's superior in the tax department.

I'm having difficulty, apologies, with my referencing. Can I ask you to go to 522. That's the LBHI2 board minutes with Mr Rush and Mr Jameson. So Mr Rush was a superior of Ms Dolby. He didn't give evidence. And Mr Jameson was the corporate counsel and he didn't give evidence. That was for LBHI2 authorising the amendments.

And the way it was done for SLP3 is, if you go to 524 the written resolution was signed by Emily Upton, who was in-house counsel for SLP3 and didn't give evidence, countersigned by Mr Rush on behalf of LBHI2. And so far as the ultimate approval for SLP3 was concerned, if you go to 528 it's the electronic consent, I think -- the parent or the general partner of SLP3, and it's signed by Mr Triolo on behalf of the sole general partner. He was senior vice president in the United States tax department, involved with US tax on the evidence, and he didn't give evidence either.

So just summarising, before we go to the detail, the points on the evidence:

The evidence was sparse. I've taken your Lordships and your Ladyship through the substantive bits as far as I can see. The evidence was sparse and largely built on such documents as there were and clearly on

reconstruction by the witnesses from those documents. That reconstruction was limited, given the fact that there were only two even potentially relevant witnesses, namely Ms Dolby and Mr Grant. I will come back to that point in a minute. And given the passage of time, understandably they had little independent recollection.

So we simply do not know, and the trial judge did not know, whether there were any discussions about any relevant matters by anyone else within Lehman or what anyone else thought about ranking for example. None of that evidence was available. The only evidence was put through Ms Dolby and to some extent Mr Grant. So that's the evidence.

The drafting process, as I submitted before lunch, presented an evolution, dealing with different concerns at different times, but ended up dealing with interest deferral, tax and consequential subordination. Those are the three issues that were addressed.

They were highlighted in blue and flagged for Lehman so they were made well aware that those amendments were being made and the reason for them. And it was apparent in any event on the face of the drafts, through the blue amendments, that the amendments were going much wider than pure interest deferral. That had been draft 1. These very substantial amendments were in draft 2.

So that is the facts. Now, the judge set out the law on rectification for mutual mistake in his judgment, 257/258. Since FSHC, we anticipate no or no sensible dispute about that. As the judge noted, the parties seeking rectification must demonstrate to the relevant necessary standard of proof a continuing common intention which, as a result of a mistake, the document failed accurately to record. And that requires convincing proof to displace the natural presumption that the written contract was an accurate record of what was agreed.

And equally, and I will come back to this point, where there's no antecedent contract and it is just a matter of common mutual understanding, the party must show the existence of a subjective common intention and that this was manifested by an outward expression of accord, as FSHC confirmed. And I will come back to the point that is taken on that in due course.

Now, from time to time, and sort of yesterday, SLP has sought to suggest that there's a dispute of law, I think, certainly before the judge and I think now, contending that there is some lesser or different rule for amendments exactly as to what you have to show.

But that is wrong. It's simply a matter of evidence. It's also irrelevant given the actual

findings from the judge, but I'll deal with that when I come on to it.

On his judgment, paragraph 260, the judge dismissed the claim on three factual bases. First, there was no discernible intention by LBHI2 about relative ranking beyond that evinced by the objective construction. Secondly, equally, no discernible intention on the part of SLP3 beyond that evinced by objective construction. And third, no outward manifestation of accord in any event.

So that's where the judge is. Now, as I indicated before lunch, I have four headings. The first heading is out of sequence in the sense that it's the respondents' notice point, but it is logically the anterior point, which is that there was no evidence at all about the intentions of the actual decision-makers, because clearly in any corporate question one must first ask who's intention is relevant before then asking what that intention was.

The judge indicated in his judgment that he did not need to decide that point because he concluded there was no mistaken intention anyway and so it wasn't necessary.

That, we submit, was clearly right. But the logical first step is to say, well, hang on a minute; who are you even talking about here?

If your Lordships and your Ladyship will forgive me, that is a point I wanted to start with or to frame the rest of it in any event.

Our primary position is that the rectification case came to court essentially on a threadbare and unprovable basis because they simply never had any evidence as to the intentions of any relevant attributable individual, which in this context, in the context of rectification, means the decision-makers. That is what one is looking for.

The normal way to advance a case on rectification is by exploring the evidence of the attributable parties, ideally from oral evidence if you can. If not, it's still possible from other documentary evidence or indirect oral evidence from others, albeit at that point you are into in inferences et cetera. It is possible but it is harder, but it's available.

However, what one sees in rectification cases, as in fact in FSHC has commented, is the evidence being "thrashed out in the witness box."

Your Lordship will have seen that in several cases. In FSHC at paragraph 38, in that case there are about a dozen witnesses involved in the process, all of whose evidence was examined. And that is the normal -- immutable position, it's the normal position on

rectification because one has to get to the evidence of the relevant person. Turning up with somebody and saying, well, she'll do, isn't a good starting point.

Now, so far as the test of attribution for rectification is concerned for rectification, it was most comprehensively explained by Mr Justice Mann in a case called Murray v Oscatello, which is in authorities bundle 3, tab 56. And can I ask you to turn to tab 56, page 1782.

After reviewing the authority, including a number of Court of Appeal authorities, Mr Justice Mann set out principles at paragraph 198, which I don't believe were disputed before the trial judge. And can I ask the court to read what the principles are.

LORD JUSTICE LEWISON: Sorry, Mr Beltrami, you are dropping your voice every now and again. Which paragraph?

MR BELTRAMI: I'm not doing well so far. It's 198.

LORD JUSTICE LEWISON: Yes.

MR BELTRAMI: So the principles A to E. Can I ask the court to read the principles, which I don't understand to be in dispute, as the starting point for identifying the persons whose intention is attributable to the contracting parties. (Pause).

As you will see from that, the focus is on the person who is the decision-maker as quoted, and that

will usually be the person with authority to bind the company. It may be someone else, if that is the reality on the facts, and it may be possible to attribute the intention of a negotiator so-called, either because he's the actual decision-maker in fact or in reality, or through some process of adoption if it can be said that the actual decision-maker adopted or shared the intentions of the negotiator.

So that is what one is looking for in identifying the relevant persons.

In that case, and it is one of those cases where the facts are interesting but I won't trouble you with them, the ultimately difference was between -- in that case the negotiators had a certain intention. And the question was, was that attributable to Isis, which was a Kaupthing service company, and Oscatello, which was a trust company? And Isis used corporate service providers whose director simply turned up one day and rubber-stamped a minute.

And the judge said, well, hang on a minute, they weren't the real decision-makers. The real decision-maker was the negotiator who was doing the deal.

Oscatello, the trust company, didn't do much more, to be fair, but had a bit more supervisory control over

what happened, ie they didn't do nothing but they may not have done very much. And the judge said, well, it may be it was likely they would do what the negotiator proposed, but it wasn't inevitable they would do what the negotiator proposed. And that was the difference, in that judge's view, on that case, ie it really has to be, if the one is moving away from the authorised decision-makers, essentially an inert party, a corporate service provider who makes no actual decision at all, who just does what he's told in reality. As soon as you get into the position where the actual decision-maker is making a real decision, then that is the person whose intention is then attributable to the company.

It still means that as a matter of evidence one can say, well, that intention was adopted, or he adopted someone else's intention, but that's a matter of evidence. But that's the question: who is the actual decision-maker? What are the intentions of the actual decision-maker for rectification purposes?

And an example of the failure to provide evidence to answer that question can be seen in the George Wimpey case, which is authorities bundle 2, tab 30, page 653.

This was a case where a dispute had been negotiated for Wimpey by a Mr Kerridge, but Mr Kerridge had no authority to contract for Wimpey. The contract was

approved by the board and executed by Mr Hewitt, the solicitor. There was a case in fact of unilateral mistake but nothing much turned on that. The problem for Wimpey was that whatever Mr Kerridge's opinions or intentions were, they had not brought to court evidence of the decision-makers, namely the board members who had made the decision in order to contract.

And if you go to page 664 one can see the problem. And at 48, maybe I can ask you to read 48 and 49.

LORD JUSTICE LEWISON: Yes. (Pause).

MR BELTRAMI: Clearly every case must turn on its own facts. I can't obviously cite it for that purpose, but it's an indication of what happens if you come to court on a rectification case without the right people. If you don't have the right decision-makers, you can't provide the evidence -- or you are not likely to be able to provide the evidence of what their intentions were.

And it doesn't work to say, well, we have somebody who had something to do with it, so that person will do instead. One always has to focus on who the decision-makers are and then ask is there evidence sufficient for rectification for their intentions to be established?

LORD JUSTICE LEWISON: There could, I suppose, have been evidence from Ms Dolby to say, well, the board always do

I what I recommend.

MR BELTRAMI: I will take you to the evidence of Ms Dolby. But your Lordship is right, we will see what she says, but there could have been. That is why I am saying you can get there through other evidence if there is such other evidence. In fact she said the opposite, but ...

So the immediate difficulty, before we even get down to any of the detail, facing SLP3 is that the starting point for Mr Justice Mann's analysis is likely to be the persons with authority to bind the companies. Here, that was Mr Rush, Mr Jameson, Ms Upton possibly, and Mr Triolo, none of whom gave evidence and none of whose intentions were therefore explored in evidence.

Now, the case on who the decision-makers were has, to be fair to my learned friends, fluctuated a bit over time. In opening it was Ms Dolby and Ms McMorrow. In closing the focus went on Ms Dolby. My learned friend's skeleton before this court, footnote 96, is the assertion that it's Ms Dolby and Ms McMorrow, with no detail at all, it's just an assertion. And yesterday the submission was that Ms Dolby was a relevant decision-maker.

So one or both of those have been floating around as the relevant decision-makers.

The difficulty in asking the question "who were the

decision-makers?" is first of all none of the authorised decision-makers gave evidence so none of them was able to explain "We just did what we were told", for example. So that was not before the court. Not conclusive, but that wasn't before the court.

There was no evidence from Ms Dolby or -- I think Ms McMorrow wasn't there -- no evidence from Ms Dolby that those were not the true decision-makers. There's no evidence that they delegated their role to her or didn't operate it properly or just acted as a rubber-stamp for what she, in her role in the tax department, was working on.

And such evidence as there was was contrary to that. If you can go to supplemental bundle 2, tab 54, page 568. This is Ms Dolby's cross-examination. We pick it up at 113 at the top left. Maybe I can ask you to read pages 113 and 114 as to the process, as one might expect by the way, within Lehman and how decisions were made. (Pause).

These decisions were made through committees, through departments, and all the way up to the board, who would then request them or focus on them as appropriate. Ms Dolby was one cog in the process in the tax department. But this is not a process, we would submit, where the authorised decision-makers can be said

to have delegated the decision-making role to somebody in the tax department. It is contrary to what she describes there.

But more than that -- I keep on saying that: and another point, and another point -- she gave incontrovertible evidence -- and the reason it's incontrovertible evidence I will explain -- that in terms she was not a decision-maker. Her role was that she was second-in-charge in the European tax department under Mr Rush. And tax was just one department involved in these complex structurings.

She was asked several times whether she was a decision-maker, and each time she denied it.

This arose before the evidence of the trial. Ms Dolby had been interviewed through, I think, some common agreement between the parties, through an informal interview between the parties. The content of the interview was adduced by SLP3 by way of a Civil Evidence Act notice. So it was their evidence which they advanced before the trial judge as to her evidence on this interview.

If you can go, please, to supplemental bundle 1, to tab 4, page 59. We pick it up at line 20. She was asked:

"Question: Did you make the ultimate decisions for

any Lehman entity?

"Answer: I wouldn't make the ultimate decisions about a project ...(Reading to the words)... Lehman entities. I'd present it to management and they would make the ultimate decision."

Over the page at line 4:

"I wouldn't be saying: you should be doing this; I've done this transaction; you should be signing off. I would be saying: this transaction has tax related ...(Reading to the words)... already been aware of it. He'd say to me periodically, how's it going?"

Then the question is:

"Question: Presumably the transaction involved more than just tax-related matters. The ultimate decision would require ...(Reading to the words)... agreeing to different things?

"Answer: Yes, and tax would be just one of them."

So she was one department in the process. And if you then go to 61, she is asked again at line 3:

"I wouldn't say I made the decision. I would have proposed the structure. Someone higher than me, management or director, would have made the decision we are going ahead with the structure."

Now, that, as I say, was SLP3's own evidence. Difficult, we would submit, to maintain a case that she

was the decision-maker when their own evidence was that she wasn't.

Once that's gone, as it must have gone, we're left with the argument that the decision-makers must be evidential argument that the decision-makers, being Mr Triolo and Mr Rush, must have just adopted her intentions, because that's all that's left, on Mr Justice Mann's analysis.

Somebody else is the decision-maker, wrong, or they are the decision-maker but they adopt the analysis of someone else. There's an evidential route to get there, but there was no evidence in support of it. They didn't give evidence as to whether they did or did not do anything Ms Dolby said, so one could not conclude it from what they said. And Ms Dolby didn't suggest that they just adopted her intentions. She indicated she was part of one department. The decision-makers had to deal with everything, and the decision-makers made their own decisions. So she didn't say they just adopted whatever she thought.

The actual evidence from the passage I took your Lordships and your Ladyship to in the judgment is that Mr Rush played an active role, asking questions and dealing with issues. And so far as Mr Triolo is concerned there is simply no evidence at all as to the

circumstances in which he came to sign the document.

Still in this interview note, if you go to page 55, this is still Ms Dolby, still SLP3's evidence. And remember, of course, they have to adopt the intentions on both sides of the transaction. At 23, she's asked about Mr Triolo. And 26:

"Is it likely that Jon Triolo would have signed the consent on the basis of what was described in it rather than requesting separately a copy of the amended document?

"Answer: I can't really comment on that. I wouldn't know how he went about authorising this. He might have requested it. I wouldn't know."

So her evidence, ie SLP's evidence, is she didn't know what Mr Triolo did and didn't do when he came to sign this document. So there's no evidential basis on which the court could have concluded that Mr Triolo adopted her intentions. Her own evidence was that nobody did.

And all that's left from all that is the residue which I think you got yesterday that Mr Phillips extracted in cross-examination a statement from Ms Dolby that Mr Rush shared her intention that the amendment was to defer interest. Mr Phillips took you to it yesterday. It's page 571 of the bundle, that Mr Rush

shared her intention.

But that, at best, is evidence that he understood the origin of the amendment. And no one disputes that he would have understood the origin of the amendment. What it isn't is evidence as to what he understood that the amendment actually did in terms of ranking, whether he had any understanding at all, whether he had no understanding, whether he understood it rightly or wrongly.

There has never been any evidence of their intention. And in the absence of any evidence of their intention, this case on rectification was never going to go anywhere.

LORD JUSTICE LEWISON: What was the basis of Ms Dolby's acceptance of the proposition that Mr Rush shared the intention? Is there evidence of some conversation between them?

MR BELTRAMI: Well, she did indicate that she spoke to Mr Rush about this from time to time. But we would submit that all that evidence meant was, well, if you looked at the board minutes that said the purpose of this is to defer interest, of course she would say, well, yes, he knew the purpose was to defer interest. That's as far as it goes. It says nothing at all about what he actually thought about these amendments.

LADY JUSTICE ASPLIN: I think she does say -- or the question is put to her on page 571:

"And you did not discuss ranking alteration with Mr Rush; that's right?"

And she says, "Yes".

MR BELTRAMI: Yes. So she had no way of knowing what he thought about ranking. And she had no intentions communicated of that ranking to him.

My Lord, that's why I started with the attribution point. The next stage -- assuming somehow we get through that, the question is, it has to be Ms Dolby or possibly Ms McMorrow or both. I mean, frankly, one of the many difficulties of this case is that if anybody's intention other than the authorised directors is going to be relevant, one would assume it would be have been Ms McMorrow of those two, because she was the legal counsel. So she might in theory, I suppose, have had some relevance to intention one way or the other. But she didn't give evidence, so she is out of the picture. So we are really left with Ms Dolby.

So the second question is, was there evidence or ought the judge to have concluded on the evidence that Ms Dolby had a mistaken intention about ranking?

As I said earlier, the judge found as a fact that

the parties had no intention other than to signing up to the amendments, whatever their objective construction was.

The judge was able to assess Ms Dolby's evidence of course. And conclude that she therefore had no relevant mistaken intention. He was certainly entitled and we submit right to reach that conclusion for several reasons. First, because it's quite clear, I don't even think it's this dispute she had no relevant intention as regards ranking. This being something which on her evidence to which she gave no thought at all. Either before or after the amendment. She had no relevant intention either way and she had no knowledge of whether anyone else had a relevant intention either way.

There are two reasons for that. The first is, on the evidence no one at Lehman thought this would ever be relevant. It would never be relevant, a) because no one thought Lehman would collapse, but (b) if they had thought about it, no one thought that if it collapsed subordinated debt ranking would matter.

I'm not sure how many solvent administrations there had been. But this is such an unusual circumstance. That's why Mr Phillips submitted that this was a fundamental change and material, et cetera. It was nowhere near anybody's radar or thought in any

way important.

That is the first reason she gave it no thought: she never thought it would arise. The second reason she gave is it was not a matter for her. It had no tax implications. It wasn't within her department, which is what she said repeatedly. If we go back to the interview and go back to page 39, please.

LADY JUSTICE ASPLIN: I'm sorry, you are going to have to give me that again.

MR BELTRAMI: It's tab 4, page 39.

LADY JUSTICE ASPLIN: Thank you.

MR BELTRAMI: So from line 20 on page 39 she is asked:

"Was the potential ranking of the debt in an insolvency a factor in choosing the interest rate?"

That's on the note:

"I wouldn't have been involved in interest rate. Treasury would have just told me what was the appropriate rate. I can't comment on that."

And then she says at 27:

"The ECAPS issue ...(Reading to the words)... an initiative led by the treasury team. I was involved in the periphery because I think the benefit of doing it was that we ended up getting a tax deduction. The initial issuance I would have been involved in from a tax perspective but other than that I didn't really

get involved post the confirmation of the tax treatment."

Then if you move on to page 40, line 23, she's asked about the A&O opinion for the purposes of a waiver application, and she is asked at 26:

"Do you recall there being any discussion about the ranking or prioritisation of the PLC Sub-Debt against other debt?

"Answer: I don't recall. But I wouldn't have been involve in those discussions, I don't think.

"Question: If there had been discussions like that, who would have been involved?

"Answer: The red guys and the treasury guys."

This wasn't even a matter for Ms Dolby.

Then over the page:

"Did you personally have any expectation as to how the notes and debt would rank against each other.

"Answer: No.

"Question: Was there any consideration, to your knowledge, in respect of ranking?

"Answer: I've got no knowledge of that."

Line 12:

"That would be a regulatory requirement.

"Answer: My regulatory colleagues would have instigated that. I wouldn't have knowledge of it or

been involved."

Then if you go to page 61, line 16:

"To the extent you did advise people, was that advice tax related or limited to tax advice?

"Answer: Yes."

Then 72, line 6 she was asked about ranking:

"Did you think about it?"

She says at line 6:

"Subordination and ranking wouldn't have been at the forefront of my mind, if it was in my mind at all.

"Question: Do you recalling thinking about subordination?

"Answer: I mean, that wasn't tax. Tax weren't interested in that. That would have been a regulatory and potentially treasury, but it wasn't a thing that we were interested in."

So just to recap, the sole person being put forward to the court as the relevant person for a mistaken intention had no interest in this. It wasn't her department.

So when you go back to the cross-examination Mr Phillips took you to, that she only intended to defer interest, of course she did. That was the only tax bit that she was interested in.

So ultimately it's to say no more than -- and this

is as far as they managed to get on the evidence -- she was not concerned with something she was not concerned with. So that's as far as it goes.

So we submit she self-evidently made no mistake about it. It also illustrates equally why the case that she's the decision-maker simply can't stand up, because she has a narrow silo interest. She's not a decision-maker across the piece. She says that herself several times.

LORD JUSTICE LEWISON: Next point.

MR BELTRAMI: Next point. More broadly on her evidence she was content to leave the drafting to Allen & Overy, even assuming she was somehow relevant and all the rest of it. And that's -- I think the court has this but it's the witness statement, supplemental bundle 1, tab 5, page 80, and there was no challenge to this evidence, where she says -- and I think the court has it:

"I had no particular reason to second guess their drafting. Ms McMorrow would have been reviewing the documentation. We ...(Reading to the words)... happy with the process. ...(Reading to the words)... finalise for execution."

Now, she didn't say -- and Mr Phillips made this point, and it doesn't matter -- that she just never read anything and just left it all to somebody else. But

what she did say, we submit, and not challenged, was that she was not going to second guess. She wasn't going to go down every clause and paragraph in their amendments and work out exactly what it was and what it achieved and whether it achieved the purpose that she wanted it to do. To that extent, she was prepared to allow Allen & Overy Allen to draft the provisions they considered needed to be drafted and to proceed on the basis that they were the right provisions for Lehman.

And that, we say, is a very commonplace approach to any corporate constitution having drafted documents. It could never be a position in rectification that as soon as you identify a provision which the clients didn't interrogate, somehow that's a mistake.

There must always be a process by which a client is able to leave it in the hands of the lawyers and bear the consequences of doing so. It's not a --

LORD JUSTICE LEWISON: It depends, doesn't it? If you instruct your lawyer to do A, and he does A and B, you might be able to say he made a mistake.

MR BELTRAMI: Your Lordship is absolutely right. And this is a point that I think your Lordship made, and we made. I'm got going to go back to it. On one view, the case really being advanced is a case on authority. It's not called that, because it can't be a case on authority,

for all sorts of other reasons. But in one sense the real case being advanced is, well, we wanted to do X; you went off on a frolic of your own and did Y; you weren't authorised to do that.

If that had been the case, different trial, for all sorts of reasons it would have failed, but in a sense that is ultimately the complaint. But there's no such complaint here. It's not alleged there's a lack of authority. So if there's no lack of authority and the client is prepared to go along with the drafting, you are only into rectification. And we would submit that you can't be into rectification on those facts.

So that was her positive evidence. It wasn't even an absence of evidence of her intention, her positive evidence and intention was that she was prepared to let Allen & Overy do the drafting. That was what we submit assisted the judge in his conclusion that the only intention within Lehman was for the objective meaning of these notes.

Now, third, going slightly out of the sequence but, third, the amendments weren't a mistake by Allen & Overy.

Now, we must be a bit careful with Allen & Overy because no one has suggested that they were the decision-makers and no one has suggested their decisions

were adopted. So in a sense, Mr Grant's evidence is not actually evidence relevant to rectification. It might be background, but there's been no link up to Lehman for his evidence.

But nevertheless we know that the amendments were specifically and intentionally drafted by them, after careful deliberation, to resolve a particular problem which they had identified. There was a tax problem and a consequential subordination problem. So it was a deliberate drafting process to achieve a result which they intended to achieve. And from their perspective that wasn't a mistake, because they achieved the result that they intended to achieve.

Now, there is a suggestion, or there was a suggestion on the evidence, that Mr Grant didn't intend to change ranking.

Now, one always has to treat that with a bit of a pinch of salt. On his evidence, he didn't even know there was other subordinated debt. He didn't even know there was a ranking question against other debt. He didn't know the ranking position was about the other debt because he didn't know it existed.

So for him to say after the event, I didn't intend to change ranking, isn't really evidence of fact, because he didn't know there was a ranking issue to

be addressed.

What he knew was that there was a subordination issue to be addressed, which he addressed effectively. And we say that did not give rise to a mistake in his context even if his intention had been relevant.

LORD JUSTICE LEWISON: I mean, if you say: I've drafted this but I didn't mean to change the ranking, I would expect the drafter to have had a view about what the pre-existing ranking was.

MR BELTRAMI: He didn't even know there was a ranking, because in his evidence he didn't know there was other debt. One doesn't -- it's difficult to grapple with that. And we do say, I mean, as a technical point about consequence et cetera, what he's talking about when he says "I didn't intend to mean ranking" is not that it's so much the legal effect of the document, because the document is a document. The document subordinates, on my construction, the notes at a certain level.

There's no mistake about that. That's what they do and that's what we say he intended to do because he drafted it so as to subordinate them at that level.

What he says he didn't intend is, if you like, the sort of factual consequence of that, which is that if you do subordinate at that level, some other debt might find itself above you. And that isn't a legal effect of

the document. It's a factual effect if that other document does or doesn't exist and say something.

So one has to be quite careful as to what the mistake supposedly is. And in terms of what the document does it does exactly what he intended it to do.

What he says in his evidence he didn't know was the factual consequence of that, which wouldn't be sufficient for rectification anyway.

So that's my third point, Allen & Overy.

The fourth point is -- sort of a build-up but in contrast to some other cases such as FSHC the amendments can't be said to have been overlooked by Lehman. That's why I took your Lordships and Ladyship through the facts. They were staring them in their face. They were all over the blue amendments. They were flagged by way of email. We have set out in our skeleton -- we don't need to turn it up -- 93(b). All the people in Lehman we identified who saw them because they were the recipients of a number of emails.

And we know in that email that I showed you from August they were specifically looking at the notes in order to decide a tax issue by reference to ranking. So it can't be said it bypassed Lehman. The documents were there in their face and flagged. And we say again that is inconsistent with an idea of rectification.

The fifth point is the judge's finding that not only was this a matter never discussed but that, had it been discussed, it would have been regarded as a matter of indifference to the parties, and if it had been raised, would have been dismissed as irrelevant.

That's judgment paragraph 262. That finding -- and I know the finding is sought to be challenged, but that finding by itself, we submit, is fatal to any case of rectification. It's one thing to say, well, it wasn't discussed. We submit that isn't nearly enough on the facts of this case. But if the conclusion is that even if it had been discussed it would have been dismissed as irrelevant, it is, we say, impossible to conclude there was relevant mistake for the purposes of rectification.

There is no case remotely similar to that effect or that factual finding in the bundle at all. Mr Phillips did describe it as a fundamental change, but the judge found as a fact that it would have been a matter of indifference.

We say he was perfectly entitled to make that, having heard all the evidence before him. In particular, in light of the regulatory indifference, no difference for regulation purposes. Clear evidence it was never discussed because no one ever thought it would arise or be relevant. Evidence that the amendments were

flagged but nobody thought: does that create a problem?

Nobody, on the evidence, not Ms Dolby or Ms Hutcherson, who was the other potential candidate, was able to say that it would have made a difference. The highest it went, if you go to Ms Dolby's witness statement --

LORD JUSTICE LEWISON: She says she would have discussed it.

MR BELTRAMI: She would have discussed it, but where does that take you on the discussion? Because the judge's finding is that even if you had discussed it it would have been met with indifference.

Nobody was able to take that next stage, that had it been discussed we would have done something about it. So there was an absence of evidence of that critical bit. That they would have discussed -- I think in fact it was "may have discussed" -- doesn't suffice or doesn't amount or isn't sufficient to challenge the finding of indifference.

And the final point, just going through the facts. We know this was a deliberate change by Allen & Overy for a deliberate tax purpose. So on that hypothetical, had it been raised, one would assume that Allen & Overy would have explained why they had done it. And in circumstances where no one in Lehman thought this issue of ranking was of any relevance at all, the judge was

perfectly entitled to conclude that that the conclusion had been it doesn't matter.

And also don't forget that because -- one mustn't forget that this rectification thing is for the whole of clause 3A. The whole thing has to go. So my learned friend's hypothesis has to be that the judge ought to have concluded that had this been raised, Ms Dolby would have discussed it with somebody, somebody would have said, "Get rid of the whole thing". It wouldn't be enough for them to say, "Just change the ranking provision", because that's not their case. Their case has to be that the whole baby has to go out with the bathwater, even though Allen & Overy are saying there is a tax issue which we are dealing with.

Now, that is so far removed from the evidence, and there is no evidence to support it at all, that there is, with respect, no basis at all to challenge the judge's finding of 'so what'.

And if they can't challenge the judge's decision of 'so what', there can't be a case on rectification.

The final point on this is that there is essentially a single theme running through much of SLP's case on rectification, which is that the change in ranking didn't fall within the supposed purpose of the amendments. Your Lordships and your Ladyship know the

point: namely to defer interest. And reference to board minutes et cetera. There you are. That's the purpose.

LORD JUSTICE LEWISON: You have been over that, haven't you?

MR BELTRAMI: I think I have been over that. Can I just show you -- your Lordship has the point. On the face of it it was a lot more than that. We know from the evidence it was a lot more than that. Mr Grant confirmed in his evidence it was more than that. Let me just give you that in case you don't have it, which is bundle 2, supplemental 2, page 549.

LORD JUSTICE LEWISON: Do you have a tab number?

MR BELTRAMI: Tab 51, I hope. And it's on the right-hand column. I asked him specifically about the bit about these documents. And from line 9, that was a reference --

LORD JUSTICE HENDERSON: Sorry, which page are we on?

MR BELTRAMI: Top right.

LORD JUSTICE LEWISON: 123?

MR BELTRAMI: 123, top right, line 9. I'm asking about one of the documents. I think it was the core(?). One of these purpose documents anyway:

"Question: That was a reference to the initial driver of the notes rather than being an exclusive statement of all of the purposes of the amendments?

"Answer: Yes, that was a reference to the core

commercial change that was being made.

"Question: The core commercial change -- wasn't a comprehensive statement?

"Answer: That's right."

So in a sense it's a statement of the obvious. We have seen that from the evidence. But to try to mount a case now there should be rectification because there was a single purpose, first of all it's not consistent with the evidence we have looked at, and not even consistent with Mr Grant's evidence that this was nothing more than a statement of a purpose, not the statement of the purpose.

So the conclusion from all of that is that in terms of intention the judge was entitled and right to find that there was no intention beyond the objective reading of the notes, and therefore there was no mistaken intention, even if Ms Dolby's intention is the relevant intention for this purpose.

Third point: no outward manifestation of accord. And all these are independent objections. FSHC confirms the absolute requirement and independent requirement of the outward manifestation of accord in order to support a common intention rectification case.

And that's paragraph 176 of Lord Justice Leggatt's judgment, amongst other cases. And the judge had

a separate conclusion that there was no such outward manifestation here.

Now, the contention from SLP3 is that that requirement does not obtain in this case because this is more like a pension case. And as Lord Justice Leggatt explained, there's a sort of special rule for unilateral documents -- starting with unilateral documents, moving into pension documents, where a unilateral document is clearly just one intention, that is important, in pension type documents what Lord Justice Leggatt says, and I won't through the detail, is that you still need a common intention but there doesn't need to be an outward manifestation of accord, in circumstances which it's a sort of hybrid document where one party, the trustee, has the power to amend and the other party, normally the company, can only consent to it.

So it's not really an agreement, a contract, as such. It's a sort of hybrid document where there's a power to make an amendment subject to a right to consent.

And that's what is explained in FSHC as to why those type of documents don't carry with them the requirement of outward expression or manifestation of accord. Both have the same meaning or intention, but they don't necessarily have to share that intention between them,

because it's not quite a contract; it's something in between.

Now, what's sought to be alleged here is that they're in that category, they're in the pension type document rather than a contract type document, and therefore they can avoid the need for outward manifestation of accord.

And that takes us to clause 12 of the notes. We can pick that back up if we may at core bundle 3, tab 41, page 728.

To be clear, before we go back to this clause, we submit this argument is entirely wrong. These notes are commercial contracts. Of course they are commercial contracts. They are multilateral commercial contractors between the Issuer and the noteholders, and, we say, in fact a regular species of commercial contract.

Any amendments to such an agreement, subject to one point which I'll show you, in the normal way requires the consent of both contracting parties, as with any other commercial contract.

And therefore we are full square within the normal rule as per Lord Justice Leggatt where manifestation of accord is required.

The reference to clause 12A has nothing to do with this at all. The reference to 12A concerns the means by

which the noteholders are deemed to agree. So sometimes called a cramming down provision. I think my Lord Lord Justice Lewison referred to this. There could be 100 per cent noteholders' agreement. Pursuant to clause 12A, if there's a reserve matter there could be an extraordinary resolution, which requires, I think, 75 per cent or 68 per cent or whatever it is. I think it's 75 per cent.

But the purpose of that is to say, not all the noteholders have to agree. They can still be bound if the relevant majority agrees for them. So their bit of the contract can be processed with other than 100 per cent agreement, because clearly as a multilateral contract everyone would have to agree, in theory, for any change.

And what this provision says is that when you are looking at the noteholders they don't all have to agree; some can be forced to agree if there's a relevant majority. And that's a matter of process within the noteholders.

But it doesn't say "and that will do the job", because what you then have to have is the agreement of the Issuer.

And this says nothing about the agreement of the Issuer. This contract couldn't be amended without

the agreement of the noteholders and the Issuer. All this does is say what will suffice for the noteholders' agreement. You still have to have the agreement of the Issuer. And that is why this is still a normal contract. This is why it's nothing to do with the point that Lord Justice Leggatt made.

This is not a contract that can be changed by one party, to which the other party has to consent. This is a contract to which both parties have to consent to any amendment. And clause 12A indicates how a noteholder can be deemed to consent. It says nothing at all about the Issuer. So it's completely irrelevant to this point.

Now, the only other issue, and in contrast almost, if you like, is 12B, just out of interest, while we're there. And that provides for some circumstances in which the registrar may, without the consent of the noteholders, agree to a modification in limited form.

So there's some process by which a registrar can effect an amendment, essentially as you might -- not expansive(?) material. So that is, on the face of it, something that wouldn't have to be done by agreement.

But we're not in that territory at all. What we are in the territory of here is an agreement to defer interest and to make other changes to the notes. And we

submit there's absolutely nothing in clause 12 to suggest that an agreement to make that amendment would not require the consent of both contracting parties in the normal way.

LORD JUSTICE LEWISON: The registrar -- I wondered if this was something to do with companies registration or Stock Exchange registration which turns out to be Lehman is the registrar on the definitions.

MR BELTRAMI: Well, I hope that wasn't the cause of all the problems. Who knows? But yes. Anyway, there's a small facility to make minor changes unilaterally, but there's no suggestion of unilateral amendments to anything else. There's just a process by which noteholders' agreement can be crammed down.

So because of that, I'm afraid we need an objective manifestation of accord.

Just to pick up one point, my learned friend also says, well, if you look at the resolution it uses the word "consent". The SLP3 resolution was consented to by LBHI2 as issuer.

But, fine, they used whatever wording they used. It doesn't affect the construction of the agreement, which is a multilateral contract requiring the agreement of the parties.

Now, if I'm right on that the question is, was the

judge right to conclude that there wasn't objective manifestation of accord? The only documents that are relied upon in support of the objective manifestation of accord are those documents about purpose. So we are going round in a circle.

So if there was such a requirement, which plainly there was, there was no objective manifestation of accord, on the judge's findings. And he was quite right to make that.

So that's my third point. My last point, which I know the court has, is -- I say "last point", and then I'm going to respond -- that the claim collapses under its weight, simply almost proves too much, such that it's impossible. The only claim to rectification before the judge was the one that the court now sees, to remove virtually the entirety of clause 3, as proposed in draft 2, and essentially to restore draft 1. So one goes back to 5 June, on the SLP3's case.

There was never any alternative case. But to succeed on that case the submission has to be that Lehman's actual intention was that the entirety of clause 3 should have no legal effect, ie that the whole exercise was a mistake. So it was a mistake to include Mr Dehal's tax changes and a mistake to include Mr Grant's consequential ranking changes. But there is,

we submit, no possible basis, even on the most favourable interpretation of the facts, to rewrite the tax changes, and indeed very dangerous now to do so, to restore Lehman's position and expose them, on the face of it, to a potential tax problem which they have resolved through that process.

Now, in any event it can't be characterised as a mistake. It was specifically intended by Allen & Overy. It was specifically flagged with Lehman. And it was for a particular purpose, not even alleged at trial to be erroneous, let alone established at trial to be erroneous. And it would be simply an impossible conclusion in a rectification case to throw out the whole of the clause.

But on the assumption that the tax changes must stay in, the subordination changes must stay in, because those were specifically intended to resolve the subordination problem consequential on the tax issue.

The real case -- I say "the real case" -- if they could get over everything else, their case which they ought to have advanced is not the case which they did advance and refused to resile from, but that somehow clause 3 should be rectified to have a sort of saving provision to say, well, nothing affects subordination against other debt, or something like that. I don't

know. Some sort of provision which could preserve the tax position, possibly. And we don't know if it would or wouldn't preserve the tax position, of course. That would be another discussion. But some provision to deal with the ranking problem and preserve all the rest of it.

That, in a sense, is the only, frankly, credible case that could have been conceived in this. It hasn't been advanced so we don't have to deal with it.

It appears to us it probably hasn't been advanced, because it is not really consistent with their purpose case. It seems that they wanted to run the purpose point: look at the board minutes; the purpose was deferral of interest; everything else should be rectified; it seems to me that's why we are where we are. That point doesn't work, for the reasons I have explained. We are left with a sort of monster which simply can't reflect the evidence.

So that's my fourth point. It just breaks under certain(?) weight. Your Lordships have that point.

Can I now deal -- and we are making very good time -- the grounds of appeal or the arguments on appeal in relation to the rectification case.

Maybe we can pick it up best from my learned friend's skeleton, which is CB1, tab 7, page 91.

Core bundle 1.

LORD JUSTICE LEWISON: You have already given your answers to these so you needn't go over them again.

MR BELTRAMI: I shall certainly try not to do so.

101, the first complaint is the judge failed to consider relevant evidence. To which we say, well, this couldn't possibly be a self-standing ground of appeal. He simply considered the evidence wasn't enough for rectification. He was perfectly entitled to do so. He didn't set it all out. Had he set it out, we'd have a longer judgment but with same answer. So that is not a ground of appeal.

The second objection, 107, is about intention. This raises one legal issue which I'm going to have to deal with at some level. It begins at 107 of the skeleton. As we see it it's a factual challenge which almost looks like or is made to look like a legal challenge, about what you have to prove for intention, particularly for amendments.

Now, it's clear as a matter of law, we submit, that rectification is possible only where a written contract conflicts with the terms which the parties positively agreed. It's not enough that the written contract provides for something they didn't agree.

So it has to be a positive conflict as opposed to

dealing with something they didn't agree to because they didn't discuss it or forgot it or whatever.

And that is, we say, clear on the authorities. If you go to -- the first one is Lloyd v Stanbury, authorities bundle 1, tab 6, page 89. In this case it was a sale of land by reference to an Ordnance Survey plot and it included a plot which the vendor claimed he intended to retain and that was included by mistake. And the question was whether there was a right to rectify that on the grounds of mutual mistake.

If you go to page 97, Mr Justice Brightman explained what needed to be shown for the rectification case. And at 97F:

"If the defence of rectification is to succeed I must be convinced that it was not the intention of either party that the plot should be included in the contract. It is not sufficient that there should be convincing proof that the written contract didn't represent the true intention. I must also be satisfied that there was a common intention that it should be excluded. There's a difference between not thinking about it and having a positive contrary intention."

And one can see that as it then played out in his analysis. Over the page on 98, top of the page, talking about the purchaser, I think:

"... highly unlikely he was interested in the question of precise boundaries. He was content to leave the exact location to his legal advisers and he didn't have the least idea who was going to be the owner of the plot."

So this is one case where one party had not thought about the point, but that was not enough. They both had to think it wasn't included, as opposed to they both had to think nothing about it at all.

Can I take you to a more recent case, which is Ralph v Ralph, at authorities bundle 4, tab 68. This was a slightly unfortunate case in many ways. It was a case to rectify the Land Registry form where parties had ticked the box for tenancy in common in circumstances where, if you go to paragraph 1:

"The question is whether a Land Registry form signed by the transferor but not the transferees should be rectified to remove a manuscript cross from the box."

On the grounds, as said in the paragraph, the trial judge held in the evidence no such thing had been actual agreed between the parties.

LORD JUSTICE LEWISON: They didn't agree that the manuscript box should be crossed.

MR BELTRAMI: Yes. There's the problem. They hadn't agreed it. They hadn't agreed anything about it, is the

problem. If you then move down to paragraph 3, then just over the page on 2337:

"I am entirely satisfied it was never intended by either party they should be joint owners in equity."

So they didn't intend to be joint owners. And at paragraph 7, the appeal. I think the judge granted rectification. He said:

"The main ground of appeal was inadmissible. There was no positive subject of common agreement between them and no sufficient outward expression of accord."

So ie they hadn't agreed anything. And the way it was then dealt with, if you move down to paragraph 34:

"... not necessary to decide whether the need for outward expression of accord."

That's because it wasn't a normal contract, of course:

"That's because, as I see the facts ...(Reading to the words)... the trial judge did not find any continuing common intention at the time of completion of the purchase as to the beneficial interest that each was to hold."

So the absence of intention was inadequate. And then 37, to confirm:

"There is no suggestion ...(Reading to the words)... the trial judge thought it had been proved to be

a continuing common intention that the property should not be held for themselves in equal shares. The most that can be said is that the trial judge found they had not agreed the property should be held in equal shares."

So kind of harsh, but rectification, I'm afraid, is harsh, and it's limited, and we know that. But clear exposition of the need for a positive contrary intention as opposed to no intention, which ends up inconsistent.

LORD JUSTICE LEWISON: I have at the back of my mind there is a case called Kemp v Neptune Concrete, which says something along these lines. I think it's a decision of this court in the '70s or '80s.

MR BELTRAMI: We can try to dig that up overnight, my Lord.

If we just go back to 35 because it feeds into a point about FSHC:

"In discussing this difference between positive intention and absence of intention, the reference FSHC see the deed would only provide the missing security."

And there may be an ambiguity in the word "only", but the idea was that it was only that and nothing other.

Now, that is the rule. There is no different rule of law when dealing with amendments. There's no special rule of law that in rectification you need to prove something different when dealing with amendments.

However, we accept, and it must be right, that in any case of rectification the court can infer an actual common intention. You don't have to have direct evidence of such. You can infer it from the evidence that you have.

That's the test. But the court can infer it from the evidence. And equally we accept that in a case of an amendment a clear positive intention to make one change might be evidence in support of a finding that there was intention not to make a different change. So it's evidence and it's capable of being inferred. And maybe in an amendment there's a greater run at it, all things being equal, than in a fresh contract from the start.

But that's not a rule of law. It's just a rule of evidence as to what one gets from the material one has. What is important and what one is looking for is the actual positive intention.

If one goes back now to the skeleton, core bundle 1, tab 7, page 89, paragraph 91. There are two contentions -- two principles.

In paragraph 91 there are two propositions being advanced, not to include the circumstance where the judge himself specifically acknowledged the rules in employee pension schemes ...

Sorry, that's the wrong reference. I apologise. It's paragraph 93. These are two propositions:

"He ought to have applied these two principles."

And the first principle is, 93.1:

"If decision-makers had a subjective intention only to make a specific change, it 'necessarily follows they didn't intend to make a further change'."

That's the first proposition. And the second proposition is at 2:

"If change X has been the subject of discussion, the absence of discussion about Y may be evidence that parties didn't subjectively intend."

Now, I quarrel with the first one. That's not -- when it says "necessarily follows" it sounds like it's supposed to be a principle of law. It can only be an argument about evidential significance. But it's only ever in the way it's framed a circular statement, because it all depends on what one means by "intention only to make a specific change".

And this is where one gets into this semantic debate about purpose et cetera. As we have said in our skeleton, there is a difference between you intend to make change X and you intend to make no further exchanges, or you intend to make change X and you are indifferent to further changes. And that is the

difference. And both of them can be conveniently described as: you only intend to make change X. But they have different analyses.

And we submit it doesn't really matter in our case because the judge found they didn't intend only to make change X. And on the evidence they didn't intend to make change X because there were other agreements on the face of the agreement which they must have intended.

But even if they had got that far, even if they had established only intention to make change X, that's only half the question, because the real question is, do you intend to make change Y? Or are you indifferent to make change Y?

And again, on the judge's findings they had no intention in relation to change Y one way or the other. So we're back into these cases where there's no intention -- at best on SLP3's case, we are back into these cases where there's no intention either way.

So that first proposition doesn't advance the argument.

The second proposition is a matter of evidence. We accept that discussion may assist the inferences to be drawn. But the trouble is, the judge didn't draw those inferences. And we submit he was perfectly entitled to do so.

That's the response to that.

We do say that this case stands in stark contrast to the cases that were referred to in my learned friend's skeleton where inferences were drawn. I won't take you to them because it's different facts et cetera. But in both, for example AMP, certainly AMP and Barker, the pensions case, the evidence was they would never have agreed this. The evidence was it made a massive difference. What they intended to amend was something which would have had minimal financial impact, and on one view might have benefited the fund. The consequence of the amendment was the acquired liabilities of something like £30 million. And the evidence was, had they known that, they obviously wouldn't have done it.

So it's a different scenario where one infers intention not to make change Y, in that sort of circumstance. Similarly, in FSHC the facts were extraordinary. They intended to complete the security by putting in one piece of a security arrangement which had been agreed in an earlier transaction and they had forgotten to complete. So the intention was to put in that one piece of security in order to fill what they had earlier agreed.

They did it by way of accession deed. The accession deed also lumped in a lot of other liabilities. And all

of a sudden the whole business was under threat because they lumped in liabilities which they had never agreed to do. It was called absurd, commercially hopeless and all the rest, and again they would never have touched it with a bargepole had they known that was the consequence.

So those are the sort of fact patterns where one can infer from an absence of a discussion an intention not to make change Y. But they are all extreme situations where it's obvious that the party concerned would not have agreed to the change had he known it had been made.

And that goes right back to judge's finding about 'so what'. That is why 'so what' is so fatal to so much of this case. As soon as you are in that situation you are not in the same (inaudible).

So that's all that. I think if one then goes to -- nearly finished -- 112 of the skeleton.

LORD JUSTICE LEWISON: Paragraph or page?

MR BELTRAMI: Paragraph 112. It's said there's a challenge to the finding of intention by reference to factors relied upon. And I think I have gone through some of these, so very briefly, at paragraph 82 it's said that the judge's finding was contrary to Ms Dolby's evidence. But for the reasons I showed you it wasn't Ms Dolby's evidence. She was dealing with tax. She wasn't

concerned with anything else. She was content to leave the drafting to Allen & Overy. Something that had no tax implications had no concern for her.

83 and 85 seem to be points about purpose, which we have dealt with.

86 is a sort of trailer for the authority case, because it's then said the sole instruction was to defer interest. But that is not the case we are dealing with. So that doesn't help.

In fact, I asked Mr Grant about this, though I won't ask you to take it up. I asked him if he considered he did have a wider remit, as one would expect, as I think my Lord Lord Henderson referred to yesterday. On his evidence he said, well, if I saw something that was a problem I considered it was within my obligations to deal with it.

So it wasn't a matter of constraining authority anyway. He considered he ought to deal with a point which was available to be dealt with. But it 's not an authority case so that doesn't go anywhere.

And 87, absence of discussion. That is something we have dealt with.

Paragraph 116, the next challenge on appeal is the challenge to findings on 'so what', which I have dealt with.

And paragraph 118 is a challenge to outward expression of accord, which I have dealt with as well.

So I'm pleased to say I have come to the end of my submissions, subject to any questions your Lordships have.

LORD JUSTICE LEWISON: Thank you, Mr Beltrami.

Ms Tolaney, I think you are next. No repetition.

MS TOLANEY: Indeed, my Lord, which makes my submissions very short.

Submissions by MS TOLANEY

MS TOLANEY: I am very grateful to Mr Beltrami and adopt his submissions.

In our skeleton argument we had taken two additional points, the second of which was on rectification at paragraphs 14 to 22, and Mr Beltrami has covered it so I will say nothing further about that.

The first point we said in our skeleton was a point that actually doesn't arise on our case. It was simply an answer to Mr Phillips' submission that the factual matrix might be relevant if the interpretation wasn't clear. And what we said in that event is first of all interpretation is clear for the reasons that Mr Beltrami has given. And secondly, if it wasn't, the answer wasn't what the judge did and what Mr Phillips proposed, which is simply essentially to not engage in a process

of contractual interpretation, but rather, to apply the Bromarin-like principles which is I think what my Lord Lord Justice Henderson had in mind yesterday.

LORD JUSTICE HENDERSON: I'd forgotten the name of the case, but Bromarin was what I had in mind.

MS TOLANEY: Exactly. It was what the parties would have intended was the correct exercise, not simply abandoning the process of construction.

Now on this appeal it makes no difference, we say, because the outcome's clears as a process of construction but I will return to that in the context of the PLC appeal where that line of authority is what we rely on. It's what we cited repeatedly but wasn't mentioned at all in the judgment.

My Lord, that's everything I had to say.

LORD JUSTICE LEWISON: Thank you. That's short and sweet and no repetition. Mr Arden next.

Submissions by MR ARDEN

MR ARDEN: I have been given 15 minutes, I pretty am sure I could do better than that.

The position of the administrators is not just as to (inaudible -- off-mic) the outcome of the ranking issue.

LORD JUSTICE LEWISON: You just want to know what to do.

MR ARDEN: We want to know what to do. There are really just two points I want to cover now against that, if

I could. We've obviously provided a certain amount of information relating to the position as to the two estates. Now, In a sense the figures don't matter and don't effect -- make no difference to the outcome on the ranking issue. All one needs to know is that there is in the case of the LBHI2 (inaudible) case of the PLC, the PLC has said maybe(?), and that on either case there is a shortfall, and that's it, that's all one needs to know.

We have in the skeleton just referred to some of the progress reports. I think I just wondered this, and it's all I wanted to say on this point now, if the court thought that it will assist in terms of judgments to have just some headline figures which just show where the estates are as things stand and where they think they will be --

LORD JUSTICE LEWISON: I think we've been told they are somewhere between 300 million and 800 million for distribution, but that's way below the amount of the subordinated debt.

MR ARDEN: Things have moved --

LORD JUSTICE LEWISON: Do we need to know much more than that?

MR ARDEN: Not for the purposes of the exercise you have to undertake. It's simply that the figures are rather

different. It's somewhere between 800 million and a billion and subject to some costs, but there is a degree of uncertainty. It's all gone up a bit and there's a little bit more certainty. The gap between best and worst is narrowed to a modest 200 million, rather better than it was.

If you think it would help for a section of the judgment or judgments then we could do that.

LORD JUSTICE LEWISON: I think we can take the figure from you, can't we?

MR ARDEN: If you take the figures that I've just given, which is that --

LORD JUSTICE LEWISON: They are only illustrative. As you say nothing actually turns on it in terms of what we have to decide.

MR ARDEN: No, that's right. In terms of realisations and potential surpluses it's somewhere between the two figures that I have just given. Of that, about 600 million has already been received of which about 350 million has been distributed already in fact to PLC but with the agreement of the two parties. So we have about 250 in hand. Most of the rest of it will come from distributions out of the LBIE estate made to LBHI2 in its capacity as a member and that's where the gap is, as it were, the uncertainty. And in respect of that

it's a 200 to 400 band, and that's probably what the first set of bullet points have said. So if you are happy with that then I will take it no further.

The other point I wanted just to raise now before I sit down, it just arises out of the difference between Mr Phillips and Mr Beltrami about the right way to approach the question of priority, and I will just tease out Mr Beltrami's approach. Essentially, and he may not entirely agree with the way in which I just summarise it, but essentially his submission was that this is all about ranking, focusing too hard on the right to prove proof and the scheme is the wrong way around; that what the court needs to do simply is to determine the question of ranking and that's a -- it's essentially by a process of contractual construction.

And then what follows from that, in terms of the scheme, is what follows will follow from the answer to the ranking question. So if you don't infer(?) to say: is there a right to prove or is there not? You simply say: who has priority? Who has priority over who? And then work out the consequences.

Now, so far as my clients are concerned I think we understand that and so I think essentially what is being said is you give effect to the ranking conclusion in whatever way is appropriate in the circumstances in

which you find yourself. And so that might be, for example, by preventing a creditor, subordinated creditor, from submitting a proof at all.

In a sense that's stage 1 of the Waterfall 1 order, and necessary in that case to get over the logical problem that Lord Neuberger identified in the Supreme Court.

You might not need to go that far -- you might not need to stop it at that point. If a proof has already been submitted you could give effect to the subordination agreement, an officeholder could give effect to it by simply declining to deal with the proof, just putting it to one side and say: I'm not going to deal with this; and so not admitting it. And in a sense that's the second part of the Waterfall 1 order where the order went on to say that the subordinated creditor could require the office holder to deal with the proof, so assume it's been lodged, just simply don't do anything, conceivably an officer holder would be justified in rejecting a proof on the grounds that it's simply premature.

The other way in which it could arise, or another part of the distribution process where the question could arise is in the context of distribution. And giving effect to a subordination agreement and to

priority might, for example, certainly would justify an officeholder in not reserving for a subordinated claim in any distribution -- in any distribution that's made, until one gets to a point where you know that there is a surplus, so it matters.

My Lord, that, I think, is what I understood Mr Beltrami's -- or where his approach to this leads, that essentially you wait until you look at the circumstances in which you find yourself, the officeholder does that, and then gives effect to the subordination, the ranking, in whatever way is appropriate in those circumstances.

I tease that out because essentially this is the way in which the officeholders will look at: well what are we supposed to do in the circumstances of this, or indeed any other case? And as it seem to me, listening to Mr Beltrami's exposition, it was something of the nature that I've just described: you just ask the question, look at the circumstances and it may be there that there be various ways in which the officeholders should do it and would be justified in doing it.

I think really that is all I want to say, it's a sort of teasing out of what -- it doesn't -- it's not Mr Beltrami's right or wrong, it's simply this is where we think that that submission goes. And goes, so far as

is relevant, to the officeholders in deciding how they should perform their functions, what they would be justified and required to do in the circumstances of a case like this.

I think that's really all I wanted to say, everything else will be obvious and clear to the court and clear from the skeleton so I don't have anything else I can usefully add.

LORD JUSTICE LEWISON: Thank you, Mr Arden.

Yes, Mr Phillips.

MR PHILLIPS: Your Lordships will have seen from the timetable that despite my having detained your Lordships until too late last night --

LORD JUSTICE LEWISON: We are well ahead.

MR PHILLIPS: Well ahead. And I was wondering in the circumstances if we might rise now to give us a little bit of time to make our reply as helpful to your Lordships as possible. I could of course do it now, I'm in your Lordships' hands. I could of course do it but it probably wouldn't be as helpful to your Lordships as it would be if perhaps we could rise now and I could start first thing tomorrow morning, but ultimately I'm in your Lordships' hands.

MS TOLANEY: My Lord, I've given up the time now because it's sensible for me to take the argument on the

Bromarin line of authorities in the PLC appeal. But I am quite tight for time there and I have been limited on that, and on partial relief, both of which are quite heavy points. So having gone ahead in the timetable today I was hoping to get a little bit more time.

(Pause).

LORD JUSTICE LEWISON: I think we would like to carry straight on, please, Mr Phillips.

Submissions in reply by MR PHILLIPS

MR PHILLIPS: My Lord, do forgive me if any of my points -- forgive the fact that I have a screen up because I have been making notes on the screen, which is frightfully modern for me.

The first point that I wanted to deal with is the contingent debt point. My learned friend, whose submission was that Lord Neuberger had not decided that the decision did not go to whether or not it was contingent, Lord Neuberger did decide that it was not contingent and the reason why that was critical to the case, never mind about the points around the outside, is that contingent debts can prove at any time and are valued. And the reason why Mr Snowdon argued in that case that the debt was contingent was because if the debt was contingent then the debt proved and then there was an argument that under the rules, because it was

a debt proved, that the interest would be payable on the subordinated as well as the other debts, and that's the reason why it was run.

LORD JUSTICE LEWISON: Can I just ask you this: if I have a contingent debt, the rules say I can prove it.

MR PHILLIPS: Yes.

LORD JUSTICE LEWISON: Can I agree not to prove it until --

MR PHILLIPS: Of course.

LORD JUSTICE LEWISON: So why does it matter in the context of Waterfall 1, given that the decision seemed to turn on clause 7, which both Mr Justice David Richards and the Supreme Court interpreted as precluding a proof.

MR PHILLIPS: Sorry, forgive me. It didn't only turn on clause 7, it turned on Lord Neuberger's analysis that it wasn't a contingent debt primarily because of the logical problems that that gives rise to.

LORD JUSTICE LEWISON: I see that. I see the logical problem, but -- well, all right.

MR PHILLIPS: And that's what then led Lord Neuberger to decide it wasn't a contingent debt. And I quite understand there's clause 7 as well, I quite understand, but on contingent debt that was decided in that case. You can tell that it was decided in that case because of the changes in the orders.

LORD JUSTICE LEWISON: Yes.

MR PHILLIPS: Because your Lordships in the Court of Appeal changed the order and expressly said it was contingent debt and the Supreme Court changed it back and said in their judgments it was not a contingent debt. And as I've said the point about provability turned on it being a contingent debt, the disagreement turned on it being a contingent debt; and if I may respectfully say although there are the other points that is the ratio.

My learned friend, with respect, is wrong in his analysis of the case and the correct analysis is in that paragraph I took you to this morning in the learned judge's judgment. And the reasoning of the learned judge, which if I may respectfully submit is correct, is that if a subordinated debt agrees to prove after senior debt that of itself is an agreement not to prove until after the senior debt. And you do not need a separate mechanism. I quite accept, my Lord, you can have contingent debt with a separate mechanism. But the shorter and the more important point is that -- it's two points -- is that you can't prove because it is subordinated debt, and that's how it works, and as I have indicated the line of reasoning goes back to MCC and it's not contingent debt.

Can I then, if you don't mind, just say something about Mr Fuller and Mr Fuller's book.

LORD JUSTICE LEWISON: Yes.
MR PHILLIPS: Mr Fuller's book was not cited to the learned judge and he refers to why it wasn't cited, because when we saw his draft judgment we explained why it wasn't cited, and there were two reasons. One is particular to Mr Fuller's position, is that he was the senior man in the Allen & Overy team and he commented on the drafts in this case. That's specific to him. But the intellectual one is actually more serious: Mr Fuller's book, with the greatest respect to Mr Fuller, is out of date and in many respects not accurate. His description in particular of how you subordinate by contingent debt is inconsistent with Lord Neuberger's judgment, and it was out of date because he didn't really come on board with what happened in 1993 in the MCC decision. It's footnote 50 in the learned judge's judgment.
LORD JUSTICE LEWISON: So when the judge quoted from Mr Fuller's book that was his own research, was it?
MR PHILLIPS: That was his own research. And if I can put it that way, in my submission it's highly regrettable, because he wasn't addressed on it and he did adopt an awful lot of Mr Fuller's analysis. And there's one point in the judgment where he is contrasting Mr Fuller's analysis of the Waterfall with Lord Neuberger in Nortel. And with the greatest of respect

a textbook is no substitution for the decisions in particular in this case of the Supreme Court. And the reason why I say that is because when you come to deal with contingent debt subordination the Supreme Court is really where one should be looking. I took you to Mr Justice Vinelott's --

LADY JUSTICE ASPLIN: Sorry to interrupt, can I just ask, because actually when one looks at the footnotes there are many, many references to Mr Fuller.

MR PHILLIPS: There are.

LADY JUSTICE ASPLIN: In paragraphs in Mr Fuller's work. Was this point not raised when you got the draft judgment? Had you said --

MR PHILLIPS: Yes.

LADY JUSTICE ASPLIN: -- "How can you rely on all this?"

MR PHILLIPS: Yes, we did raise it, my Lady. I should, in fairness to the learned judge, show you footnote 50 which is how the learned judge dealt with it.

LADY JUSTICE ASPLIN: I'm sorry, I do recall that after all.

LORD JUSTICE HENDERSON: Sorry, there is a sort of related question: did the judge explain why he was placing so much reliance on Fuller? I had at the back of my mind he may have said something about that, maybe that's what you were going to take us to, but if not one slightly wonders where it came from, so to speak.

MR PHILLIPS: Do you mind if I just turn up footnote 50?
LORD JUSTICE HENDERSON: Of course not, I am sorry, I didn't mean to ask two questions all at once, I thought maybe it might help if it gets the answer.
MR PHILLIPS: I'm reminded, you probably know this, but the judgment was in draft for some months, I think it was about three months in all. But yes, we did raise the point. And of course if it was a matter of interest to you we would be very happy to forward to you what we said to the learned judge. But what he says is the parties were quo(?) (inaudible word), and he explains the reasons, and he points out:

"The book is also eight years old in its third edition."

And he says:

"I have elected to cite Fuller because it seems to me important to use so far as possible the common set of terms of reference to the concepts here in play."

And one of the results, if I may respectfully put it this way, of having relied on Fuller is he picked up the similarity between my learned friend's submission and the description of "contingent debt" in Fuller and he's then gone with it. And one of the consequences is this contingent debt, simple contractual subordination analysis. And with the greatest respect to the learned

judge we do disagree. We have made our submissions. We don't think it's contingent debt. We do think you construe the clauses as a whole. It is a pay-ability condition. It does not make the liability contingent, if I can put it that way, my Lord.

But two other points, first of all this footnote was only added as a result of the submissions that we put in and in my submission it would have been preferable had a different approach been taken in relation to Mr Fuller's books as your Lordships know. We just didn't debate it. But I do respectfully want to make it clear that in my submission the question of whether or not clause 5.1 creates contingent debt as opposed to has a condition as to when payment can be made is an important point of principle.

LORD JUSTICE LEWISON: It's been decided by the Supreme Court.

MR PHILLIPS: It's been decided by the Supreme Court. And when I say "contingent debt", I mean contingent debt in the insolvency sense; in other words, that qualifies as a contingent debt when you prove it. I have not myself done an extensive trawl of other areas in which the description "contingent" might be used but it may be that this is restricted to something of a term of art, if I can put it that way.

But the point is 5.1 is not a contingent debt, that was the decision of the Supreme Court and I do respectfully submit that you should not construe this particular clause in those circumstances as a contingent debt.

LORD JUSTICE HENDERSON: There certainly are plenty of other contexts. I am thinking of the Law of Property in Trusts, where is a clear distinction between an interest which is actually contingent in the sense it doesn't arise until the happening of some event on the one hand, and interests which give rise to a present obligation which is only dischargeable in the future on the other.

MR PHILLIPS: Yes.

LORD JUSTICE HENDERSON: I mean, if it's a remainder subject to a life interest, at best immediately, it is not a contingent interest. Whereas if it's a remainder sort of per sums borne of X or Y that is purely contingent.

MR PHILLIPS: My Lord, your Lordship has the point. And the point in this case is that the liability is always there, but there are conditions that need to be met before it can be paid. And the reason, as your Lordships have seen, that is done is to ensure that the subordinated debt is not paid before the senior debt; and that's where it goes to. And I'm reminded to say it's very much this is an insolvency law issue and it's

an issue my learned friend told you that he didn't think was terribly important but it is important as a point of principle.

So that was the first point.

The second point, if I may, was my learned friend's submissions on the preference shares, because -- it was very cleverly done but it's one of those occasions where you have to spot the joins. Because what my learned friend's argument depends upon is the notes being placed in the Waterfall at the level of a preference share and therefore having a ceiling as well as a floor. I will develop this a little bit but he described it as though it's a brick in the wall, and there it goes in as a preference share and once it goes in as a preference share you have your ceiling and your floor. And my learned friend said, and I wrote it down, "Preference shares have a clear and recognised place". That was my learned friend's language.

However, the notional preference share in the amended Sub-Notes does not sit in the clear and recognised place in the Waterfall that my learned friend identified. It does not clearly set a ranking by reference to such a place. If I can go back to clause 3, which I'm sure you have, it's CB3 at 741, it describes a preference share which could not in fact be

a preference share. And so you cannot take the well-known position of a preference share in the ranking or in the Waterfall and say: from that I can determine that that is where these notes rank. And the reason why I say that -- and this is where the joins were -- is that as you know it has a preferential right of return over and it's first of all the holder of all other classes of share. There's no problem with that. Preference shares having the rights over all other shares is not a problem and probably accords with my learned friend's description.

LORD JUSTICE HENDERSON: That's why they are preference shares.

MR PHILLIPS: Exactly, which is the well known position of a preference share. But this is not in that position, because it is also over the notional holders. And the notional holder is a creditor. The notional holder is a creditor whose claims against the Issuer are quantified as though they hold a notional share. And the notional share is notional ownership shares which have a preferential right. And we know why this has happened. But it is a creditor with a right over the preference shareholders because the notional holder is a preference shareholder. If one looks at the description of the notional holders that's the

preference shareholder. And it is a creditor with a right over that preference shareholder. And so the notes come in above a creditor and that is not in the clear and recognised place of a preference shareholder.

So what you get from this is what we've been saying throughout: it identifies above whom, but it does not identify below whom. It just identifies that they rank above a creditor, who is above the preference shareholders.

Now the fact that there is a description of "preference shareholder" in this notional mechanism is neither here nor there, that does not pin them in that well-known place of preference shareholders, so you do not find the ceiling bit, in our submission, you just don't find it and you do have to look at the rest of the clause.

That means that you look at those in respect of whom the notes are subordinated, and they are subordinated in right of payment, as you well know, to the senior creditors as defined. And we've seen the definition of the senior creditors over the page and I won't go through that again. That is below whom they are ranked.

We know why this mechanism has been used. It's being used because the upper tier 2 debt subordination type of technique is often done this way and this was

used for LT2 and so it was changed and it was changed by putting a creditor in. So rather than the mechanism which says: I am treating you as if you are a preference shareholder; it says: I am treating you as if you are one rank of creditor above a creditor. And so from that you just can't take the reference to "preference shareholder" as fixing in the ranking where they sit.

I'm not suggesting for a moment, my Lords, that this is not relevant. Of course it's relevant. We construe the clause as a whole. But it doesn't tell you below whom. It doesn't fix them in that ranking by reference to a preference shareholder.

Can I just make one other point. My learned friend throughout his submissions on this point referred to upper tier 2 subordinated debt holders as shareholders. That's not right. They could be preference shareholders or they could be creditors, and that is clear from --

LORD JUSTICE LEWISON: I think creditors were undated debt.

MR PHILLIPS: My Lord, you have the point, you have the point. But I did notice that that language --

LORD JUSTICE LEWISON: No, I think Mr Beltrami said that. My recollection is that he did.

MR BELTRAMI: I thought I'd said it, but if I didn't I'll say it now.

MR PHILLIPS: We are all clear, we are all on the same page.

Another point to bear in mind is that of course the preference shareholding position in the Waterfall would rank the notes below all debt and it wouldn't rank the notes above the notional holders. I'm sorry, forgive me if I'm repeating myself a little bit. As I've indicated you have to look elsewhere.

Another point that arose was the relevance of subordination inside and outside of an insolvency. And it is relevant -- and those provisions are not in there for no reason. What you have outside of an insolvency is you have conditions that would enable the Issuer to repay some of the subordinated debt. And in order to pay the subordinated debt outside of an insolvency you have to be solvent, in other words -- and the way we would construe it and I'm simplifying it, we would construe it is you have to be able to pay the senior creditors. You have to be able to pay the senior creditors and if you can pay -- and there are two things that you need to be able to pay ... sorry, you have to be able to pay your debts as they fall due, and your assets have to exceed your liabilities, other than those that are not senior creditors.

Now, for the purpose of this let me just go with my learned friend's split(?). You have our point about the brackets applying to both. Let's just take it for

a minute that it was debt. So outside of an insolvency you have to be able to do both of those things in order to repay your subordinated debt. And it matters which subordinated debt you have to be able to repay because the second of these, even on my learned friend's construction, is assets that exceed its liabilities other than the liabilities to people who are not senior. So those who you have to be able to pay turns on who are senior to the subordinated debt in question. And that applies outside and inside. So it identifies which subordinated debt you can repay, and it matters. And a senior subordinated debt can be paid before a more junior debt. And of course on the face of the judge's decision the notes could be repaid before the debt when Lehmans was solvent, if it passed the solvency test, these notes, the 6 million worth of notes could be repaid but the debt couldn't. Then once you get to insolvency --

LORD JUSTICE LEWISON: Just say that again, "on the judgment's judgment the notes ..."

MR PHILLIPS: On the judge's judgment the notes were senior to the debt prior to insolvency. So if you were to look at the debts solvency condition, because they all have these solvency conditions, you would have to be able to pay the notes before you could pay any of the debt, on

the judge's decision. Sorry, am I doing this --

LORD JUSTICE LEWISON: I thought it was the other way round, no?

MR PHILIPPS: The judge's decision before insolvency was the notes were senior to the debt. Sorry, it was just one of those horrible moments. So the judge's decision --

LORD JUSTICE LEWISON: Before amendment.

MR PHILLIPS: Yes -- no, not before amendment -- well, outside amendment because it's outside of an insolvency. So I am in a solvent situation, Lehmans hasn't gone bust and it has 6 billion worth of Sub-Notes and it has all this Sub-Debt. And the effect of the solvency condition that you find in the Sub-Debt is that you have to be able to pay the Sub-Notes before you pay the Sub-Debt.

LORD JUSTICE LEWISON: Can you give me a cross-reference in judge's judgment. You don't need to do it now, perhaps you could come back with it tomorrow morning.

MR PHILLIPS: Yes, of course, I will do that tomorrow.

LORD JUSTICE LEWISON: Where does he explain this point?

MR PHILLIPS: No, he doesn't explain this point.

LORD JUSTICE LEWISON: Oh I see.

MR PHILLIPS: I'm explaining this is a consequence of --

LORD JUSTICE LEWISON: I see.

MR PHILLIPS: My learned friend said it didn't matter outside of an insolvency; that's just plain wrong.

Because outside of an insolvency the relative subordination determines who the company can pay first. So if Lehmans had wanted to redeem some of its subordinated debt before an insolvency Lehmans would have to have repaid the notes before the debt. And that is because the solvency condition -- assuming the judge is right that it was senior, of course, but then one gets into the solvency condition in the notes which for your note is on 679. And it says:

"The borrower shall be solvent if it is able to pay its liabilities other than subordinated liabilities, disregarding excluded."

So if the notes were senior, which on the judge's analysis before insolvency they were, they have to be paid before you could pay anything on the notes.

You then go into an insolvency --

LORD JUSTICE LEWISON: Sorry, I'm getting lost here.

MR PHILLIPS: I'm sorry, my Lord.

LORD JUSTICE LEWISON: The issue is solvent if it's able to pay its debts as they fall due.

MR PHILLIPS: Ah, no, you are looking at the wrong insolvency condition, I'm going to come back to debts in a moment.

LORD JUSTICE LEWISON: The judge said you have to satisfy both.

MR PHILLIPS: Yes. I'm looking at the solvency condition in the Sub-Debt.

LORD JUSTICE LEWISON: In that case I'm looking at entirely the wrong --

MR PHILLIPS: I'm so sorry. I'm doing it too quickly and it's one of the ...

Could your Lordship turn to tab 38 at page 679, then I will go back to the other definition, my Lord, which -- I will deal with that.

LORD JUSTICE LEWISON: Right. So looking at the solvency condition.

MR PHILLIPS: In the Sub-Debt.

LORD JUSTICE LEWISON: In the Sub-Debt, right.

MR PHILLIPS: So:

"The borrower shall be solvent if it is able to pay its liabilities other than the subordinated liabilities in full, disregarding the excluded."

That is at the top of the page in (ii) my Lord. So prior to an insolvency, if the notes are senior to the debt what that means is that the notes have to be payable before anything could be paid on the notes. And the point that I was just dealing with is it does matter before an insolvency; it doesn't only arise when Lehmans goes bust, because one thing that you've seen is that they did from time to time pay back or issue their

regulatory capital. And it was effected prior to insolvency by the priorities.

And that is one of the reasons why -- it's very simple in this case to just look at it and think: this only arises in an insolvency; it's only when Lehmans goes bust that it matters, and therefore to just look at what the ranking is under the amended notes and say, well, that's what the ranking is and it doesn't matter.

It does matter. And that's why when I said to your Lordships that a position where the notes are senior before an insolvency but are then junior after an insolvency is commercially at least highly surprising. And I would respectfully submit that your Lordships should have that in mind when your Lordships are construing these provisions.

So at was just looking at the relevance before. But I know, my Lord, that you would like me to go back now to, if we can go forward to tab 42.

LORD JUSTICE LEWISON: No, I was just looking at the wrong documents.

MR PHILLIPS: No, no. My Lord, I can't pretend that my points are necessarily in a logical order. So why don't we look at this.

LADY JUSTICE ASPLIN: Sorry, are you now going to 42?

MR PHILLIPS: I'm now going back to the solvency condition

in the Sub-Notes, which your Lordships will find at 42 at 742 at the top of the page. As you know there are two parts, (1) and (2) to the solvency condition. (1) is "be able to pay its debts as they fall due", and I will come back to that; and the second is "the assets exceed its liabilities as defined."

Now you have had our submission on the effect of the brackets applying to both and this only making sense if it is senior debt.

The words my learned friend did not draw attention to, and this is important, is "able to pay its debts as they fall due". Because the submission that's being made is that the effect of that is that you have to be able to pay all debts. And the effect of that is to make the notes junior to all other debt. It is only debts as they fall due. And the argument depends on its debts, including junior debts, and it depends on junior debts falling due at the time that this is looked at.

We just looked at a junior debt and we saw that it can only fall due if the senior debt could all be paid. So it is not as simple as my learned friend suggested. Because that junior debt will not fall due according to that condition that I just showed you, the solvency condition in the Sub-Debt, it will not fall due for so long as the senior debt has not been paid.

So my learned friend's submission that on the back of "is able to pay its debts", and he didn't go on to the rest, that this subordinates the notes to all the debts it's just not right. And when you read that in the context of the rest of the clause, as I respectfully submitted yesterday, it refers to senior debt. Not only because this debt is subordinated to senior debt but also because the junior debt is not going to be due until and unless the senior debt has been or can be paid. I hope I didn't make that too --

LORD JUSTICE LEWISON: No, I understand that. If the payments under the notes are not due then the notes are within limb 2 and not limb 1.

MR PHILLIPS: Exactly. We don't fall underneath. That submission is not right. Sorry, forgive me.

Can I just make a couple of points in relation to Mr Grant's description of the subordination. (Pause).

Thank you to my learned junior, Mr Willson. My learned friend did not sufficiently address the points that we made yesterday that if the Sub-Notes contemplate that they will sit above other junior debt, which we've seen that they do, then the same clause cannot put the notes at the bottom of the Waterfall.

And in our submission the point that my learned friend made, which is, "Well, there was no junior debt;

don't worry about it", I'm sorry, but that doesn't deal with the point of construction. When we are construing this we have to construe it on the basis that there is or there may be.

Just one final point, it's the same with the excluded liabilities: you have reference to excluded liabilities, the fact there weren't any doesn't mean that one doesn't construe what that might be.

I said I was going to look at Mr Grant's description of the subordination. Mr Grant's evidence is in A1 at paragraph 52. My learned friend took you to paragraph 52, supplementary 1, tab 1 at page 19. With respect to my learned friend, and I don't want to bicker about this, but he didn't read all of it so I want to take you through all of what he said:

"Following the amendments, in a winding up the noteholders were still described as ranking below senior creditors."

And I think that's the passage my learned friend skipped over:

"But in place of the solvency condition they were also described as ranking above all classes of issued shares, including ordinary and preferential shares and above the notional holders upper tier 2 securities. Whereas before the amendments the conditions only

described what ranked above the LBHI2 Sub-Notes the amended condition described what ranks above the Sub-Notes and what ranks below them."

And my learned friend said: there you are, it shows that Mr Grant was telling you that the solvency condition identified a ceiling and a floor. What my learned friend did not show your Lordships is the ceiling that is in that paragraph, it's the ceiling that is in that paragraph --

LORD JUSTICE LEWISON: Why are we looking at this paragraph?

MR PHILLIPS: I'm dealing with the specific point on the evidence that was made by my learned friend.

LORD JUSTICE LEWISON: Are you saying this is relevant to the interpretation of the Sub-Notes?

MR PHILLIPS: No.

LORD JUSTICE LEWISON: So it's got nothing to do with interpretation, so why are we looking at it?

MR PHILLIPS: This was a point that was made on rectification.

LORD JUSTICE LEWISON: That's fine, I understand that. So are we moving to rectification now?

MR PHILLIPS: Yes. I will just check, if I may, with my notes that I didn't have anything else. Okay. I'm going to do this from here.

Now I'm going to turn to rectification. I don't

think I have any other points but if I do on construction I will come back to them tomorrow morning.

LORD JUSTICE LEWISON: Just as long as I know where we are. So we are going to rectification.

MR PHILLIPS: I quite understand.

LORD JUSTICE LEWISON: In which case of course Mr Grant's evidence is relevant.

MR PHILLIPS: Absolutely. And I want to do some different points before I do that, I'm sorry.

The first thing that I wanted just to remind your Lordships, because a lot has been said about what we were asking for in terms of rectification, it is in core bundle 2 at tab 32.

LORD JUSTICE LEWISON: It's in your position paper.

MR PHILLIPS: Your Lordship has it. Your Lordship has it. I just wanted there to be clarity in relation to --

LORD JUSTICE LEWISON: Yes, I mean normally you would look for a pleading but the position paper is as close as we get.

MR PHILLIPS: My Lord, may I say something about the position papers because they are not pleadings, they are a sort of modus operandi that developed in Lehmans and when I came to this matter there was already this modus operandi. And all I will say is that they have never been treated like pleadings, which is lucky for my

learned friend Mr Beltrami, because the argument that he ran on conditionality wasn't the argument in the position paper. I'm not taking that --

LORD JUSTICE LEWISON: I have only ever come across them actually in family cases before position papers were ...

MR PHILLIPS: My Lord, you have an advantage over me. Anyway, be that as it may.

Going to substance, my learned friend towards the end of his submissions, and I think it was in his point 4, he say that the rectification case should have been to include a statement that the amendments didn't affect the ranking, or words to that effect. I don't have that quite clearly. But with respect that is precisely what the confirmatory note does in this clause. It's precisely what it does, and your Lordships have heard the submissions on that. Now if such language is sufficient to direct the way in which this should be interpreted then I'm the first to say great. That is a construction point.

My learned friend then talked about clause 12(a) and if I may just say a few words about clause 12(a). Your Lordships have seen it is a mechanism for the amendment of certain reserved matters. And those certain reserved matters included altering the date for payment of interest. And of course one of the reasons for that,

and I'm doing this as a matter of construction, one of the reasons for that is that those reserved matters 0are important matters that required not just the sort of amendments my learned friend identified in 12(b), they are more important matters, so they are reserved and they require the assent of the shareholders through the mechanism in 12(b).

It is a proposal by the Issuer. And my learned friend said the Issuer has to agree. Well the Issuer is the one who proposes it. This mechanism isn't an offer and acceptance to that mechanism, it is a proposal and accord mechanism. And of course any party proposing a mechanism is doing so on the basis of that's what they want to do. And you don't need anything more than a proposal. And there is a mechanism for noteholders to assent to those proposals: it could be two-thirds, it could be one-third, it could be 100 per cent, which as you know is what happened here. But is still assent by extraordinary resolution. And in our submission that is no different to the pension cases because it's a mechanism.

LORD JUSTICE LEWISON: Your reliance on clause 12, as I understand it, is to say: well, we don't need an outward expression of accord, as you would normally do in a rectification case. Is clause 12 wide enough to

apply this mechanism to a change in relative ranking?

MR PHILLIPS: I'm looking at the clock and I'm wondering if I really ought to check.

LORD JUSTICE LEWISON: You may want to. What I'm curious about is if a particular change -- let us assume that you are wrong about construction, and that particular change was a change in the ranking, if it is outside the scope of clause 12 does that still mean you don't need the outward expression of accord? I think in AMP v Barker the change was within the scope of the power.

MR PHILLIPS: Forgive me for a moment.

LORD JUSTICE LEWISON: You can come back to this tomorrow, Mr Phillips. As you know we've made up quite a lot of time.

MR PHILLIPS: If I may, because i really do want -- I think the answer to the question --

LORD JUSTICE LEWISON: Do you understand the question I am putting to you?

MR PHILLIPS: It is on the transcript. (Pause).

The question your Lordship is asking is: if it's outside the scope of this mechanism, do you need agreement in the ordinary way?

LORD JUSTICE LEWISON: Does clause 12 still remove the need for an outward accord? I understand the argument. If

it's within the scope of clause 12, and you say well that's the mechanism, you don't need anything else. But if it's not within the scope of clause 12, what then?

MR PHILLIPS: I think the answer to your Lordship's question is yes, because it's modification by extraordinary resolution. There are then reserved matters but I think modification as a general matter. But I will come back and answer that --

LORD JUSTICE LEWISON: If clause 12 extends to any conceivable modification then that's your answer.

MR PHILLIPS: Yes. Let me check. That I think is the answer but I'll check.

LORD JUSTICE LEWISON: All right. Well then let's stop there.

MR PHILLIPS: Thank you, my Lord.

LORD JUSTICE LEWISON: We will sit again tomorrow at 10.30.

(4.13 pm)

(The hearing adjourned until the following day at 10.30 am)