CR-2008-000026

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

IN THE MATTER OF LEHMAN BROTHERS HOLDINGS PLC (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

The Joint Administrators of Lehman Brothers Holdings Plc (in administration)

Applicants

- and -

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

Respondents

LBHI'S REPLY POSITION PAPER[1]

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1. This reply position paper is filed on behalf of LBHI in accordance with paragraph 3 of the Order. The purpose of this reply position paper is to provide the outline of LBHI's responses to the position papers filed and served by GP1 and DB on 30 June 2023 (respectively, the **GP1 PP** and the **DB PP**).[2] In their position paper, the PLC JAs (**PLC PP**) have adopted a neutral stance in relation to the five issues raised in the Application. The PLC JAs' objections (at [48] to [52]) in relation to the Strike Out Application are, however, noted.

2. Regrettably, notwithstanding: (a) DB's acknowledgment that it would be '*sensible'* (at [4]) to determine the merits of each of the *four* Issues it now seeks to strike out from the Application; and (b) a reasonable expectation that having been listed for hearing alongside the substantive Application, the relevance of the Strike Out Application would have fallen away (PLC PP, at [52]]), the DB PP majors on the topics of *res judicata* and abuse of process[3]. A summary of the reasons why DB's specific arguments in this connection are misconceived is set out below. As an overarching matter, however, LBHI's position is that on an application for directions by officeholders the parties' time is most usefully spent arguing the merits of the questions which the PLC JAs have seen fit to raise, as opposed to: (a) seeking to derive '*determinations*' from judicial

[1] Save except where expressly stated otherwise, the abbreviations adopted herein are the same as those used in the position paper filed and served by LBHI on 30 June 2023 (**LBHI PP**).
[2] Save except where expressly admitted below, no admission is made in respect of the matters set out in the GP1 PP and the DB PP.
[3] Footnote 4 of the DB PP states that, to the extent necessary, DB will apply to amend its Strike Out Application to include Issue 3. That amendment would be refused for the reasons given in the text below.

dicta in earlier proceedings which allegedly dispose of Issues raised in this case; and/or (b) sifting through ancillary legal propositions adopted in relation to different issues in previous proceedings with a view to arguing that they give rise to issue estoppels or abuses of process now.

ISSUE 1

3. **Overview**. LBHI's position on Issue 1 remains that summarised in the LBHI PP, at [2], i.e., that Issue 1 is properly answered as a matter of the interpretation of the subordinated debt agreements and the Rules, with the benefit of the Court of Appeal's decision in Sub-Debt1. Issue 1 was not determined either way by the Court of Appeal in the Sub-Debt1 proceedings, but it follows from its reasoning that statutory interest referable to Claim D ranks *below* the proved debt in respect of Claim C.

4. **The Merits**. DB relies on the proposition (at [16(3)]) that '*[s]ince Claim C is subordinated to Claim D,* ***it follows that*** *Claim C cannot be proved for until principal* ***and*** *statutory interest on Claim D has been paid in full*' (emphasis added). That conclusion simply begs the question and does not follow logically. It assumes, incorrectly, that by being subordinated to Claim D, Claim C is necessarily subordinated to statutory interest payable on the proved debt in respect of Claim D as well. It is not. Nothing in the language of the subordination provisions of Claims C or D evinces an intention that the proved debt in respect of Claim C be precluded from proving until after statutory interest referable to Claim D is paid. Put in other words, there is no indication of any objective intention to depart from '*the default statutory rule*', as GP1 puts it, that statutory interest is paid after proved debts and is paid equally, irrespective of ranking of the proved debts.[4]

5. GP1's and DB's attempt to subsume statutory interest payable on the proved debt in respect of Claim D as a Subordinated Liability under Claim D proceeds by bare assertion.[5] Their construction is wrong: see LBHI PP at [3.6.3] to [3.6.6]. The entitlement to statutory interest referable to Claim D only arises after the proved debt in respect of Claim D is paid. It is therefore an Excluded Liability from the perspective of the subordination provision in Claim D.

6. If it is not a Subordinated Liability in Claim D, GP1's position (at [13.2]) is that statutory interest referable to Claim D is nevertheless *not* an Excluded Liability from Claim C's perspective because, '*Nowhere in Claim C's contractual subordination provision is statutory interest "expressed to be junior" to Claim C.*' GP1 is incorrect that in order for statutory interest to be '*expressed to be junior*', *Claim C* must state so in terms. The expression can be found in the statute or instrument

[4] GP1 PP, at [13.2]. GP1 mischaracterises LBHI's position in this regard. LBHI's position is not that all statutory interest must be paid at the same point in time. Rather, where there is nothing in the language of the subordination provisions which evinces an intention to depart from Rule 14.23(7)(a)-(b), then it will be irrelevant that Claim D as to its proved debt ranks above Claim C as to its proved debt: see LBHI PP at [3.8].

[5] See DB PP, at [9(2)], which fails to have proper regard to the full wording of the Subordinated Liabilities definition in Claim D, and GP1 PP, at [12.6].

creating the more junior debt, and there is a statutory expression of subordination under Rule 14.23(7) in relation to statutory interest. Claim C is a provable debt which becomes entitled to be proved after the proved debt that makes up Claim D has been paid in full and, by Rule 14.23(7), the statutory interest on Claim D expresses itself to be junior to Claim C. Contrary to what GP1 suggests (at [13.2]) that analysis does not depend on the implication of a term into Claim C.

7. ***Res judicata* and abuse of process**. DB's primary position (at [10]) is that the Sub-Debt1 proceedings '*determined the answer to [Issue 1]*' to be that statutory interest referable to Claim D is paid in priority to Claim C. LBHI's position is that the Sub-Debt1 decision did not determine Issue 1 and does not give rise to a cause of action estoppel or an issue estoppel[6]. On DB's own case, the findings of the Court of Appeal in Sub-Debt1 are *not* said to be determinative of Issue 1. Rather, having set out what it asserts was determined by the Court of Appeal (at [8]),[7] DB goes on to make *further* submissions (at [9]) as to why the Court of Appeal's findings '***also answer** [Issue 1]*'. The fact that further submissions are required, including as to the construction of Subordinated Liabilities, and the interrelationship between statutory interest and the proved debts in respect of Claims C and D (see above), highlights the fact that the Court of Appeal did not '*determine*' Issue 1. That is unsurprising in circumstances where the Court of Appeal was not asked to determine, nor was it even addressed as to, the relative ranking of statutory interest on Claims C and D.

8. DB's alternative case that a party could and should have raised the relative ranking of statutory interest on Claim D and principal on Claim C in Sub-Debt1, such that it constitutes an abuse of the Court's process now to do so, proceeds by way of assertion and is left wholly unexplained (see at [14(1)]). In any event, that contention is rejected by reference to the factual circumstances explained in Geraghty3 and the matters referred to in the LBHI PP, at [4].

ISSUE 2

9. **Overview**. LBHI's position on Issue 2 remains as summarised in the LBHI PP, at [9]. GP1 and DB misconstrue the terms of Rule 14.23(7) and, in relation to LBHI's alternative case, rely on an overly restrictive reading of the word '*dividend*' in Rule 14.44.

10. **Rule 14.23**. Contrary to the approach taken by GP1, the terms of Rule 14.23(7) are the correct starting point in relation to Issue 2. As to that, whilst DB cites Lord Neuberger's invitation in Waterfall1, at [89], to pay '*proper regard to the language of the provision interpreted in its context*', it proceeds to construe the words '*those debts*' in Rule 14.23(7)(a) in isolation, arguing that they

[6] DB's reliance on cause of action estoppel in the DB PP, at [10] to [11], is unexplained and not understood in circumstances where: (a) no cause of action was determined in Sub-Debt1 in the context of an officeholders' application for directions, such that no cause of action merged into the Sub-Debt1 judgments; and (b) no cause of action forms the basis of the PLC JAs' Application.

[7] For the avoidance of doubt, LBHI does not accept that this represents a full and accurate summary of what the Court of Appeal decided: see LBHI PP in this regard at [3.1] to [3.3], and [3.7.3].

refer to the full proved amount of a future debt.[8] That ignores both the statutory wording and its context. The direction to pay interest on '*those debts*' refers back to and depends upon the phrase '***after payment of the debts proved***...'. As David Richards J made clear in Waterfall2A, at [207], the '*debts'* are paid '*as ascertained or estimated in accordance with the legislation*'.[9] Accordingly, in the case of a future debt where the underlying debt has not matured at the date of dividend, '*those debts*' necessarily refers to the discounted amount paid on the debt proved.

11. GP1 says (at [20]) that '*the "outstanding" debts referred to*' in Rule 14.23(7)(a) are the full face-value undiscounted debts admitted to proof. However, as Gloster LJ held in Waterfall2A, at [54], the period(s) for the calculation of statutory interest ends '*on each dividend date (in respect of the part of the provable debt then paid)*', at which point the debt ceases to be '*outstanding*'. Accordingly, in the case of future unmatured debts, '*those debts*' are only '*outstanding*' insofar as they have *not* been paid a discounted amount as ascertained in accordance with Rules. This points towards a single touchstone for the purposes of both calculating the surplus and paying it, namely, the amount of the '*debts proved*' that was actually paid. Consistent with this, in Waterfall2A, at [27], Gloster LJ said:

> 'The requirement that there should be a surplus out of which statutory interest is paid means that the aggregate of principal and pre-administration interest will for each creditor be a specific, known figure, **ascertained** during the course of the administration, **prior to the calculation and payment of any statutory interest**' (emphasis added).

12. This is also why DB is in turn wrong (at [23]) to suggest that LBHI's position requires some further mechanism for quantifying the debt on which statutory interest is to be paid. There is a single touchstone both for calculating the amount of statutory interest available and for paying it on '*those debts*', namely, the amount of the '*debts proved*' that was actually paid to produce the surplus – no further mechanism is needed.

13. **Rule 14.44**. Alternatively, LBHI's position is that statutory interest is the payment of a '*dividend*' in respect of proved debts for which purpose discounting takes place under Rule 14.44. DB's and GP1's differing grounds for adopting a narrow reading of the phrase '*for the purpose of dividend*' are wrong. As to the particular qualities of a '*dividend*' which are said to disqualify payment of statutory interest, GP1 states that dividends '*are paid on proved debts*' (at [17.2]), while DB states that the term is '*limited to dividend in the narrow sense of the monetary dividend payable on the proved debt*' (at [26(5)]). On any view, statutory interest *is* a monetary sum paid on proved debts such that statutory interest is a '*dividend*' according to these stated positions of GP1 and DB.

[8] DB PP, at [22].
[9] See also Waterfall1, at [77]: '*it is in my view clear that the payment of the…discounted value of future debts in an administration or liquidation is payment of those debts in full*'.

14. **Commercial consequences**. Both GP1 and DB cite certain examples which they say highlight the allegedly '*bizarre*'[10] or '*implausible*'[11] distinction between: (a) the treatment of a creditor whose future debt matures before the date of dividend (who is paid principal and statutory interest on an undiscounted basis), and (b) the creditor whose debt has not matured before the date of dividend (who is paid principal on a discounted basis and, on LBHI's case, statutory interest on the discounted sum paid). Any arguable unfairness in that regard, however, is a function of the discounting Rules themselves – in circumstances where statutory interest is to be calculated by reference to the amount paid on the proved debt as ascertained in accordance with the relevant Rules – and not LBHI's case in relation to Rule 14.23: see further as to the noted imperfections of the discounting rule, Waterfall2A, CA, at [56] (Gloster LJ) and Waterfall2A, at [197] and [215] (David Richards J). Conversely, the unprincipled outcome of GP1's and DB's position is that the proved debt in respect of Claim D is paid on a *discounted* basis to reflect the present value of that debt, but statutory interest is paid on an *undiscounted* basis.

ISSUE 3

15. **Overview**. LBHI's position on Issue 3 remains that summarised in the LBHI PP, at [7]. GP1's and DB's case as to the substance of Issue 3 does not engage with the distinctive feature of subordinated debt, viz., it is precluded from proving until senior liabilities are first paid. The attempt to invoke alleged *res judicata* or abuse of process in relation to Issue 3 is belied by the lateness with which the points are raised, as well as an implausibly broad understanding of the doctrine of issue estoppel.

16. **The Merits**. Neither of the first two reasons given by GP1 (at [26] to [27]) justifies the payment of statutory interest on Claim D from the date of PLC's administration – both reasons are addressed in the LBHI PP, at [9.4] to [9.7]. There is also nothing in GP1's third reason (at [28], i.e., timing of payment of Senior Liabilities determines the point at which GP1 becomes entitled to prove and receive statutory interest). The subordinated creditor who agrees to step back from a *pari passu* distribution and not to prove until Senior Liabilities have been paid has also opted out of compensation for the time-value of its debt until those same Senior Liabilities have been paid and its claim is entitled to be admitted to proof.

17. DB's further point invoking the hindsight principle in these circumstances is misconceived. It argues (at [37(3)(ii)]) that '*the only approach consistent*' with that principle is for the proved debt '*to be treated*' as having been '*outstanding*' since the date of administration. Whilst the hindsight principle may be relied upon to take into account events post-dating the date of administration to estimate the *value* of a contingent debt or to revise an estimate as to value,[12] it does not warrant

[10] DB PP, at [28(3)].
[11] GP1 PP, at [21.2].
[12] Waterfall2A, at [200] (David Richards J).

adopting a fiction that Claim D could be proved at the commencement of the administration. Claim D could not be proved at the commencement of the administration, and thus Claim D could not be among '*those debts*' paid to produce a surplus *until* Claim D became entitled to prove and was in fact paid.

18. ***Res judicata* and abuse of process**. For the first time, DB takes issue in its position paper with the inclusion of Issue 3 in the Application on the basis of *res judicata* or abuse of process. DB's approach is unsatisfactory. LBHI's responsive evidence on the Strike Out Application was due on the same date as the exchange of position papers. If DB's intention had been to broaden the scope of the Strike Out Application,[13] it ought to have given LBHI proper notice of the same to enable LBHI to address the point in its evidence. Without prejudice to LBHI's right to file evidence to address these new points in the event that DB does so in its responsive evidence, DB's contentions are flawed.

19. The relevant *issue* raised by the PLC JAs in the Previous PLC Application was whether, '*the quantum of [PLC's] liability under the [PLC] Sub-Notes for distribution purposes falls to be discounted under Rule 14.44 of the Insolvency (England and Wales) Rules 2016, or by reference to some other method and if so which method*' (the **Discounting Issue**). DB ran a number of alternative arguments,[14] all of which were rejected by Marcus Smith J, who refused permission to appeal, as did the Court of Appeal: (a) DB's primary position was that Claim D was not a future debt; (b) alternatively, even if it was a future debt, Claim D was said not to be provable and therefore not amenable to discounting (and, by extension, not eligible for statutory interest); and (c) in the further alternative, DB argued that a claim for future interest should be admitted or accepted to reflect the contractual right to interest by reference to the case of Re Browne and Wingrove Ex parte Ador [1891] 2 QB 574 (the **Browne v Wingrove point**). In the context of the Browne v Wingrove point, DB proceeded on the basis that Claim D would also be entitled to statutory interest (in the alternative to its primary case) from the commencement of the administration,[15] which was common ground with LBHI.

20. Against this backdrop, DB is wrong to contend that: (a) the PLC JAs are precluded from raising Issue 3; and (b) LBHI is estopped from advancing its position in relation to Issue 3:

    20.1. As to (a), DB provides no justification as to why the PLC JAs, who were neutral on all issues in the Previous PLC Application, ought to be barred from raising Issue 3. The common ground between DB and LBHI was, at best, ancillary to a subsidiary point (the Browne v Wingrove point), which was itself determined on different grounds (see below).

[13] Which it plainly was – see DB PP, at footnote 4.
[14] See DB's position paper dated 22 February 2019 filed in the Sub-Debt1 proceedings, at [54] to [55].
[15] See the DB PP, at [35].

20.2. As to (b), DB refers to two different bases, though the primary basis it relies on remains unclear.[16] Taking them in turn:

20.2.1. No issue estoppel arises in this case. In Sub-Debt1, DB's Browne v Wingrove point centred on its interpretation of *Rule 14.23(1)*. DB's trial skeleton, at [274], framed the argument this way: '***The question for the Court is therefore whether the effect of Rule 14.23(1)*** *("Where a debt proved in insolvency proceedings bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the relevant date")* ***is to exclude from proof anything other than the right to prove for interest on a debt that had fallen due at or prior to the relevant date*** *(i.e. the commencement of the relevant insolvency)*' (emphasis added).[17] Marcus Smith J held that DB's reading of Rule 14.23(1) was untenable (at [318], '*I do not see how this provision can be circumvented: its terms are clear*'). That holding was sufficient to determine the Browne v Wingrove point. As to the common ground between LBHI and DB, this was not a fundamental aspect of the decision reached on the Browne v Wingrove point, nor was it established as the necessary legal foundation or justification for the judge's conclusion. No issue estoppel arises in these circumstances: see Blair v Curran (1939) 62 CLR 464 (Dixon J),[18] '*matters of law or fact which are subsidiary or collateral are not covered by the estoppel…Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation*'.

20.2.2. There is no arguable abuse of process either. Where a matter is raised in previous proceedings but does *not* give rise to an issue estoppel, that will rarely give rise to an abuse of process: see Re Norris [2001] UKHL 34 at [26] (Lord Hobhouse): '*It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse*.' In any event, none of the circumstances in relation to the Browne v Wingrove point render litigating Issue 3 an abuse or misuse of the Court's process now: (a) the common

[16] Thus, footnote 4 to the DB PP refers to Issue 3 being '*precluded by an issue estoppel or it is an abuse of process for that issue to be raised now*', whereas at [36], it is said that would '*at the very least be an abuse of process, alternatively precluded by an issue estoppel, for any of the parties to the ECAPS 1 Proceedings including LBHI*' now to argue Issue 3 against DB.

[17] Notably, DB's trial skeleton, at [24(3)], framed its Browne v Wingrove point as an *alternative* to its case as to Claim D being non-provable: '*In particular,* ***to the extent that any claim in respect of the PLC Sub-Notes is provable****, that claim for future interest is not barred from proof* ***on the proper construction of Rule 14.23(1)***' (emphasis added).

[18] Frequently cited with approval by the English courts, e.g., Inhenagwa v Onyeneho [2017] EWHC 1971 (Ch) at [48] (Morgan J).

ground between LBHI and DB arose as part of an alternative to DB's alternative case on the Discounting Issue, in circumstances where it was also arguing that Claim D was non-provable and thus could not give rise to statutory interest; (b) the point was, in any event, common ground with DB, such that it cannot have suffered any prejudice in the way that it put its argument on the Browne v Wingrove point or as regards Issue 3 (in this Application), which was *not* before Marcus Smith J; and (c) the lateness with which the abuse point has been taken strongly tells against its significance in relation to Issue 3.

ISSUE 4

21. **Overview**. LBHI's position on Issue 4 remains that summarised in the LBHI PP, at [10]. LBHI's construction of Clause 2.11 is to be preferred to GP1's and DB's. No issue estoppel arises in respect of Issue 4, and the attempt to characterise arguments concerning the construction of Clause 2.11 as an abuse of process are misguided.

22. **The Merits**. LBHI has set out its case on the proper construction of Clause 2.11 at LBHI PP, at [11]. The rival construction advanced by DB and GP1 is rejected. For the purposes of this reply, LBHI notes that:

    22.1. GP1 (at [42]) and DB (at [54]) are wrong to suggest that unless the relevant payments are made in respect of obligations under the ECAPS Guarantees, Clause 2.11 is not engaged. The language of Clause 2.11 is not restricted in this way. It refers in terms to the making of *'any payment*' and to '*any other indebtedness of the Guarantor*…'.

    22.2. GP1 accepts that payments received by the Holder will '*in practice originate from PLC*' (at [40.1]). This serves to satisfy the receipt requirement imposed by Clause 2.11: see LBHI PP, at [11.3.3] and [11.5.3].

    22.3. GP1's reading of the phrase '*including any such payment…owing under this Subordinated Guarantee*' as being limited to the payment of more junior claims '*which happen also to be held by the Holders'* (GP1 PP, at [41.1]) is wrong. That phrase encompasses a payment by a more junior subordinated creditor *to* the Holder, such that Clause 2.11 expressly contemplates an indirect receipt by the Holder as being caught by its terms.

23. Three further subsidiary points taken by GP1 and DB are also incorrect:

    23.1. GP1 (at [42]) and DB (at [52]) argue that, having been executed by Deed Poll, the ECAPS Guarantees cannot impose obligations on the Holder. That is wrong as a matter of law. The ECAPS Guarantees were included in each ECAPS Prospectus, constituting a continuing offer open to acceptance. In circumstances where the Holder accepted the terms of that offer and benefitted from PLC's promise as surety, it cannot now disclaim obligations imposed

by the same contract: see Goode & Gullifer, Legal Problems of Credit and Security (7th ed.), para 8-04.

23.2. DB (at footnote 15) takes the unattractive point that it is now entitled to argue that the ECAPS Guarantees have terminated (having taken the opposite position in Sub-Debt1)[19] on the basis that LBHI is allegedly also taking an inconsistent position. LBHI's position on Issue 4 is not inconsistent with its previous position in Sub-Debt1 (see below) and, in any event, the termination of the ECAPS Guarantees would have no impact on the continuing rights and obligations created by Clause 2.11: see the proviso at the end of Clause 4 of the ECAPS Guarantees.

23.3. Finally, GP1's reliance (at [43]) on Clause 2.11 of the ECAPS Limited Partnership Agreements is misplaced: that clause does not on its face preclude a trust arising as between the Holder and PLC.

24. ***Res judicata*** **and abuse of process**. LBHI's position is that Issue 4 is not precluded by issue estoppel, nor does litigating the issue now constitute an abuse of process:

24.1. As to issue estoppel, DB's position (at [42]) is that Marcus Smith J '*determined*' that '*distributions on Claim D would benefit the holders of the ECAPS*' by reference to a comment made in Sub-Debt1, at [19], where the judge introduced Claim D. No issue estoppel arose as a result. The issue for decision, as DB observes (at [40(1)]), related to the relative priority between Claim C and Claim D. It was no part of that decision, let alone a fundamental or necessary part of it, that Claim D might '*benefit'* the Holders of the ECAPS, in circumstances where the relevant Holder was not even before the Court and the Court was not asked to determine how the proceeds of Claim D should be applied after distributions were made by PLC to GP1.

24.2. As to the alleged abuse of process, this is not a case where, in all the circumstances, the Court's process is being misused by a party seeking to raise an issue which could and should have been raised before. The relevant circumstances are set out in Geraghty3 and the LBHI PP, at [12], which address the points now made in the DB PP at [45]. LBHI rejects DB's further point on the termination of the ECAPS Guarantees, which it says (at [48]) renders the Clause 2.11 argument '*particularly abusive*'. In Sub-Debt1, LBHI acknowledged that the termination issue did *not* need to be determined[20] and the Court's declaration by consent necessarily assumed that the ECAPS Guarantee had *not* been terminated. In any event, LBHI's position in Sub-Debt1 is not inconsistent with its Clause 2.11 argument. That is

[19] See DB's position paper dated 22 February 2019, at [68]: 'Deutsche Bank's position is that the PLC Guarantees have not been terminated and remain in effect, but are subordinated to both the PLC Sub-Notes and the PLC Sub-Debt.'

[20] See Weil's letter to all parties dated 14 May 2019, p. 2.

because termination would have no impact upon the continuing rights and obligations under Clause 2.11: see Clause 4 of the ECAPS Guarantees, which addresses this eventuality in terms in the closing proviso.

ISSUE 5

25. LBHI's position on Issue 5 remains that summarised in the LBHI PP, at [13]. The two arguments raised by DB (at [58]) and GP1 (at [47] to [49]), which are said to result in an '*infinite circularity*' in the event that LBHI is right on Issue 4, are incorrectly premised on the notion that payment in full of the proved debt in respect of Claim D will not extinguish GP1's rights under Claim D:

    25.1. DB's position (at [58]) is at best opaque – it appears to be premised on the notion that payment on the proved debt in respect of Claim D would not '*discharge PLC's liability*' under Claim D because payments would '*remain fixed with PLC's proprietary interes*t' and not be received beneficially by GP1. As to this: (a) payments *would be* received beneficially by GP1 as the Clause 2.11 trust only arises in the hands of the Holder; it is only at the point at which the property specified by Clause 2.11 becomes vested in the Holder that the trust becomes constituted; and (b) payments by way of dividend on the proved debt in respect of Claim D therefore discharge the underlying debt *pro tanto*.

    25.2. GP1's basis (at [49]) for positing a '*further circularity problem or impasse*' is the final sentence of Clause 2.11. GP1 says that it has the effect that no payment or distribution on Claim D will be deemed to have been made to GP1 upon the return of assets to PLC via Clause 2.11. The final sentence of Clause 2.11 cannot have the legal effect of reviving Claim D after GP1's proof has been satisfied in full. That would override the statutory process for proof and dividend which will have replaced and extinguished GP1's contractual rights under Claim D.

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28 July 2023