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Case No: CR-2008-000026

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

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 29 November 2023

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

Before :

THE HONOURABLE MR JUSTICE HILDYARD

Between :

**THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS
HOLDINGS PLC
(in Administration)**

Applicants

- and -

(1) LB GP NO.1 LIMITED (in Liquidation)
(2) LEHMAN BROTHERS HOLDINGS INC.
(3) DEUTSCHE BANK A.G. (London Branch)

Respondents

Adrian Beltrami KC, Kate Holderness (instructed by Hogan Lovells International LLP) for the Applicant
Lexa Hilliard KC, Tom Roscoe (instructed by Charles Russell Speechlys LLP) for the 1st Respondent
David Allison KC, Adam Al-Attar, Edoardo Lupi (instructed by Weil, Gotshal & Manges (London) LLP) for
the 2nd Respondent
Sonia Tolaney KC, Richard Fisher KC, Tim Goldfarb (instructed by Alston & Bird (City) LLP) for the 3rd
Respondent

Hearing dates: 9 and 10 October 2023

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 29 November 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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THE HONOURABLE MR JUSTICE HILDYARD

The Honourable Mr Justice Hildyard:

Introduction

1. This judgment relates to a further instalment of the Lehman saga arising out of the collapse of the Lehman Brothers group in 2008. More particularly, it arises out of the unusual circumstance of the process of administration having resulted, not in deficiency, but in considerable recoveries in excess of the claims of unsubordinated creditors. It concerns the priority as between subordinated creditors in the distributing administration of Lehman Brothers Holdings Plc (“PLC”) after payment of or provision for unsubordinated liabilities in full (including statutory interest). The particular issue raised is whether a subordinated creditor having priority as to principal is entitled to be paid statutory interest in priority to repayment of principal on another subordinated claim ranking lower in the queue.
2. PLC, which is an intermediate holding company within Lehman’s UK group structure, has been in a distributing administration since 2 May 2014. Its administrators (“the PLC JAs”) have declared and paid a number of dividends totalling approximately £1,074.7 million, which have now discharged 100% of the principal value of unsecured, non-preferential, unsubordinated creditors. In addition, the PLC JAs have paid 44.6% (or £354.1 million) of the accrued statutory interest on claims to the unsubordinated creditors.
3. An updated estimated outcome statement published by the PLC JAs on the PLC website as of June 2023 indicated a base case recovery for subordinated creditors of some £233 million and a high case recovery of some £490 million. It is common ground that, though considerable, these funds are not enough to satisfy all subordinated claims. Issues of priority as between different classes of subordinated debt have arisen accordingly.

The subordinated debt and the contesting parties

4. PLC’s subordinated debt comprises the following:
 - (1) The PLC Sub-Debt, sometimes also referred to as “Claim C”:
 - (a) These are liabilities of approximately US\$1.9 billion (£1.059 billion) under 3 subordinated loan facility agreements dated (in two cases) 30 July 2004, and (in one case) 31 October 2005.
 - (b) The original lender under the PLC Sub-Debt was Lehman Brothers UK Holdings Ltd, but the debt is now held by Lehman Brothers Holdings Inc. (the second Respondent, “LBHI”).
 - (2) The PLC Sub-Notes, sometimes also referred to as “Claim D”:
 - (a) These are liabilities with an aggregate face value of approximately €790 million under subordinated note issuances pursuant to offering circulars dated 29 March 2005, 19 September 2005, 26 October 2005 and 20 February 2006.

- (b) The notes were issued, variously, to one of three limited partnerships, Lehman Brothers Capital Funding LP, Lehman Brothers Capital Funding II LP and Lehman Brothers Capital Funding III LP (“the Partnerships”).
 - (c) The General Partner of each of the Partnerships is LB GP No 1 Limited (in Liquidation) (“GP1”), now acting by its liquidators.
 - (d) The PLC Sub-Notes were long-dated instruments, falling due in 2035 or 2036, and which did not include acceleration provisions in the event of a PLC insolvency. The Court has confirmed (see further below) that these obligations are future debts which are subject to discounting under rule 14.44 of the Insolvency (England and Wales) Rules 2016 (“IR”). On the PLC JAs’ current calculations, discounting reduces the claim on the PLC Sub-Notes to approximately £188 million.
 - (e) The PLC Sub-Notes were funded by external investors through the issue by the Partnerships of further sets of securities through 3 separate offering circulars. Some of those securities were entitled Enhanced Capital Advantaged Preferred Securities, and they have all been referred to generally as “ECAPS”. Under this structure, the economic interest in the PLC Sub-Notes lies in the ECAPS.
- (3) The ECAPS Guarantees, sometimes also referred to as “Claim E”:
- (a) The offering circulars for the ECAPS made reference to the provision of a subordinated guarantee to be given by PLC to the Holder of the securities.
 - (b) The front page and signed execution pages for two of the three ECAPS Guarantees have been located. The third has not been located, notwithstanding an extensive disclosure process in previous Court proceedings described below (“the *ECAPSI Proceedings*”), though the PLC JAs have no reason to believe that the guarantee was not in fact executed.
5. The Respondents are all holders of, or otherwise economically interested in, PLC’s subordinated debt. The contest between them which is the subject of this application is essentially between those interested in the PLC Sub-Debt (Claim C) and those interested in the PLC Sub-Notes (Claim D). They are:
- (1) LBHI, which is PLC’s ultimate parent company, and is interested in Claim C;
 - (2) LB GP No. 1 Limited (“GP1”), which is interested in Claim D; and
 - (3) Deutsche Bank A.G. (London Branch) (“DB”), which is also interested in Claim D.
6. As to DB, under the structure summarised in paragraph [4(2)] above, the economic interest in the PLC Sub-Notes lies in the ECAPS. DB’s skeleton argument described its interest as being an economic one in the distributions to be paid by PLC to GP1; and DB is (so the PLC JAs understand it) the beneficial owner of a quantity of ECAPS. In the *ECAPSI Proceedings*, DB participated as an informal representative of the beneficial owners of the ECAPS, and the PLC JAs remain content for them to continue to do so. DB has been joined and participated in this application accordingly.

The ECAPSI Proceedings

7. The *ECAPSI Proceedings*, which eventually resulted in a decision of the Court of Appeal which is of considerable continuing relevance in this application, concerned two applications for directions¹: (a) an application by the joint administrators of LB Holdings Intermediate 2 Ltd (“LBHI2”) as to the relative priority of the subordinated debt in the LBHI2 estate; and (b) an application by the PLC JAs as to the relative priority of the subordinated debt in the PLC estate. The applications were heard together because of the commonality of issues and parties.
8. LBHI2’s subordinated creditors were (i) PLC under 3 subordinated debt agreements (the LBHI2 Sub-Debt, sometimes referred to as “Claim A”); and (ii) Lehman Brothers Holdings Scottish LP3 (“SLP3”, an LBHI entity) under a subordinated note issuance (the LBHI2 Sub-Notes, sometimes referred to as “Claim B”).
9. In the *ECAPSI Proceedings*, there was a single issue for determination in the LBHI2 estate, namely as to the respective priority of those debts, within which SLP3 also advanced a claim for rectification. The initial parties to the application were the joint administrators of LBHI2, SLP3 and PLC. By Order dated 24 July 2018, Mann J permitted the joinder of DB, on condition that DB bore its own costs of participating and avoided duplication of submissions.
10. The applications in the two estates were made by the respective joint administrators following a lengthy process of engagement with the interested parties. The scope of the applications reflected the issues expressly raised by the parties as matters in dispute, and the drafting itself was finalised after consultation with them. Although GP1 and DB initially contended that, given the need for resolution of the prior dispute in the LBHI2 estate, it was premature to seek directions at the PLC level, the PLC JAs considered it appropriate and in the interests of creditors as a whole for the PLC application to be made alongside the LBHI2 application. Ultimately, this was not actively opposed by any party.
11. It was common ground, and ultimately ordered, that the PLC Sub-Debt and the PLC Sub-Notes were senior to the ECAPS Guarantees. In the PLC estate, that left for determination the issue of the respective priority between the PLC Sub-Debt and the PLC Sub-Notes, together with a number of further issues which had been raised by the parties.
12. Following the judgments of Marcus Smith J ([2020] EWHC 1681 (Ch)) and the Court of Appeal ([2021] EWCA Civ 1523), and the refusal of the Supreme Court to grant permission to appeal, the answers provided to the issues in the *ECAPSI Proceedings* were as follows:

¹ It is possible that other parties have used the term “ECAPS 1” to mean only that part of the prior proceedings that concerned the application in the PLC estate. Nothing is understood to turn on this distinction.

- (1) In the LBHI2 estate, the LBHI2 Sub-Debt is senior to the LBHI2 Sub-Notes (and the application for rectification failed).
- (2) In the PLC estate, the PLC Sub-Notes are senior to the PLC Sub-Debt and both the PLC Sub-Notes and the PLC Sub-Debt are senior to the ECAPS Guarantees.
- (3) Also in the PLC estate:
 - (a) The PLC Sub-Debt has not been released under the terms of a Settlement Agreement within the Lehman estates entered into as of 24 October 2011.
 - (b) The PLC Sub-Notes are future debts, subject to discounting under IR 14.44.
 - (c) The value of the PLC Sub-Debt falls to be partially reduced to the extent that guarantee payments were made (by LBHI) on that debt.
13. The Court of Appeal's determination that "*Claim D must be paid in priority to Claim C*" (see paragraph [90]) is, of course, binding on the parties, and in any event, binding on this court as a matter of precedent.
14. I shall return to the Court of Appeal's detailed analysis in *ECAPSI* later; for the present it is sufficient to note Lewison LJ's summary of his reasoning and conclusions as follows (at [90]):

'...There are three possible categories of claim by unsecured creditors: senior claims, pari passu claims and junior claims. Claim D subordinates itself to claims which are senior to it. It does not subordinate itself to claims which rank pari passu with it. It takes its place in the queue alongside other creditors whose claims rank pari passu with it. Claim C on the other hand has agreed to stand even further back in the queue. It has agreed to subordinate itself to claims other than those that are junior to it. In other words, it has agreed to stand in the queue behind creditors whose claims would otherwise rank pari passu with Claim C.'

The present application

15. As with the process that led to the *ECAPSI Proceedings*, the present Application ("the Statutory Interest Application") followed a period of consultation with the interested parties, in which those parties were encouraged to identify and explain issues which they considered to be in dispute and to comment on the drafting of the Statutory Interest Application Notice.
16. After such input, the Statutory Interest Application identified 5 issues, as follows:
 - (1) Whether the principal amount of the PLC Sub-Debt (Claim C) falls to be paid in priority to statutory interest payable on the claim in respect of the PLC Sub-Notes (Claim D), or whether statutory interest payable on Claim D falls to be paid in priority to the principal amount of Claim C.
 - (2) Whether statutory interest payable on the claim in respect of the PLC Sub-Notes falls to be calculated by reference to the face amount of the PLC Sub-Notes, or by reference to the discounted sum payable on that claim in accordance with IR 14.44.

- (3) Whether the applicable period for the purposes of the calculation of statutory interest on the claim in respect of the PLC Sub-Notes begins with the date on which PLC entered administration, or on the date on which, in accordance with the subordination provisions of the PLC Sub-Notes, the holder of the PLC Sub-Notes became entitled to submit proofs of debt in PLC's administration in respect of that claim (and, if so, what that date is).
 - (4) Whether clause 2.11 of the ECAPS Guarantees imposes upon the Holder (as defined therein) a trust in respect of any proceeds which have been distributed by PLC, which takes effect on receipt of those proceeds and requires such proceeds to be turned over to PLC. If so, what are the circumstances in which such trust arises and in respect of what proceeds.
 - (5) If PLC makes distributions on the PLC Sub-Notes but proceeds are thereafter turned over to PLC by the Holder pursuant to clause 2.11 of the ECAPS Guarantees, what is the resultant order of priority, as between the PLC Sub-Debt (Claim C) and the PLC Sub-Notes (Claim D), in respect of such sums received by PLC?
17. However, a few days before the commencement of the hearing of the Statutory Interest Application, the parties informed the court that it was likely that they would be in a position to achieve by consent resolution of issues (2) to (5) above; and on the first day of the oral hearing a Consent Order was sent to the court providing for the PLC JAs to withdraw their application in respect of those issues, which I approved.
18. Thus, only Issue (1) is extant and requires determination. Its context and importance is that the PLC JAs anticipate that the funds available within PLC's estate for distribution will be insufficient to discharge both the statutory interest on Claim D (the PLC Sub-Notes) and principal of Claim C (the PLC Sub-Debt) in full. The priority between them must be determined.

Ambit of Issue (1)

19. It was common ground that the analysis of the provisions of Claim C and Claim D in the decision of the Court of Appeal in *ECAPSI*, which (as explained above) determined priority as between Claim D and Claim C in respect of principal, is of central importance in the determination of Issue (1). Indeed, in that context DB also contends (with the support at the Hearing of GP1)² that the issue is already *res judicata* (on the basis of the decision in *ECAPSI*) or an abuse of process (since even if not *res judicata* in its strict sense, it is an abuse of process for LBHI to raise it now, having had the opportunity to do so in the course of the *ECAPSI Proceedings* but not done so).
20. However, although both sides of the argument (GP1 and DB on one side, and LBHI on the other side) embraced the approach of the Court of Appeal, they reached opposite conclusions as to its application to the issue whether Claim D has priority in respect of statutory interest as well as in respect of principal (which GP1 and DB contended was clearly the case, whereas LBHI contended it was not). In the circumstances, the PLC

² Though this point was not in GP1's skeleton argument, and GP1 specifically left it to DB to advance it.

JAs have concluded that they require directions from the court as to whether statutory interest should be paid on Claim D before the payment of principal on Claim C.

21. The determination of Issue (1), and thus what directions should be given to the PLC JAs, requires the analysis of (a) the respective provisions of the PLC Sub-Debt (Claim C) and the PLC Sub-Notes 18 June 2018 (Claim D); (b) the relevant IR and (c) the rationale of the judgments both of the Court of Appeal in *ECAPSI* and of the Supreme Court in *In re Lehman Brothers International (Europe) (in administration) (No 4)* [2018] AC 465, [2017] UKSC 38 (often, and below, referred to as “*Waterfall I*”)³.

The subordination provisions of Claim C and Claim D respectively

22. The subordination provisions of Claim C are contained in Clause 5 of the PLC Sub-Debt. This clause provides:⁴

‘(1) Notwithstanding the provisions of paragraph 4, the rights of the Lender in respect of the Subordinated Liabilities are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) of the Subordinated Liabilities is conditional upon –

(a) (if an order has not been made or an effective resolution passed for the Insolvency of the Borrower and, being a partnership, the Borrower has not been dissolved) the Borrower being in compliance with not less than 120% of its Financial Resources Requirement immediately after payment by the Borrower and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that –

- i. paragraph 4(3) has been complied with; and
- ii. the Borrower could make such payment and still be in compliance with such Financial Resources Requirement; and

(b) the Borrower being “solvent” at the time of, and immediately after, the payment by the Borrower and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that the Borrower could make such payment and still be “solvent”.

(2) For the purposes of sub-paragraph (1)(b) above, the Borrower shall be “solvent” if it is able to pay its Liabilities (other than the Subordinated Liabilities) in full disregarding–

(a) obligations which are not payable or capable of being established or determined in the Insolvency of the Borrower, and

³ The order of priority for payment out of the company’s assets is often referred to as the insolvency ‘waterfall’ (see *In re Nortel Networks UK Ltd (No 2)* [2018] Bus LR 206 at [25]). The various sequentially numbered ‘*Waterfall*’ cases referred to in this judgment all concerned the proper application of surplus in Lehman Brothers International (Europe), an unlimited company, which was the Lehman Group’s main trading company in Europe.

⁴ As noted above, there are three subordinated loan facilities making up Claim C, three subordinated note issuances making up claim D, and three ECAPS series, with certain immaterial (save to the extent set out here) differences between their terms.

(b) the Excluded Liabilities.’

23. The following defined terms are relevant to the subordination provisions in Claim C:
- (1) ‘Liabilities’ is defined to mean ‘*all present and future sums, liabilities and obligations payable or owing by the Borrower (whether actual or contingent, jointly or severally or otherwise howsoever)*’.
 - (2) ‘Senior Liabilities’ are ‘*all Liabilities except the Subordinated Liabilities and Excluded Liabilities*’.
 - (3) ‘Subordinated Liabilities’ are ‘*all Liabilities to the Lender in respect of each Advance made under the Agreement and all interest payable thereon*’.
 - (4) ‘Excluded Liabilities’ are ‘*Liabilities which are expressed to be and, in the opinion of the Insolvency Officer, do, rank junior to the Subordinated Liabilities in any Insolvency of the Borrower*’.
24. Claim D’s relevant subordination provision is Condition 3 of the PLC Sub-Notes, which provides:
- ‘(a) The Notes constitute direct, unsecured and subordinated obligations of the Issuer and the rights and claims of the Noteholders against the Issuer rank *pari passu* without any preference among themselves. The rights of the Noteholders in respect of the Notes are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) in respect of the Notes is conditional upon:
- (i) (if an order has not been made or an effective resolution passed for the Insolvency of the Issuer) the Issuer being in compliance with not less than 100 per cent of its Financial Resources Requirement immediately after such payment, and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that (a) Condition 3(d) or Condition 3(g), as the case may be, has been complied with; and (b) the Issuer could make such payment and still be in compliance with such Financial Resources Requirements; and
 - (ii) the Issuer being solvent at the time of, and immediately after, such payment, and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that the Issuer could make such payment and still be solvent.
- (b) For the purposes of Condition 3(a) above, the Issuer shall be “solvent” if it is able to pay its Liabilities (other than the Subordinated Liabilities) in full disregarding (i) obligations which are not payable or capable of being established or determined in the Insolvency of the Issuer, and (ii) the Excluded Liabilities.’
25. The following defined terms are relevant to that subordination provision in Claim D:

- (1) ‘Senior Liabilities’ is defined as ‘*all Liabilities except the Subordinated Liabilities and Excluded Liabilities*’;
 - (2) ‘Liabilities’ are ‘*all present and future sums, liabilities and obligations payable or owing by the Issuer (whether actual or contingent, jointly or severally or otherwise howsoever)*’;
 - (3) ‘Subordinated Liabilities’ are ‘*all Liabilities to Noteholders in respect of the Notes and all other Liabilities of the Issuer which rank or are expressed to rank pari passu with the Notes*’; and
 - (4) ‘Excluded Liabilities’ are ‘*Liabilities which are expressed to be and, in the opinion of the Insolvency Officer do, rank junior to the Subordinated Liabilities in any Insolvency of the Issuer*’.
26. In *ECAPSI* at first instance, Marcus Smith J noted a “significant difference” between the definition of *Subordinated Liabilities* in Claim C and the definition of the same phrase in Claim D. The difference then identified was that the definition in Claim C makes no reference to “*Liabilities of the Issuer which rank or are expressed to rank pari passu with the Notes.*” Marcus Smith J nevertheless concluded that the definitional difference made “no difference to the outcome.” On appeal, however, the Court of Appeal concluded in the *ECAPSI Proceedings* that the difference was determinative in reaching its conclusion as to the priority of Claim D to Claim C, at least in terms of principal. The importance of the first difference was explained by the Court of Appeal in *ECAPSI*.
27. Another difference which is possibly significant in this case (though not in *ECAPSI*) is the extension of the definition in Claim D to all “*Liabilities to Noteholders in respect of the Notes*”, whereas the definition in Claim C is confined to “*all Liabilities to the Lender in respect of each Advance made under this Agreement and all interest payable thereon*”. I return to this latter difference later.

The Court of Appeal’s analysis in ECAPSI of the contractual provisions of Claim C and Claim D

28. I have already set out Lewison LJ’s summary of his conclusions: see paragraph [14] above.
29. The Court of Appeal’s more detailed reasoning was elaborated as follows:
- (1) In the insolvency regime, all debts must be ranked to determine the order in which they may be proved; and the “*question is when a particular creditor is entitled to prove and whether he is entitled to be paid in priority to or pari passu with another creditor...[and]...that is a question of interpretation of the various contractual instruments involved, rather than a question for the rules. The rules are there to give effect to an order of priority that has been contractually agreed as between subordinated debts*” (see paragraph [13]). As to that:
 - (2) First, in determining the issue as to the relative ranking between Claim C and Claim D in respect of principal (“the PLC Ranking Issue”), the overarching

question for the Court was how far back in the queue each of Claims C and D had agreed to stand (see paragraph [78]). The subordination provisions in each Claim were to be read as a whole, having regard to their common objective; being to identify the creditor's place in the queue (see [26]).

- (3) Second, when considering how far back Claim D had agreed to stand in the queue, the effect of the Subordinated Liabilities definition was that: *'The clear intention behind the exclusion is that Claim D has not agreed to stand further back in the queue than claims which rank pari passu with it. In relation to such claims it will share in a distribution pari passu*' (emphasis added, at [82]). By so holding, the Court of Appeal accepted the submission that, contrary to the view of the judge at first instance, the difference in Claim C's and Claim D's Subordinated Liabilities definitions made all the difference to the outcome of the PLC Ranking Issue.
- (4) Third, and as to the difference in definition, when considering where Claim C had agreed to stand in the queue, the effect of its Subordinated Liabilities and Excluded Liabilities definitions was that: *'Claim C expresses itself to be junior to all claims except those which are themselves junior to Claim C. If a claim would otherwise rank pari passu with Claim C, Claim C has subordinated itself to that claim*' (at [83], emphasis added). Accordingly, the Court of Appeal held that Claim C had not subordinated itself to junior claims but that it was subordinated to claims that would otherwise rank *pari passu* with it.
- (5) Fourth, applying those conclusions to determine the relative priority of Claims D and C, it followed that:
 - (a) From the perspective of Claim D's subordination provision, the principal on Claim C was an Excluded Liability.
 - (b) From the perspective of Claim C's subordination provision, the principal on Claim D was a Senior Liability. To reach that conclusion, it had been *'necessary to look at Claim D to see what is expressed'* (at [86]).
 - (c) For this purpose, one had to look at the Subordinated Liabilities definition in Claim D. As to this: *'The clear thrust of this definition is that Claim D is not subordinated to claims which have an equal ranking with Claim D... Whatever else may be said about the clarity of the drafting, it is not possible to regard Claim D as "expressing" itself to be "junior" to Claim C*' (at [88], emphasis supplied).
 - (d) Accordingly, given that Claim D was not an Excluded Liability from Claim C's perspective, Claim D was necessarily, as regards Claim C, a Senior Liability.

Relevance and application of the IR as to payment of interest: IR 14.23

30. Before addressing the application of that contractual analysis to Issue (1), it is necessary in this case to consider also the terms of the IR.
31. As previously noted, in the *ECAPSI Proceedings*, the Court of Appeal focused exclusively on the effect of the contractual provisions in determining the real question

as to how far back in the queue each Claim had agreed to stand. In that case, there was no need or reason to consider the effect (if any) of any Insolvency Rules. The provisions of the IR were not relied on either by the parties or the court in determining that issue. The position is different in the present case.

32. In the present case it is common ground that the IR, and in particular IR 14.23 (which regulates the payment of interest), are also relevant. Indeed, IR 14.23 underpins the submissions of all parties, though each ‘side’ culls a different conclusion from it in their application.

33. IR 14.23(7) provides:

‘(7) In an administration—

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

(b) all interest payable under sub-paragraph (a) ranks equally whether or not the debts on which it is payable rank equally; and

(c) the rate of interest payable under sub-paragraph (a) is whichever is the greater of the rate specified under paragraph (6) and the rate applicable to the debt apart from the administration.’

34. It will be necessary to elaborate the contesting parties’ respective submissions on IR 14.2, but a brief summary may be convenient at this stage and assist understanding of the interconnection between the contractual terms and the provisions of the IR in the parties’ respective submissions.

35. In summary, therefore:

(1) LBHI submit that statutory interest is not a Liability “*in respect of the Notes*” for the purposes of Claim D nor a Liability “*in respect of each Advance*” for the purposes of Claim C and is not a Subordinated Liability within the definition of that term in each Claim. Rather, it falls within the definition of ‘*Excluded Liabilities*’ in both Claim D and Claim C, ranking behind a claim to principal under Claim C notwithstanding Claim D’s priority in respect of principal. Further, the provisions of IR 14.23(7) reinforce the conclusion that statutory interest should not be payable on either Claim until after payment in full of the principal on both.

(2) Against this, both GP1 and DB submit that statutory interest does not fall within the definition of *Excluded Liabilities* in Claim C but rather for the purposes of Claim C is a *Senior Liability*; and for the purposes of Claim D, it falls within the definition of *Subordinated Liabilities* ranking *pari passu* with principal. Accordingly, as a matter of contractual interpretation, Claim D is entitled to payment of statutory interest in priority to any repayment of principal on Claim C. Further or alternatively, and indeed GP1’s primary case, which DB adopted and which is elaborated later, is that the provisions of IR 14.23(7)(a) demonstrate that the priority accorded to principal (as determined by the Court of Appeal in *ECAPSI*) also mandates priority in respect of statutory interest.

The decision of the Supreme Court in Waterfall I

36. Before turning to discuss in greater detail the parties' respective submissions on the contractual provisions and the provisions of IR 14.23, it is convenient to complete this description of the relevant material by explaining in broad terms the relevance to the present issue of the decision of the Supreme Court in *Waterfall I* (and see paragraph [21] above).
37. *Waterfall I* concerned the question whether statutory interest, even if correctly described as a 'Liability payable or owing by [PLC]' (which was in issue there but is now common ground in these proceedings), ranked before or after subordinated liabilities; and a further but related question whether a proof for subordinated debt could be lodged validly before payment in full of statutory interest in respect of unsubordinated debt and payment (or provision) in full of any non-provable liabilities.
38. The Supreme Court concluded that both statutory interest and non-provable liabilities had priority over subordinated debt (see [64] in the speech of Lord Neuberger of Abbotsbury PSC), and (disagreeing with the Court of Appeal but agreeing with David Richards J (as he then was) at first instance) that it was not open to the holder of subordinated debt to lodge a proof in respect of that debt until statutory interest in respect of the unsubordinated debt had been paid in full and any 'non-provable' liabilities had either been paid in full or fully provided for (see [70] *ibid.*).
39. Noting that the subordinated loan agreements (for revolving credit facilities) in issue in *Waterfall I* contained subordination clauses in exactly the same terms as those in Claim C, Ms Lexa Hilliard KC for GP1 submitted that the conclusions of the Supreme Court in *Waterfall I* that statutory interest on unsubordinated debt is payable in priority to the payment of principal on subordinated debt, and that no proof could be lodged in respect of subordinated debt unless and until any liabilities in respect of unsubordinated debt had been paid in full, was applicable by the same reasoning to the issue in this case.
40. Mr Allison KC for LBHI, on the other hand, submitted that (a) *Waterfall I* was concerned with an issue of priority between unsubordinated claims and subordinated claims, and was not concerned with, did not address and has no application to, the question here raised of ranking as between subordinated liabilities themselves; and (b) whereas in *Waterfall I* the unsubordinated debt was, as such, a 'Senior Liability' ranking prior to any other liabilities, that is not so in this case; and in any event (c) even though (admittedly) statutory interest is a 'Liability', it is nevertheless not a Liability 'in respect of the Notes' within the definition of Claim D, because it is not a liability having the Notes as its legal source.
41. These submissions were considerably elaborated; and I turn next to a more detailed analysis of the parties' competing submissions.

The parties' submissions on contractual interpretation and IR 14.23 in more detail

LBHI

42. At the hearing, and after a helpful introduction of the context and issues by Mr Beltrami KC for the PLC JAs, I acceded to Mr Allison speaking first, since the burden appeared

to be on him to show why Claim D's priority as to principal should not carry with it the right to payment of statutory interest prior to any distributions in respect of Claim C.

43. LBHI's case, in the round, is:

- (1) The decision of the Supreme Court in *Waterfall I* has no direct application to the issue in this case. *Waterfall I* concerned a competition between unsubordinated debt and subordinated debt. In that context, the requirement for regulatory capital in the form of subordinated debt carries with it the strong implication or corollary that no payments are to be made to subordinated creditors unless and until all unsubordinated claims and entitlements have been satisfied in full. No such regulatory considerations inform a competition between subordinated claims⁵. Moreover, the Supreme Court certainly did not address any issue relating to statutory interest on subordinated debt.
- (2) The decision in *ECAPSI* illuminates the required approach of the court in determining an issue of priority in a competition between subordinated claims, but that case dealt only with priority between Claim C and Claim D as regards repayment of principal. There was no consideration in that context of the question in this case as to the priority between Claim D's claim to statutory interest and Claim C's claim to repayment of principal. It is for this court to determine that question in accordance with the approach prescribed by the Court of Appeal in *ECAPSI* and against the background that debts (other than preferential debts) rank *pari passu* unless the instrument creating the debt in question evinces a contrary intention (and see *ECAPSI* at [14]).
- (3) The overarching question for the court is how far back in the queue, and relative to each other, have Claims C and D agreed to stand. As Lewison LJ put it in *ECAPSI* at ([17]):

"Given that a creditor cannot, by agreement with the debtor, advance his position in the queue from where it would otherwise have been, the question that arises in relation to each instrument is how far back in the queue the creditor has agreed to stand."
- (4) Accordingly, it is necessary to consider in turn the detailed contractual provisions of each Claim to determine whether one claim has ceded priority to the other, and in what respects. There is in this context neither the regulatory requirement to insulate unsubordinated claims nor the mandate to do so inherent in the distinction between unsubordinated debt and subordinated debt that drove the decision in *Waterfall I*.
- (5) In this case, there is nothing in the terms of either Claim C or Claim D to denote that Claim C has agreed to stand behind Claim D in the queue save in respect of principal and other contractually-sourced liabilities.

⁵ Cf Lewison LJ's judgment in *ECAPSI* at [29] to [31], where he stated that the judge at first instance, in determining that "the rules regarding regulatory capital, and their potential breach, have no bearing on the questions of subordination that I must address" had "put the point too high". Lewison LJ went on that though "ultimately, the meaning of a contract depends on its own terms....I do not think that it can be said that the regulatory background has "no bearing" on questions of interpretation." However, it is also to be noted that in that case, the regulatory background did not materially affect the semantic interpretation of the words of the contracts.

- (6) It follows that, in accordance with the approach in *ECAPSI*, Claim C should be paid principal after payment of principal on Claim D but before Claim D or Claim C are paid statutory interest on a *pari passu* basis out of any surplus remaining after payment of such contractual claims.
44. By reference to the provisions of Claim C and Claim D in more detail, Mr Allison's submissions were elaborated to the following effect:
- (1) In both Claim C and Claim D, liabilities are defined, and their priorities are determined, by the three exclusive categories of "*Senior Liabilities*", "*Subordinated Liabilities*", and "*Excluded Liabilities*". In the context of both instruments, all claims must be categorised by reference to one or other of those three categories, as explained by Lewison LJ in *ECAPSI* at [80] to [91]. It is stipulated that no payment can be paid in respect of any liability unless the Borrower/Issuer will be solvent before and after the payment.
- (2) In Claim C, "*Subordinated Liabilities*" comprise the rights of the lender "*in respect of each Advance made under this Agreement and all interest payable thereon*" and by clause 5 those rights "*are subordinated to the Senior Liabilities...*". "*Senior Liabilities*" are all liabilities except the *Subordinated Liabilities* and *Excluded Liabilities*. Thus, Claim C is subordinated to claims that would otherwise rank *pari passu* with it, but not to *Excluded Liabilities*, which are liabilities expressed to be junior to it. In Claim C, "*Excluded Liabilities*" are defined to mean, in effect, liabilities which "*rank junior to the Subordinated Liabilities...*" Statutory interest is, for the purposes of Claim C, neither a *Senior Liability* nor is it a *Subordinated Liability*; and accordingly, and also because by dint of IR 14.23(7)(a) it is not payable until after payment of principal on Claim D, it must be an *Excluded Liability* which Claim C has not agreed to stand behind in the queue. As such, although it was determined in *Waterfall I* that it is a "liability payable or owing by the company", it is not a liability which Claim C has agreed to stand behind in the queue or 'waterfall'; rather, it ranks for payment after payment of principal on Claim C. Indeed, statutory interest is an axiomatic example of an *Excluded Liability*, viz., a Liability which in Claim C is '*expressed to be...junior to the Subordinated Liabilities in any Insolvency of the Issuer*'. This follows from:
- (a) the terms of IR 14.23(7)(a). By its terms, the liability to pay statutory interest arises after the payment of the proved debts: see *In re Lehman Bros International (Europe) (in administration) (No 6)* [2015] EWHC 2269 (Ch), [2016] Bus LR 17, which is often referred to as "*Waterfall 2A*", in which David Richards J so held in the context of rejecting the submission that dividends were first to be appropriated to 'accrued' statutory interest (see at [134]-[135] and [144]-[149]); and on appeal [2017] EWCA Civ 1462, [2018] Bus LR 508 at [27], where Gloster LJ noted that the Rules '*contain a built-in assumption that the whole of the principal of the relevant debts will already have been paid by dividend since, otherwise, there will be no relevant surplus*'. Thus, the obligation to pay statutory interest only arises after the payment of proved debts and it does not 'accrue' in the meantime

from the date of the administration. By reason of this statutory definition, the obligation to pay statutory interest in relation to Claim D arises after the payment of the proved debt that is Claim D. Indeed, if Claim D were not a proved debt that was paid in full, Claim D would not enjoy any right to statutory interest at all;

- (b) the definition of *Excluded Liabilities* [in Claim C] and its role in Condition 3(a), envisages an insolvency context, referring to the ‘*opinion of the Insolvency Officer*’ as to whether the liabilities in question are expressed to rank junior to the *Subordinated Liabilities* ‘*in any Insolvency of the Issuer*’. Statutory interest under the IR is an example of a liability subordinated by statute that would reasonably be known to the insolvency officeholder as being junior to Claim D in an insolvency of PLC.
- (3) That conclusion is likewise entirely consistent with the provisions of Claim D. Claim D has not agreed to stand further back in the queue than claims which rank *pari passu* with it, and in relation to such claims (including repayment of principal), therefore, it will share in any distribution *pari passu* (and see *ECAPSI* at [82]). The question becomes whether, for the purposes of the definitions in Claim D, statutory interest is a Liability “*in respect of the [Claim D] Notes*” [my emphasis], so that it is to be treated as a claim which ranks *pari passu* with Claim D. As to this:
- (a) Statutory interest is a liability created by statute and not by contract (and see section 189 of the Insolvency Act 1986 (“IA 1986”) and *Waterfall I* at [47]). It is the product of a statutory direction to a liquidator or administrator in respect of a surplus against *proved debts*, and it is by reason of that direction that a right arises, albeit one not enforceable by suit against the issuer: see, in addition to the paragraphs of Lord Neuberger’s judgment in *Waterfall I* referred to above, the first instance judgment of David Richards J (as he then was) in *Waterfall I* ([2015] Ch 1), at [70]-[71]. As such, it is a claim separate to the claim in respect of principal which arises by statute in respect of ‘*the debts proved*’ that are paid (see IR 14.23(7)(a). A good illustration of this is that the obligation to pay statutory interest arises irrespective of whether the underlying debt is interest-bearing.
 - (b) On its true interpretation, the phrase “*Liabilities...in respect of the Notes*” is confined to liabilities which have their source in the contractual terms, and not liabilities arising *dehors* the contractual provisions and only by virtue of statutory provisions and rules providing for payment of statutory interest on ‘*the debts proved*’.
 - (c) Accordingly, although (as previously noted) it is no longer disputed that statutory interest is a Liability, it is not a Liability “*in respect of the [Claim D] Notes*” [my emphasis] for the purposes of the definition therein of “*Subordinated Liabilities*”. Rather, it forms part of the statutory process for proof and dividend which replaces and extinguishes creditors’ contractual rights, including as to interest (as Gloster LJ held in *Waterfall 2A* [2018] Bus LR 508 at [77]). In other words, it is not payable in respect of the Notes, but rather by statutory direction on the debt proved, whether interest

bearing or not. The phrase “*Liabilities...in respect of the Notes*” must be interpreted and given a confined meaning accordingly.

45. Mr Allison characterised the broader interpretation advanced by GP1 and DB as misconceived. He submitted that the premise of their argument “necessarily assumes that the draftsman of Claim D departed from the statutory starting point (i.e., that statutory interest ranks junior to proved debts) and has subsumed statutory interest at the same level of subordination as the Subordinated Liabilities (i.e., subordinating it at the same level as the Notes and Liabilities ranking *pari passu* with them)”. He dismissed this premise as making no commercial or regulatory sense: and that no commercial or regulatory reason has been identified by DB and GP1 as to why a regulatory subordinated instrument should include within the scope of its subordination provision a Liability which (a) does not have the subordinated instrument as the legal source of the obligation, and (b) is already deeply subordinated by statute, such that it already ranks below the subordinated instrument as a matter of law. Whilst claims to principal and contractual interest arise under the Notes and therefore need to be subordinated to fulfil a clear regulatory purpose, statutory interest does not arise under the Notes, and is already subordinated by statute to all proved debts, including the Notes themselves.
46. Further, Mr Allison submitted, it is “impossible” for statutory interest to rank at the same level as principal on Claim D, given that statutory interest can only be paid if there is a surplus after proved debt, and inexplicable and “inherently improbable” that “the draftsman of a regulatory subordinated debt would structure Claim D in such a way as to subordinate statutory interest to the same level as principal, when statutory interest would otherwise be more deeply subordinated by the express terms of statute”. He suggested that “the absurdity of subsuming statutory interest on Claim D as a *Subordinated Liability*” is underscored by the “commercial oddity” that on the wider interpretation contended for by GP1 and DB, statutory interest on Claim D would rank above statutory interest on other subordinated debts, even where those debts are expressed to rank *pari passu* with Claim D.
47. He submitted also that a contextual and semantic analysis of the phrase demonstrates the inaptness, incongruity or internal inconsistency of including statutory interest within the definition, and that the broader (and usual) meaning of the phrase “*in respect of*” is displaced by the particular context and a reading of the provisions of Claim D as a whole:
 - (1) A narrower meaning is required to give the words any sensible import. If the broader view is adopted the words have no function, in that the meaning of the first part of the ‘*Subordinated Liabilities*’ definition would, on GP1’s and DB’s reading, be the same even if one omitted the words ‘*in respect of the Notes/Advance.*’ The court should assume their inclusion was considered necessary and strive to give those words a sensible meaning according to their context.
 - (2) As a matter of language, there is a built-in assumption to Condition 3(a), which is that the relevant Liabilities ‘*in respect of*’ the Notes rank *pari passu* with each other. The first two sentences of Condition 3(a) provide that “*The Notes constitute direct, unsecured and subordinated obligations of the Issuer and the*

rights and claims of the Noteholders rank pari passu without any preference among themselves. The rights of the Noteholders in respect of the Notes are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) in respect of the Notes is conditional upon...)”. The function of the subordination language in the opening words of Condition 3(a) is to ensure the subordination of sums ‘*in respect of the Notes*’ to Senior Liabilities. The rights of the Noteholders ‘*in respect of the Notes*’ described in the second sentence refer back to the ‘*rights and claims of the Noteholders against the Issuer*’ described in the first sentence, which are expressly said to ‘*rank pari passu without any preference among themselves*’. The function of the latter phrase is simply to clarify that rights under the different Notes, which were tradeable, rank *pari passu* among themselves.

- (3) The *pari passu* assumption is carried through into the definition of *Subordinated Liabilities*, where the second part of the definition (‘...and all other Liabilities of the Issuer which rank or are expressed to rank *pari passu* with the Notes’) [emphasis supplied] plainly informs the words preceding it, which include the ‘*in respect of the Notes*’ wording. What the draftsman had in mind were Liabilities under the Notes which rank *pari passu* with each other, and other Liabilities of PLC which rank or are expressed to rank *pari passu* with Claim D, thus creating a single *pari passu* layer of ‘*Subordinated Liabilities*.’
- (4) The phrase concerned is used repeatedly in the PLC Sub-Notes and each time it is inapt to describe statutory interest and/or contemplates an obligation which has the PLC Sub-Notes as its legal source. For example,
 - (a) Condition 4(a)(i) refers to the requirement of FSA written consent where a person purports to retain or set off any amount payable by it ‘*to the Issuer against any amounts due in respect of the Notes*’. That use of the ‘*in respect of the Notes*’ expression is not apt to apply to statutory interest. Similarly, by Condition 4(a)(v) FSA consent is required for a person to ‘*take or enforce any security, guarantee or indemnity from any person for all or any part of the liabilities of the Issuer in respect of the Notes*’, where that phrase envisages liabilities under the Notes, in respect of which a security, guarantee or indemnity might be taken or enforced, which cannot be done with respect to statutory interest.
 - (b) By Condition 4(b)(vi), the Issuer was also not permitted (without the FSA’s written consent) to ‘*arrange or permit any contract of suretyship...relating to its liabilities under these Conditions in respect of the Notes to be entered into*’ [emphasis supplied]. This Issuer covenant mirrors the covenant at Condition 4(a)(v), which applies to any person. Importantly, it unpacks the phrase ‘*in respect of the Notes*’ to mean the ‘liabilities under these Conditions in respect of the Notes’, which would plainly disqualify statutory interest. [Emphasis supplied]
 - (c) The detailed provisions in relation to the payment and calculation of interest at Condition 5 of Claim D are directed only at contractual interest having the PLC Sub-Notes as its legal source.

- (5) As, for the purposes of both Claim C and Claim D, statutory interest does not fall within the definition of *Subordinated Liabilities*, it must fall within one of the other two categories. Being payable (under the terms of IR 14.23(7)) only after proof and payment of principal on Claim D, it does not fall within the definition of *Senior Liabilities*. It must therefore be treated within the definition of *Excluded Liabilities*. Whilst Claim C has agreed to subordinate itself to Claim D in respect of liabilities which are *Subordinated Liabilities* for the purposes of Claim D, it has not agreed to subordinate itself to *Excluded Liabilities*.
- (6) Thus, whilst the Court of Appeal's reasoning in the *ECAPSI Proceedings* resolved the PLC Ranking Issue in favour of the principal amount under Claim C ranking junior to the principal amount under Claim D (because the two are claims which would otherwise rank *pari passu*), when applied to Issue (1), the same reasoning results in the conclusion that statutory interest on Claim D is *junior* to the principal amount under Claim C. This is because statutory interest would not otherwise rank *pari passu* with Claim C but would rank junior to it.
- (7) This conclusion fits with IR 14.23(7)(b) which applies the *pari passu* principle to statutory interest payable on Claim C and Claim D *irrespective* of the ranking of the proved debts *inter se*.

GP1 and DB

48. Neither GP1 nor DB accepted LBHI's analysis. In particular, neither accepted that statutory interest on Claim D fell within the definition of *Excluded Liabilities* for the purposes of Claim C. Rather, statutory interest constituted, as the Court of Appeal in *ECAPSI* had already held in the case of principal, a liability "*in respect of...the Notes*" ranking *pari passu* with principal. If, as is clear, statutory interest cannot be classified as an *Excluded Liability* for the purposes of the definition in Claim C, it is of no avail for LBHI to resort to and pray in aid the subordination provisions of Claim D: LBHI cannot succeed if Claim C has agreed to stand behind Claim D in respect of statutory interest as well as principal; and Claim C must be taken so to have agreed if statutory interest is not an *Excluded Liability*. But even if resort is made to the subordination provisions of Claim D, there is no inaptness, incongruity or violence done to the language or scheme of the subordination provisions in Claim D to characterise statutory interest as within the definition of *Subordinated Liabilities*, so that on that basis too it is to be treated as having the same priority over Claim C as has Claim D's entitlement to repayment of principal.
49. In more detail, GP1 and DB submitted that as a matter of contractual interpretation:
 - (1) Statutory interest is not within the definitions of *Subordinated Liabilities* and *Excluded Liabilities* in Claim C. Only *Advances* under the Claim C agreements themselves fall within the definition of *Subordinated Liabilities* in Claim C. "*Excluded Liabilities*" are defined in Claim C as "*Liabilities which are expressed to be, and in the opinion of the Insolvency Officer of the Borrower do, rank junior to the Subordinated Liabilities in any insolvency of the Borrower*". There is no such express provision in either Claim C or Claim D. LBHI's attempt to relegate statutory interest to being an *Excluded Liability* because statutory interest can be paid only after a creditor's proved debt has been paid out of any surplus then remaining is manifestly incorrect: the stipulation in the statutory

rules as to sequence of payments on one claim does not signify subordination as regards Claim C or other claims.

- (2) Like Claim D's claim to principal, statutory interest on Claim D falls within the definition of "*Senior Liabilities*" in Claim C which Claim C had agreed to stand behind in the queue. "*Senior Liabilities*" are defined in Claim C's provisions as "*all Liabilities except the Subordinated Liabilities and Excluded Liabilities*". Not falling within either excepted category, Claim D must be a "*Senior Liability*" for the purposes of Claim C's subordination provisions, in just the same way as the unsubordinated debts were "*Senior Liabilities*" for the purposes of the identical subordination provisions in *Waterfall I*. In *Waterfall I*, the Supreme Court had already established that statutory interest on *Senior Liabilities* is payable in priority to principal on (relatively) junior debt in the 'waterfall'.
 - (3) The subordination provisions in Claim D lead to the same conclusion. Contrary to Mr Allison's submissions, the phrase "*all Liabilities...in respect of the Notes*" in the definition of *Subordinated Liabilities* in Claim D connotes a very broad range of association: and statutory interest is plainly a Liability "*in respect of*" the Notes within that broader range. Thus, under the terms of Claim D, statutory interest ranks *pari passu* with the Notes, which have already been determined to rank as to principal in priority to Claim C.
50. Further, on behalf of GP1 (and with the support of Ms Tolaney KC on behalf of DB), Ms Hilliard KC put forward the following "routes" to the conclusion that statutory interest falls to be paid out of the available 'surplus' in priority to the principal of Claim C (I have slightly altered the sequence in which they were advanced so as to follow on from the previous analysis):
- (1) The decision in *Waterfall I* is determinative of this case. In *Waterfall I*, the subordination clauses in the loan agreements concerned (revolving credit facilities) were in exactly the same terms as those in Claim C (see [40]). Lord Neuberger PSC concluded (at [56]) that statutory interest (a) was a Liability payable by the company, which (b) fell within the definition of *Senior Liabilities* which (c) "*under the terms of the loan agreements...enjoys priority over the repayment of subordinated debt*". That makes clear that (i) statutory interest need not all be paid at the same time, irrespective of how the underlying claims rank, (ii) it is perfectly possible for the terms of a loan agreement to accord priority in respect of statutory interest, and (iii) the effect of the provisions was to do just that. Ranking is to be determined as between two claimants by reference to the subordination provisions governing their lending, not according to whether they are subordinated or unsubordinated as a matter of composite description. Just as Claim D could not be proved before payment in full of "*Senior Liabilities*" in the form of unsubordinated debt (including statutory interest and non-provable liabilities) so too Claim C could not be proved until Claim D, as a "*Senior Liability*" had likewise been paid in respect not only of principal, but the other liabilities due to be satisfied. In this case, Claim D is a *Senior Liability* for the purposes of Claim C's subordination provisions, in just the same way that the unsubordinated debts were *Senior Liabilities* for the purposes of the identical subordination provisions considered in *Waterfall I*. Ms Hilliard concluded (taking this from her skeleton argument) that

“Accordingly, the Supreme Court has already established that statutory interest on *Senior Liabilities*, such as Claim D in comparison to Claim C, is payable in priority to the principal on the subordinated debt of Claim C.”

- (2) Further, IR 14.23(7) requires the same conclusion. *ECAPSI* established that the principal of Claim D ranks ahead of the principal of Claim C. It is clear, therefore, that Claim C will not be able to prove until the principal on Claim D has been proved and paid: that is a direct application of *Waterfall I* at [68] to [72]. As soon as principal on Claim D has been paid, IR 14.23(7) applies, and IR 14.23(7)(a) unambiguously mandates that surplus remaining after payment of proved debts “*must*” be applied in paying “*interest on those debts*” (i.e. on Claim D), “*before being applied for any other purpose*” (e.g. paying the principal on Claim C). On that basis, there is no need, for the purposes of determining the priority issue in this case, to consider the subordination provisions in Claim D: IR 14.23(7) provides a complete answer to the effect that (subject to solvency and the availability of surplus immediately afterwards) statutory interest is mandated to be paid next and immediately after principal on Claim D has been proved and paid.
 - (3) Standing back, and given that it was established in *Waterfall I* and is common ground that statutory interest on unsubordinated debts ranks ahead of the principal on Claim D, there is no principled point of distinction, and certainly none had been identified, for treating statutory interest on Claim D as subordinate to principal on Claim C. Claim C stands in the same position vis-à-vis Claim D as Claim D stands vis-à-vis unsubordinated creditors. There is nothing in LBHI’s argument that, on analysis, Claim D expresses statutory interest to rank “junior” to the principal of Claim D: there is no such “expression” in Claim D of juniority to Claim C. Further, the requirement in IR 14.23(7) that statutory interest can be paid on Claim D only out of surplus following the payment of the principal on Claim D (which reverses the ordinary rule that a creditor may apply any payment first to outstanding interest) at most stipulates that on the same claim principal has priority over statutory interest, and does not in any way denote subordination to payment of principal on a separate and subordinated claim (here, Claim C).
51. Ms Tolaney KC adopted all of Ms Hilliard’s submissions. Although she chose herself to focus primarily on the issues of *res judicata* and abuse of process (which I address later), she also emphasised the following on the substantive issue of contractual interpretation:
- (1) For the purposes of the subordination provisions in Claim C, statutory interest on Claim D is a Liability payable or owing by PLC which does not fall within either of the categories of Liabilities which are excluded from being *Senior Liabilities* (that is to say, *Subordinated Liabilities* or *Excluded Liabilities*). That is because in Claim C:
 - (a) the term “*Subordinated Liabilities*” means “*all Liabilities to the Lender in respect of each Advance made under this Agreement and all interest payable thereon*”. The definition of *Subordinated Liabilities* in Claim C is thus confined to Advances comprising Claim C and interest thereon and does not extend to any other liability;

- (b) the phrase “*Excluded Liabilities*” in Claim C means “*Liabilities which are expressed to be and, in the opinion of the Insolvency Holder of the Borrower, do, rank junior to the Subordinated Liabilities in any Insolvency of the Borrower*”. Statutory interest on Claim D is not expressed to be junior to the PLC Sub Debt, and so it is also not within the definition of *Excluded Liabilities* in Claim C.
- (2) She described as “the fundamental error” in LBHI’s case its disregard of the language actually used in the Claim D subordination provisions and its construction of “*in respect of the notes*” in the definition of *Subordinated Liabilities* in Claim D as meaning “*a liability that arises under the notes*”. That is not what the language of the relevant provisions says and, to the extent it is suggested that a payment of statutory interest is not “*in respect of the notes*” in the required sense, it is wrong, in light of both the language of Clause 3(a) and the reasoning of the Supreme Court in *Waterfall I* (see above). Furthermore:
- (a) there is nothing in the point that the usual broader interpretation of the phrase would render the disputed words redundant or meaningless since the interpretation of the definition would be the same even if the disputed words were omitted. The phrase serves to restrict the ambit of the definition to a Liability to Noteholders in that it excludes Liabilities unconnected with the Notes other than “*other Liabilities which rank or are expressed to rank pari passu with the Notes*”.
- (b) the fact that the regulator is not concerned with a competition between subordinated creditors is no reason for not according the contractual subordination provisions their true effect;
- (c) contrary to Mr Allison’s submission, Condition 3 of Claim D does not restrict the meaning of the disputed phrase to a claim under the Notes. Mr Allison’s argument was premised on treating IR 14.23(7) as having the effect that statutory interest could not be treated as *pari passu* with principal because it could not be paid until after payment of principal. That argument was mistaken for the reason previously given: a prescribed sequence of payment in respect of one claim does not signify subordination in respect of another, nor does the sequence denote ranking between the noteholders *inter se*. More particularly:
- (i) Neither the content of Condition 3(a) as a whole, nor the juxtaposition of its first two sentences (see paragraph [47(2)] above), signifies that statutory interest falls outside the definition of *Subordinated Liabilities* because, by dint of IR 14.23(7), it sits behind principal in the waterfall or queue. The first sentence simply provides for the claims of all Noteholders “*in respect of the Notes*” to rank *pari passu* and does not provide for any ranking between the noteholders *inter se*. Its purpose and effect is simply to ensure that, as Ms Tolaney put it, “their rights and claims as noteholders have no internal priority over each other”. The second sentence does not assist LBHI either: on the contrary, its provision for “*the rights of the Noteholders in respect of the Notes*” to be subordinated to the *Senior Liabilities*, and for any payment “*whether principal, interest or otherwise*” [emphasis supplied] to be

conditional on certain criteria supports a broad and not a confined interpretation.

- (ii) Mr Allison's reliance on Condition 3(d) as contemplating only contractual interest, and thereby restricting the ambit of the disputed phrase to that, is misplaced: Condition 3(d) does not mention the disputed phrase, and Condition 3(d)'s focus on payments of interest as provided for in Condition 5(a) does not signify any confinement of that ambit.
 - (d) Mr Allison's reliance on Condition 4 in Claim D is misplaced also. The principal purpose of those provisions, which impose a requirement of the FSA's prior consent in respect of certain identified actions which might have a regulatory impact, is to regulate how the Notes are dealt with while the Issuer is a regulated entity. More particularly, clause 4(b)(iv), which provides that without the prior written consent of the FSA the Issuer shall not "*repay any amounts in respect of the Notes otherwise than in accordance with these Conditions*", cannot bear the weight placed on it by Mr Allison: it does not limit or confine the meaning of "*in respect of*" more generally, and simply confines the manner and timing of any repayment by the Issuer of a particular kind. Similarly, clause 4(b)(vi), in requiring prior FSA consent to any contract of suretyship (or similar agreement) relating to the Issuer's "*liabilities under these Conditions in respect of the Notes*" simply identifies particular transactions which require such consent and does not confine the disputed phrase for any other purpose or context. The provisions provide no assistance in determining the correct interpretation of the disputed phrase.
- (3) LBHI's argument that IR 14.23(7), in providing for payment of statutory interest after proof of the debt, is to be taken as an expression of junior ranking for the statutory interest on Claim D is wrong:
- (a) IR 14.23(7)(a) provides the unsurprising statutory starting point for the ranking and payment of statutory interest, i.e. that it must be paid after the payment of proved debts. It is the counter-part of IR 14.23(1), which provides that where a debt proved in insolvency proceedings bears interest, the interest is provable as part of the debt, save insofar as it is payable in respect of any period after the commencement of the administration. IR 14.23(7)(a) reflects the long-standing approach to the "*cut-off*" date for proof of interest, and establishes that, in terms of the insolvency waterfall for distributions, statutory interest sits below the payment of unsecured provable debts: see *Waterfall I* in the Supreme Court at [17] per Lord Neuberger.
 - (b) IR 14.23(7)(a) is, however, simply the starting point when one is considering subordinated claims. It is entirely possible to subordinate the payment of a provable debt to the payment of statutory interest on other provable debts. That was the issue raised and conclusion reached in *Waterfall I* by the Supreme Court: see [46] onwards under the heading "*Subordination to statutory interest*" generally, and [66] confirming that

there is no objection to giving effect to a contractual agreement that a claim will rank lower than it would otherwise do in the “waterfall”.

- (c) IR 14.23(7)(a) is not (and cannot be) the required “*expression of juniority*” for the purpose of that definition. Any other conclusion would be contrary to the Supreme Court’s conclusion in *Waterfall I* and is simply wrong: IR 14.23(7)(a) is, as explained above, the rule which provides the starting point for the waterfall ranking but is not an immutable ranking or expression of juniority. If statutory interest is otherwise within the scope of the liabilities which are conferred with contractual seniority (which is the case in this instance), statutory interest is not removed from that category simply by reason of IR 14.23(7)(a).
- (d) In short, it makes no difference that, absent subordination, statutory interest on a proved debt would be paid after the proved debts (i.e. principal claims) by reason of Rule 14.23(7)(a), because there is contractual subordination which in this instance requires payment of statutory interest on Claim D before the principal on Claim C.
- (4) Further and in any event, she submitted that LBHI’s argument is flawed by circularity. IR 14.23(7)(a) provides that statutory interest must be paid “*after payment of debts proved*”. But Claim C will be a debt proved only once PLC’s more senior ranking liabilities have been satisfied. That is the effect of the contractual subordination of Claim C to Claim D. This then begs the question: is statutory interest on Claim D to be paid before Claim C? If it is, then Claim C cannot be proved and the statutory interest on Claim D must be paid. If it is not, Claim C can be proved. But the answer to the question of whether statutory interest on Claim D ranks for payment before Claim C must be answered before IR 14.23(7)(a) can apply. LBHI’s argument can only work by assuming the answer that it wants to arrive at; and is inherently circular. In short, IR 14.23(7)(a) does not contain an expression of junior ranking for statutory interest generally because its effect is always subject to contractual subordination.

My approach and conclusions on the substantive issue

52. As is apparent, the issues raised concern (a) the proper interpretation of the subordination provisions of Claim C and Claim D in the light of preceding authority (including authority involving a dispute between the same parties where the same provisions were considered, albeit in relation to priority as to capital repayment without regard to any entitlement to statutory interest) and (b) their interrelationship with, and the meaning and effect of, IR 14.23(7).
53. Pausing at the latter, that is, the interrelationship between the contractual and the statutory provisions, I think it is important to note that all of the parties accepted that the provisions of IR 14.23(7) might inform the approach to the contractual arrangements, but none contended that they should be read as overriding any contractually agreed priority or as mandating that statutory interest be paid only out of any ‘surplus’ remaining after payment of all debts which are ultimately proved. That is so notwithstanding that Mr Allison drew my attention to certain passages (especially in

the judgment of David Richards J (at [134]–[135] and [144]–[149]) in *Waterfall 2A*, in the judgment of Gloster LJ on appeal (at [27]) and the observation of Lord Briggs JSC in *Revenue and Customs Commissioners v Joint Administrators of Lehman Brothers International* [2019] 2 All ER 559 at 576b–c that “Statutory interest is never due until all proving creditors have been paid in full”) which might suggest that IR 14.23(7) provides an exclusive and overriding scheme for the payment of statutory interest *pari passu* from any surplus remaining after payment of all Claims ultimately proved.

54. In my judgment, the parties correctly proceeded on the basis that (as Ms Tolaney put it) IR 14.23(7)(a) is “simply the starting point when one is considering subordinated claims”. It is clear from the reasoning and conclusion reached in *Waterfall I* in the Supreme Court that a lender may validly agree that repayment of principal on its debt should stand behind payment of statutory interest to another lender. Further, although Mr Allison sought otherwise to confine the effect of that decision to priority between statutory interest on unsubordinated debt and principal on subordinated debt⁶, and as not determining any issue of priority as between subordinated creditors, he does appear to have accepted (in my judgment, correctly) that a contractual provision for priority is to be given effect in both contexts, notwithstanding what appears to me to be one possible reading of IR 14.23(7).
55. Equally important, I consider that it is inherent, and likewise follows from the decision in *Waterfall I*, that in the context of IR 14.23(7)(a) ‘surplus’ does not, in the context, mean what remains after all debts have been proved; it means the amount left in the hands of the Administrators after paying proved debts at each level of the ‘waterfall’. In other words, surplus is quantified as each layer of debt is proved, without taking into account provable debts at lower levels of the waterfall which must wait their turn in the queue before being proved (even though in due course these may be permitted to be proved and thereupon move from being ‘provable’ to become proved debts).
56. Mr Allison’s submissions were crafted to tread the narrow path which he contended was left open as regards subordinated claims notwithstanding the decisions in *Waterfall I* and *ECAPSI*. He contended that *Waterfall I* should be distinguished because “the context for the ‘how far back in the queue’ question is entirely different when dealing with subordinated debts”; and that once this difference was appreciated, and when then the instruments in question in Claim C and Claim D were interpreted objectively in accordance with the approach of *ECAPSI*, it is clear that although Claim C ceded priority to Claim D in respect of principal and contractual interest, it had not done so as regards a payment pursuant to a statutory direction *dehors* the contracts.
57. I accept that there are plainly differences in the nature of the competition between this case and both *Waterfall I* and *ECAPSI*. I accept, of course, that in *Waterfall I*, the contest was between unsubordinated debt (as a class) and subordinated debt (as a class). In that context, the principal purposes of subordination are to protect unsubordinated creditors by ensuring that subordinated claims cannot compete with unsubordinated claims in the event of insolvency, thereby enabling subordinated debt to qualify as regulatory capital. The regulatory considerations and concerns which require that unsubordinated claims should be insulated in all respects from subordinated claims, and thereby signal and require that no payments should be made to subordinated claims

⁶ As Mr Allison put it in his oral submissions, “...we say what Waterfall I doesn’t do at all is consider the position of ranking as between subordinated liabilities themselves. So it tells one that statutory interest is a liability in LBIE’s insolvency, but it doesn’t tell you anything more”.

unless and until any entitlements relating to unsubordinated claims have been satisfied in full, have no application in the context of subordinated claims. I accept also that in *ECAPSI*, there was no issue raised before the court about statutory interest, or the application or wider effect of IR 14.23(7).

58. However, as it seems to me, the regulatory driver was an important but not exclusive factor in *Waterfall I*. The fact that there are no regulatory considerations to signal priority between subordinated claims does not answer the question raised in this case, just as the fact that they were in play in *Waterfall I* was only one factor in the conclusions of the Supreme Court in that case. The process of determining whether a lender has agreed to stand behind another in the queue, or to borrow the words of the subordination provisions under scrutiny in this case, for determining what one lender is prepared to acknowledge as being “*Senior Liabilities*”, is substantially the same whether the competition is between unsubordinated creditors and subordinated creditors or between subordinated creditors *inter se*.
59. It also seems to me inescapably to follow from the judgment of Lewison LJ and the decision of the Court of Appeal in *ECAPSI* that even where the regulatory imperative of subordination of debt for the purpose of insulating unsubordinated claims and enabling subordinated debt to qualify as regulatory capital is not applicable, the definitions and provisions of each of the Claims apply likewise to determine priority as between one subordinated Claim and another subordinated Claim (in that case the payment of principal in respect of Claim C being subordinated to the payment of principal in respect of Claim D). In short, the absence of any regulatory imperative is part of the background; but, as in the case of a competition relating to principal, it is not “*of any real moment*” (*per* Lewison LJ in *ECAPSI* at [76]). What is required, as explained by Lewison LJ, is intense focus on the definitions which provide the mechanism for determining priority between different claims/debts.
60. Although in *ECAPSI*, there was no issue raised before the court about statutory interest, or the application or wider effect of IR 14.23(7), the analysis in *ECAPSI*, which led to the conclusion that as between the two subordinated Claims, Claim C had ceded to Claim D priority as to principal, must be adopted here. The question is whether, by reference to the same definitions which mandated priority as regards principal, Claim C has also contractually ceded priority in respect of other potential payments to Claim D.
61. In that regard, I do not agree with Mr Allison’s principal submission that, once regulatory concerns and requirements are set aside, there is nothing in the language of the instruments respectively creating Claim C and Claim D which evinces an intention to depart in this regard from that which he submitted is otherwise prescribed by the insolvency code (and, in particular, IR 14.23(7)) in its application to subordinated claims. I do not agree that, correctly interpreted, none of the provisions of those Claims touch upon or affect the payment of statutory interest under IR 14.23(7) and neither Claim ceded priority to the other in respect of statutory interest.
62. In my view, and reflecting the approach of both GP1 and DB, the starting point is the subordination provisions in Claim C, and the correct allocation of statutory interest to one of the categories of Liability identified in those provisions, being (as in all these cases) “*Senior Liabilities*”, “*Subordinated Liabilities*” and “*Excluded Liabilities*”. It is in the subordination provisions that any agreement on behalf of Claim C to cede priority is primarily to be found.

63. I consider that for the purposes of the subordination provisions in Claim C, statutory interest is not to be categorised as an *Excluded Liability*, cannot be categorised as a *Subordinated Liability* and must be treated as a *Senior Liability*. That is because in my view, and consistently with the submissions of Ms Hilliard and Ms Tolaney:
- (1) Claim D does not fall within the definition of *Subordinated Liabilities* in Claim C: only advances under the Claim C agreements themselves do so.
 - (2) *Excluded Liabilities* are defined in Claim C as “*Liabilities which are expressed to be, and in the opinion of the Insolvency Officer of the Borrower do, rank junior to the Subordinated Liabilities in any insolvency of the Borrower*”. There is no such express provision in Claim C.
 - (3) *Senior Liabilities* are defined in Claim C’s provisions as “*all Liabilities except the Subordinated Liabilities and Excluded Liabilities*”. “Accordingly, and on the same analysis as in *Waterfall I*, Claim D must be a “*Senior Liability*” for the purposes of Claim C’s subordination provisions, in just the same way as the unsubordinated debts were “*Senior Liabilities*” for the purposes of the identical subordination provisions in *Waterfall I*. In *Waterfall I*, the Supreme Court has already established that statutory interest on *Senior Liabilities* is payable in priority to principal on (relatively) junior debt in the ‘waterfall’ or queue.
64. Turning then to the subordination provisions in Claim D, to check to see whether there is any inconsistency (as would arise, for example, if such provisions evince an intention to cede priority in respect of statutory interest), the issue is again as to the correct allocation of the relevant liability as between the three identified categories.
65. As to this, I consider that for the purposes of the subordination provisions in Claim D, statutory interest is plainly not a *Senior Liability*, is not an *Excluded Liability* and is (as indeed it must be since that is the only remaining category) a *Subordinated Liability* ranking *pari passu* with principal. That is because, again consistently with the submissions of Ms Hilliard and Ms Tolaney:
- (1) There is no question of statutory interest coming before principal on Claim D: it would not be open to Claim D to specify that in any event; so statutory interest can only be categorised as either a *Subordinated Liability* or an *Excluded Liability*.
 - (2) *Excluded Liabilities* are defined in Claim D (as in Claim C in the same terms) as “*Liabilities which are expressed to be, and in the opinion of the Insolvency Officer of the Issuer do, rank junior to the Subordinated Liabilities in any insolvency of the Issuer*”. There is no such express provision in Claim D (just as there is not in Claim C).
 - (3) *Subordinated Liabilities* is the only remaining category. But that is not the only reason for allocating statutory interest on Claim D to this category. Contrary to the argument of Mr Allison and in agreement with the submissions of Ms Hilliard and Ms Tolaney, I consider that in the definition of *Subordinated Liabilities* in Claim D, the phrase “*Liabilities in respect of...the Notes*” connotes a very broad range of qualifying association: and statutory interest is plainly a Liability “*in respect of*” the Notes within that definition. I do not agree with Mr Allison that

the usual meaning of the phrase is displaced by the particular context and a reading of the provisions of Claim D as a whole, and in the context denotes and is limited to a liability which has its source in, or “under” the contract. I see no sufficient reason not to accord the phrase its usual broad meaning, and to proceed on the basis that the draftsman’s choice of it (rather than the word ‘under’) should be respected and given effect.

66. Further to my conclusion as to the meaning of “*Liabilities ...in respect of the Notes*”, which was accepted by all parties to be a crucial point, and was the subject of detailed submissions by Mr Allison (which I have summarised in paragraph [47] above):
- (1) I do not accept that the usual wide meaning of the disputed words would render them redundant (as adding nothing to “*all Liabilities to Noteholders*” in the first part of the relevant definition). Whether on that approach or on Mr Allison’s, their purpose is to identify the universe of *Liabilities* as those “*to Noteholders... in respect of the Notes*” and as not extending beyond that. Different views as to the extent of *Liabilities* thus identified does not render the phrase redundant.
 - (2) Whether or not the draftsman actually had statutory interest in mind, the status of payments due by way of statutory interest as *Liabilities* is clearly established by *Waterfall I*. Mr Allison asserted that “by its very nature” statutory interest is nevertheless not aptly described as a Liability “*in respect of the Notes*” because (he submitted) it is, rather, “a Liability in respect of proved debts as ascertained in accordance with IR 16”. He sought to support this by distinguishing statutory interest from interest payable on a liability because (a) there is nothing which can be said to accrue from time to time “*in respect of the Notes*”, (b) a right to statutory interest only arises by reason of a direction to a liquidator or administrator to pay it out of surplus, and not pursuant to any provision in the debt instrument and (c) the obligation to pay statutory interest applies irrespective of the terms of the loan in question and irrespective of whether the underlying debt is interest-bearing. But whilst these characteristics distinguish statutory interest from contractual interest payable under the Notes, it does not seem to me that they necessarily disqualify statutory interest from being a liability in respect of the Notes. A payment made to satisfy a liability arising in right of the Notes and calibrated as to its amount according to the value of the Notes and payable to Noteholders seems to me likely to have been captured within the definition, even if the source of the Liability is not contractual.
 - (3) Mr Allison’s contention that “no commercial or regulatory reason has been identified...as to why a regulatory subordinated instrument should include within the scope of its subordination provision a Liability” for which the source is not contractual and which already “ranks below the subordinated instrument as a matter of law” seems to me to beg the question, and in any event is disposed of by the considerations I have outlined in (2) above.
 - (4) Mr Allison subjected to specific analysis the provisions of Condition 4 and Condition 5 of the Notes with a view to demonstrating that in each case where it appears the expression “*in respect of the Notes*” is used to contemplate an obligation of which the source is contractual. The examples he provided are summarised in paragraph [47(4)] above. He particularly emphasised Condition 4(b)(vi), which he suggested equated the phrase “*in respect of*” with the

subsequent phrase “*liabilities under these Conditions in respect of the Notes*”. However, the fact that these Conditions, which in the case of Condition 4 are in each case directed to restricting the exercise of certain contractual rights without the prior written consent of the FSA, are confined to such contractual rights is hardly surprising: and it seems to me nothing to the point that this sequence of Conditions does not address statutory interest, and the Conditions do not appear to me to be required to be read as restricting the meaning of “*in respect of*” in other contexts. Similarly, the fact that the detailed provisions in Condition 5 in relation to the calculation and payment of contractual interest do not accommodate statutory interest seems to me even more unsurprising, and nothing to the point.

- (5) I do not accept what Mr Allison described in his oral submissions as “the key point”, that “statutory interest on Claim D cannot reasonably be characterised as ranking *pari passu* with the other liabilities which rank *pari passu* with the notes because, of course, statutory interest is only payable if and when proved debts have been paid in full...” I have already explained that this can only be a reference to debts proved at each level of the waterfall; and though I accept that IR 14.23(7) provides for the payment of statutory interest only after a debt has been proved, that does not seem to me to constitute a provision for subordination to another claim in the queue, but rather a prescribed sequence of payments in respect of the same Claim.
67. I agree with Ms Hilliard and Ms Tolaney that the phrase “*Liabilities to the Noteholders in respect of the Notes*” in the definition of *Subordinated Liabilities* in Claim D encompasses statutory interest. The phrase “*in respect of*” ordinarily denotes a very broad category of qualifying association. I do not read any of the terms of Claim D as cutting down its ambit. I do not accept Mr Allison’s submissions that it denotes and is limited to a liability which has its source in contract, nor his submission (to the same effect) that it is limited to claims “under” the Notes. I see no sufficient reason not to accord the phrase its usual broad meaning, and to proceed on the basis that the draftsman’s choice of that phrase (rather than the word ‘under’) should be respected and given effect.
68. That, as I see it, is enough to determine the issue. However, I should for comprehensiveness address Ms Hilliard’s submission that an alternative route leading to the same conclusions as to the priority of Claim D’s entitlement to statutory interest was that, since it had been decided and was now common ground that Claim C could not be proved until after Claim D had been satisfied as to principal, IR 14.23(7) required also the payment of statutory interest on Claim D before Claim C could be proved at all.
69. For the reasons already given, I accept what seems to me to be the lynchpin of Ms Hilliard’s argument that IR 14.23(7)(a) in effect directs a sequence of assessments of ‘surplus’ and the payment of statutory interest after proof and payment of each level of debt after each such assessment.
70. In summary, whilst I prefer to base my decision on their analysis of the subordination provisions in Claim C and (if necessary) Claim D, which I have in substance accepted, I also accept the arguments of Ms Hilliard (who put this as her first “route” to her desired conclusion) and Ms Tolaney that IR 14.23 does, consistently with their

submissions as to the contractually agreed order of priority, make clear that all amounts payable in respect of Claims duly proved must be satisfied before any Claim further down in the queue can be proved at all. My reservation, which underpins my preference for the contractual solution, is that in another case, there might be inconsistency with the contract: that is not this case and I need not decide what should then be done; but the parties having all accepted that IR 14.23(7) may be modified in its effect by contractual provision suggests that the contract would prevail.

71. I have reservations about Ms Hilliard's "second route". She presented the conclusion she sought as a "straightforward application of the *ratio* of Lord Neuberger PSC's judgment in the Supreme Court in *Waterfall I*", in which she contended it was "established that statutory interest on Senior Liabilities, such as Claim D, is payable in priority to the principal on the subordinated debt of Claim C." That is beguiling, but to my mind, simplistic.
72. Certainly, the conclusions in *Waterfall I* to the effect that (a) statutory interest is a Liability payable and owing by the relevant company (which, as I have made clear before, was common ground in this case), (b) the IA 1986 and IR are consistent with and require payment of statutory interest on unsubordinated claims before payments on subordinated debts and non-provable debts, and (c) statutory interest must be paid on all proved debts before non-provable debts, and non-provable debts must be paid out of any assets remaining before any distributions to a company's members (see [58D] in Lord Neuberger's judgment). However, and as I have also previously noted, Lord Neuberger did not have to and did not consider any issue arising in the different context of a competition between subordinated but provable claims *inter se*. The emphasis of his judgment is on the necessity of according priority to unsubordinated debts over subordinated debts, such priority being inherent in their descriptions (what Lord Neuberger called their "eponymous nature"), clear from the terms of each as considered in *Waterfall I*, and necessary to fulfil regulatory objectives. The position when the competition is between subordinated claims is more nuanced.
73. All that said, it does seem to me to follow from Lord Neuberger's judgment in *Waterfall I* that in any competition between provable debts, including as to the priority between a claim to statutory interest on a debt standing (by virtue of contractual subordination provisions) before another in the queue and principal on the lower ranking claim, the priority must be decided according to what was contractually agreed (in particular, under the subordination provisions of the lower ranking claim). The common ground between the parties that IR 14.23(7) does not override and must be read subject to contractual subordination provisions, supports the same conclusion.
74. Put another way, and in summary, I consider that the decision in *Waterfall I* supports the conclusion sought on behalf of GP1 (and DB) but ultimately that conclusion is dependent on the contractual analysis which is explained in *ECAPSI*. It follows that Ms Hilliard's "second route" is not an alternative solution, but an exposition of the support in authority for the primacy of contractual subordination provisions, leading to the conclusion that, albeit without the regulatory overlay which contextualised *Waterfall I*, statutory interest on Claim D comes before the repayment of principal on Claim C.
75. In what she presented as a third "route" to that same conclusion, Ms Hilliard posed the question as to why, it being common ground that statutory interest on unsubordinated debts ranks ahead of the principal on Claim D, there should be any difference as

regards the payment of statutory interest on Claim D and the payment of principal on Claim C. She submitted, in answer, that there should be no difference, since “Claim C stands in precisely the same position vis-à-vis Claim D as Claim D stands vis-à-vis the unsubordinated creditors. There is, and LBHI has identified, no principled point of distinction.” She noted that LBHI had sought to reach a different conclusion in reliance on the subordination provisions in Claim D: but that is an erroneous approach because (a) it has already been determined in *ECAPSI* that Claim D ranks ahead of Claim C, and that is “the end of the matter”, and (b) the subordination provisions in Claim D do not refer to statutory interest, do not say anything expressly about where statutory interest on Claim D ranks, but do on their true interpretation provide for the entitlement to statutory interest in respect of Claim D to be subordinated only to the same extent as Claim D itself (and no further). She also made again her submission that in the Claim C subordination provisions, which primarily and (she contends) exclusively determine Claim C’s position in the queue, Claim C is expressed to rank junior to all of PLC’s Liabilities except “*Excluded Liabilities*”; and since on no possible construction of Claim D is statutory interest “*expressed*” to be junior to Claim C, it cannot fall within that definition.

76. It seems to me that this third “route” does not on analysis add more than the contractual analysis in the light of *Waterfall I* and *ECAPSI* already undertaken. It is not really a third “route” but another way of expressing the same conclusion, with which I agree.

My conclusion on the substantive question in Issue (1)

77. Accordingly, in my judgment, statutory interest in respect of Claim D falls to be paid before the principal payable under Claim C. That conclusion also accords with the decisions in *Waterfall I* and *ECAPSI*.
78. Standing back, I do not regard this result as counter-intuitive; nor as contrary to any regulatory requirement, or undermining of any regulatory objective or concern. On the contrary, I think it would be more counter-intuitive to dissociate and relegate the payment of statutory interest on a proved debt in order to give priority to that extent to a debt, possibly a whole series of debts, lower down in a long queue, which have not yet been proved or permitted to be proved. All the more so, to my mind, given the function of statutory interest which is to serve as compensation for the delay after the commencement of the administration until paying out on proved debts “*for the periods during which they have been outstanding since the relevant date*” (IR 14.23(7)(a)). Statutory interest may not be the fruit of the tree; but it is paid in respect of the tree nonetheless.

Res judicata or abuse of process?

79. That conclusion makes strictly unnecessary determination of the question raised by DB (with GP1’s support at the Hearing)⁸ as to whether the issue raised now was *res judicata* or otherwise an abuse of process on the ground that it could and should have been raised in the context of *ECAPSI*. However, I turn to consider that issue as well because (a) it was argued at some length, (b) the question of how the principles apply to

⁷ Defined in IR 14.1(3), and in this context meaning the date on which the company entered administration.

⁸ See footnote 2 above.

applications by Administrators seems to me to be of some novelty and interest, (c) I need to explain why I did not address this as a preliminary point, given the objective of and the policy underlying *res judicata* and the broader principles established in *Henderson v Henderson*; and (d) last but not least, in case my judgment on the substantive issue (in favour of the position advocated by GP1 and DB) is later reversed.

80. First, a word on process, and in particular why I heard and have dealt first with the substantive legal issues, rather than determining first (as might ordinarily seem logical) whether the argument proposed to be put forward should be precluded by either *res judicata* or the broader principles in *Henderson v Henderson*.
81. As to this, DB (by Application Notice dated 27 April 2023) formally applied to strike out each of the Issues numbered (1), (4) and (5) on the basis that:

“the bringing or pursuing of those issues is precluded by the doctrines of cause of action estoppel, issue estoppel and/or abuse of process in circumstances where Priority Issues 1, 4 and 5 seek the determination of issues that were either decided and/or could and should have been raised for determination in a previous application made by the Joint Administrators dated 16 March 2018.”

GP1 supported this position in its Position Papers, but stated that, “to avoid duplication”, it would leave it to DB to advance those arguments.

82. However, at a Directions Hearing before me on 4 May 2023, and subsequently in their respective Position Papers which I required to be exchanged, all parties agreed that it would be sensible to determine the merits of each of the identified Issues in the alternative, especially bearing in mind the possibility of an appeal. That being so, it became the consensus between the parties that any arguments under the general portmanteau of estoppel or abuse of process should be heard as part and parcel of and subsumed within the submissions on the substantive legal points. I agreed with and indeed encouraged that approach in the particular circumstances of this case. That was in part informed by my preliminary views that (a) this was not a case of *res judicata* in its strict sense, (b) quite apart from the possibility of an appeal, the issues would have, in any event, to be addressed carefully once the argument became based on issue estoppel or abuse of process, and (c) I would be reluctant to refuse the PLC JAs the guidance they sought in accordance with the Act, and unlikely also to regard myself as bound to consider that principles of issue estoppel or abuse of process required the court not to give the directions indicated by its assessment of the substantive issues raised.
83. There was, at the outset of the substantive hearing, some discussion whether it was nevertheless necessary for DB to pursue its strike out application or whether (as DB and GP1 were quite content should be the position) it would suffice for all matters to be treated as open for argument and to be determined. Mr Beltrami, for the PLC JAs, was especially keen that this be clarified, largely to avoid a peripheral argument as to whether it could ever be right to strike out the PLC JAs’ own application and if not, what would be the proper relief. Suffice it to say, that after some consideration all parties agreed to my considering all aspects together, as I did.
84. One further point on process is this: in light of the agreement between the parties as to the disposition of Issues (2) to (5), the arguments relating to estoppel and abuse of

process were confined to Issue (1).

85. Turning to the competing arguments, the essence of GP1 and DB's case in this regard is simple: that the arguments they advanced and the solutions they proposed on the substantive issues were the corollary of and flowed inexorably from earlier decisions in *Waterfall I* and/or the *ECAPSI Proceedings* and thus *res judicata*; and/or that arguments to the contrary were barred or an abuse of process under broader principles established long ago in *Henderson v Henderson* (1843) 3 Hare 100.
86. LBHI rejected any such suggestion as "wholly devoid of merit". Its position was that the priority issues now raised (a) could not be said to involve the re-litigation of identical causes of action to those already determined; nor (b) could they be said to raise issues decided in a previous case which were necessary or fundamental to the decision; and it followed that there could be no question of true *res judicata*. Even if such issues could have been raised in *ECAPSI*, there was no sufficient basis for concluding that they should have been: so it was not a proper case for the application of the broader principles in *Henderson v Henderson*.
87. The PLC JAs' position was carefully nuanced. They disagreed with any assertion, if put forward, that their making the Application for directions pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 could itself be the subject of an estoppel or amount to an abuse of process. However, they sought to be neutral on any contested submission that there is a cause of action estoppel or an issue estoppel which determines any, or any element, of the priority issues now before the court. Likewise they sought to be neutral on any submission that it is an abuse of process for any interested party to run an argument or take a position on the legal issues raised that the party could or should have run or taken in the *ECAPSI*.
88. The parties' respective submissions were considerably elaborated by reference to numerous authorities. However, in the course of the hearing it became clear, and although I consider more briefly the issue of estoppel, I took it to be accepted, that the real battleground was whether LBHI's conduct amounted to an abuse of process.

Cause of action estoppel, issue estoppel and abuse of process distinguished

89. It is necessary to distinguish (as DB's Application Notice did) between three distinct doctrines sometimes compendiously referred to under the portmanteau '*res judicata*': (a) cause of action estoppel, (b) issue estoppel and (c) abuse of process. That is so even though, as Lord Bingham of Cornhill stated in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 (at page 31):

"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of parties and the public as a whole."

90. Despite that shared objective, *Res judicata* and abuse of process are '*juridically very different*': *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] A.C. 160, at [25] *per* Lord Sumption. In that case, Lord Sumption explained that:

‘Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.’ (Ibid.)

91. In *Allsop v Banner Jones Ltd* [2021] 3 W.L.R. 1317, Marcus Smith J (giving the judgment of the Court of Appeal) explained the essential difference between cause of action estoppel and issue estoppel:

‘A res judicata is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes, once and for all, of all the fundamental matters decided, so that, except on appeal, they cannot be relitigated between persons bound by the judgment. A party to a res judicata will be estopped, as against any other party, from disputing the correctness of the decision, except on appeal. This is known as “cause of action estoppel”. The same is true—save to a narrower extent—of “issue estoppel”. A final decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning.’

92. As to abuse of process:

- (1) In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 536, Lord Diplock defined abuse of process in general as involving:

‘misuse of [the court’s] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power’.

- (2) One form of such abuse was identified long ago by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115: it is an abuse for a party to raise in subsequent proceedings matters which were not but could and should have been raised in the earlier ones (*“Henderson v Henderson abuse”*).

Res judicata

93. I did not understand DB to contend that Issue (1) is subject to *res judicata* in the strict sense of the cause of action having been determined in a previous decision. LBHI’s legal claim to priority as regards principal was that statutory interest fell within the definition of *‘Excluded Liabilities’* in Claim C and that accordingly Claim C had not agreed to stand behind payment of statutory interest on Claim D. That was not determined in *ECAPS I* nor in *Waterfall I*.

94. Indeed, my understanding was and is that Ms Tolaney accepted in her oral submissions on the second day of the substantive hearing that the point was not expressly argued or

determined in either case, and that she instead relied on issue estoppel or abuse of process. In my judgment, her concession that this is not a case of *res judicata* or cause of action estoppel was correct.

Issue estoppel

95. In DB’s skeleton argument it had been submitted that “there can be no doubt that [the Court of Appeal’s determination in *ECAPSI*] gave rise to an issue estoppel binding on all parties to the *ECAPS I Proceedings*, including LBHI and the PLC Administrators” given that the Court of Appeal had determined in *ECAPSI* that (quoting from their order):

*“The claims of [...] (“GPI”) under [...] (the “PLC Sub-Notes”) rank for distribution in priority to the claims of LBHI under the PLC Sub-Debt”.*⁹

96. However, in her oral submissions, and after further reflection, Ms Tolaney conceded that as the point had not been expressly argued or decided, and although she maintained that the answers to Issue (1) were clear from the judgments of the Court of Appeal in *ECAPSI* and the Supreme Court in *Waterfall I*, she would not press her case on issue estoppel either.

97. Again, I think she was right not to do so. The fact that the approach of the court on an issue arising in one case may be determinative of a different issue in another case between the same parties does not, without more, establish an issue estoppel. The issue in the later case must be one which was expressly decided, or a necessary and fundamental part of or step in the decision in the earlier case. Parity of reasoning or confluence in the reasoning in the two cases is not enough. In the decision of the High Court of Australia in *Blair v Curran* (1939) 62 CLR 464, 531-533,¹⁰ Dixon J stated as follows (by reference to Lord Shaw’s judgment in *Hoystead v. Commissioner of Taxation* [1926] AC 155):

‘A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared.

[...]

*Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estopped is confined to those ultimate facts which form the ingredients in the cause of action, that is the title to the right established...But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J in *R v Inhabitants of the Township of Hartington Middle Quarter* the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided*

⁹ Paragraph 4 of the Order of the Court of Appeal

¹⁰ The case was referred to with approval in *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] F.S.R. 289 by Aldous LJ.

as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

[...]

In the phraseology of Lord Shaw, “a fact fundamental to the decision arrived at in the former proceedings and “the legal quality of the fact” must be taken as finally and conclusively established (Hoystead v. Commissioner of Taxation [1926] AC 155). But 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.’

98. There was no need to decide, and it was not decided, in *ECAPSI* whether statutory interest on Claim D fell within the definition of ‘*Excluded Liability*’ in Claim C; nor was the meaning in that context of the contested and crucial phrase “*in respect of...*” addressed.
99. Similarly, GP1’s argument in its Position Paper that “*Claim C is in exactly the same position vis-à-vis Claim D as Claim D is vis-à-vis the unsubordinated creditors*’, and that there is a direct analogy with the reasoning in *Waterfall I* is flawed for the same reason. It is a deduction from the earlier decision; but that earlier decision did not decide the issue, nor was the issue contested now a fundamental part or stepping stone to that earlier decision.
100. In my judgment, therefore, no issue estoppel has been shown such as to preclude the argument that LBHI has raised in this case. I accept, however, that the confluence between the issues raised and the approach of the Court of Appeal in *ECAPSI*, and the issue and the approach I have adopted to it in this case, is marked; and the question whether LBHI’s argument now is *Henderson v Henderson* abuse is more arguable.

Abuse of Process

101. As set out in LBHI’s skeleton argument in these proceedings, the burden of establishing *Henderson v Henderson* abuse is on the person who says it applies; and it is not sufficient to show that because a matter could have been raised in earlier proceedings, it should have been, so as to render the raising of it in later proceedings necessarily abusive.
102. To quote again Lord Bingham’s speech in *Johnson v Gore Wood & Co* (at page 90, *supra*):

“The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the

earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not”.

103. Clarke LJ (as he then was) identified the following proposition in *Dexter Ltd (In Administrative Receivership) v Vlieland-Boddy* [2003] EWCA Civ 14 at [49]:

(i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
iii) The burden of establishing abuse of process is on B or C or as the case may be.
iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
v) The question in every case is whether, applying a broad merits-based approach, A’s conduct is in all the circumstances an abuse of process.
vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.’

104. In adopting the “*broad merits-based approach*” required in determining whether or not a matter which could have been raised in the earlier proceedings “*should*” have been raised, the court may take into account such factors as whether raising the issue in the former proceedings would have been premature, or unduly hypothetical, or likely to raise issues which might distract from the main point, or for any reason better left for subsequent decision if and when it arose (see, for example, *Barrow v Bankside Members Agency* [1996] 1 W.L.R. 257, at p. 268 *per* Saville LJ (as he then was) in a case forming part of the complex Lloyd’s litigation of the early 1990s).

105. Plainly, if in retrospect an issue seems to have been both obvious and important, the court will inevitably have in mind, especially in the case of sophisticated and well-advised parties, why it did not appear so at the time and/or why it was not taken at the time. Of course, if it is established that a party deliberately contrived to hold back a point in one case ‘*pour mieux sauter*’ in the next or to mount (in effect) a collateral attack on the result, that would be likely to be a paradigm case of abuse. But even a

logical decision by the party that raising the point at the earlier stage would be premature or distracting or hypothetical or the like might not be a justification accepted by the court.

106. Ms Tolaney advanced this under the banner of what she referred to as “*the Aldi Stores rule*”, after the decision of Thomas LJ (as he then was) in *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748. In that case, although (reversing the judge at first instance) the Court of Appeal concluded that Aldi’s decision to proceed with a cause of action in a subsequent and separate claim was not a misuse or abuse of the process of the court, Thomas LJ ended his judgment with the following prescription for the future, with which the rest of the Court (Wall and Longmore LJJ), agreed:

“...for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not in the interests of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future.”

107. Ms Tolaney sought to establish on that basis a rule that if at the time of the earlier proceeding, a party has identified a point which could be dealt with at that proceeding, the court will need to consider whether the party should have placed it before the court to enable the court to decide whether it should be dealt with, rather than for the party to make that determination itself; its purpose being to give the court an opportunity to consider how the resources of the court may be utilised in the most cost effective and efficient way and to allow the other parties to take an informed view of their position (for example, in relation to costs and settlement). Moreover, Ms Tolaney submitted that if the party did identify the point at the earlier stage, the *Aldi Stores rule* is mandatory, and failure to comply will constitute an abuse of process: she relied on *Clutterbuck v Cleghorn* [2017] EWCA Civ 137, at [81].
108. As to that latter factor, Ms Tolaney submitted that the point now in issue was “*an obvious construction point*” and was “*not the sort of issue that one might not have had in mind if you were LBHI...*”, as if to float the suggestion that LBHI had kept the point back. She went on to submit that perhaps having not found much success in the previous cases, LBHI had simply concluded that the point was worth a run as a “last roll of the dice”, and that taking such a late point as a final expedient was an abuse. She submitted that this was especially so where (as was the case here) the PLC JAs had asked all concerned before the *ECAPSI Proceedings* to consider carefully whether there were any other points to raise. When I pressed her on this, Ms Tolaney clarified that she did not need to go so far as to suggest and was not suggesting, that there was any deliberate decision by LBHI to hold back the point; she submitted that all she needed to establish was that “*they are [were] aware of the point and therefore could and should have brought it.*”
109. Both the *Aldi Stores* case and *Clutterbuck v Cleghorn* are, of course, decisions of the Court of Appeal and thus binding on me. However, I do not consider that they (and indeed other cases in the Court of Appeal cited in *Clutterbuck v Cleghorn* such as *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 and *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, [2014]

PNLR 11) should be elevated to the status of an inflexible overriding rule (which is what it seemed to me Ms Tolaney was suggesting). That would not be consistent with the decision and guidance given by the Supreme Court in *Johnson v Gore Wood* (which Thomas LJ cited as the principal authority) and Lord Bingham's emphasis in that case (a) that it was wrong "*to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment*" and (b) that "*there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party*" (see the passage cited more fully in paragraph [102] above).

110. I note also that in *Clutterbuck v Cleghorn*, the Court again emphasised (a) the need to evaluate all the circumstances, (b) that even an "*inexcusable*" failure to comply was not dispositive (see [91]) but simply "*a relevant factor*". It is also apparent from the review of authority in *Clutterbuck v Cleghorn* that the *Aldi Stores* guidelines had been engaged only in cases where it was clearly demonstrated that the party said to be abusing the process had intentionally "*[kept] a second claim against the same defendant up his sleeve*" (*Stuart v Goldberg* at [77]) or had "*sought to pursue a second claim in which they made essentially the same allegations as those they made in an earlier claim which they had settled*" which would have been "*a shocking consequence*" (see *Gladman* at [66]).
111. In short, therefore, the court must undertake what is often referred to as a "multi-factorial" review of all the circumstances with what Buxton LJ described in *Taylor Walton (a firm) v Laing* [2007] EWCA Civ 1146, [2008] PNLR 11 at [12] as "*an intense focus on the facts of the particular case...*" with a view to determining "*whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute.*"
112. Always bearing in mind Lord Bingham's overall prescription that "*it is preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances*", I propose, for the purpose of the intense focus on the facts which is required, to consider all the circumstances with particular attention to the following questions:
 - (a) what was the context and purpose of the *ECAPSI Proceedings*, and had LBHI identified and determined to keep back the issue as to the priority between statutory interest on Claim D and principal on Claim C at the time of the *ECAPSI Proceedings*;
 - (b) whether, if the point had been put forward at that time for the court to direct whether it should be determined as part of the *ECAPSI Proceedings*, the court would probably have thought it appropriate for it to be determined at that earlier stage, rather than at a later stage; all with a view to determining the ultimate question, which is
 - (c) whether in all the circumstances and applying a broad merits approach, LBHI's conduct is to be characterised as unfair, oppressive and an abuse.
113. As to (a), the parties' respective witness statements and Position Papers addressed at some length the context and purpose of the *ECAPSI Proceedings*. DB's evidence (in

the 1st witness statement of Phillip Denis Taylor, a partner in the restructuring and insolvency department of Alston & Bird (City) LLP), went into considerable detail about their genesis, purpose and ambit, and the genesis of these proceedings after the decisions at first instance and in the Court of Appeal. LBHI's evidence in reply was provided in the 3rd witness statement of Ronald John Geraghty, the Managing Director of LBHI.

114. It is not necessary to rehearse every point and counter-point in that evidence. The following uncontested points of particular importance seem to me to emerge:

- (1) There was, at the time of both *ECAPSI proceedings*, considerable legal and economic uncertainty as to the quantum of prospective funds in the PLC estate, and correspondingly, as to whether any funds would be available for any subordinated claims. That depended upon whether there would be any amounts paid to PLC by LBHI2 and thus upon the outcome of LBHI2's application. Put shortly, PLC had to win on the issue raised in the LBHI2 Application in order to be able to pay anything at all to its subordinated creditors. If PLC had not won on that issue, the outstanding substantive issue in these proceedings would not have arisen. This was graphically illustrated in the Lehman Funds Flow Chart dated 15 November 2019 ("the Funds Flow") which was handed up at first instance in the *ECAPSI Proceedings* (and is appended to this judgment as Appendix 1); the range was summarised in the PLC JAs' Progress Report dated 10 October 2019 where it was stated that:

"PLC currently estimates that it may make no significant recoveries (in which case its unsecured unsubordinated creditors will not receive full statutory interest) or may have up to £600m as a surplus after payment in full of unsecured unsubordinated creditors plus statutory interest."

- (2) All parties acknowledged that there was a possibility that PLC's subordinated creditors might receive nothing at all. Such was the uncertainty and the range of possible outcomes that there was a debate among the parties in early 2018 as to whether the issues raised by PLC in *ECAPSI* should be raised for determination at all at that time or whether the proceedings should be confined to an application by the administrators of LBHI2 to determine priority between Claim B and Claim A. Ironically, both DB and GP1 argued at the time that the ranking of subordinated debt at PLC should not be determined at all in *ECAPSI* but rather should await determination of the ranking at LBHI2. Furthermore, DB argued in *ECAPSI* that Claim C had been released in its entirety: and, had it been successful, that would have rendered Issue (1) moot even if funds flowed from LBHI2 to PLC.
- (3) In fact, it was not, for some time at least, the preferred approach of the respective JAs of LBHI2 and PLC that the PLC issues be adjudicated at the same time as the LBHI2 issues. It was principally LBHI which argued that the claims of PLC's subordinated creditors should be determined together with the LBHI2 issues, given similarities between the ranking issues at LBHI2 and PLC. Their inclusion in the menu was the result of negotiation. It is clear from evidence filed by the PLC JAs that they ultimately agreed to the inclusion of the issue in light of the clearly delineated disagreement between the parties on the substantive issue as to

the priority ranking of PLC's subordinated obligations. Mr Geraghty, on behalf of LBHI, described this as follows:

"The menu of issues covered in Sub-Debt1 was the result of negotiation and consideration between the parties, which sought to ensure that a number of issues, time and cost of the application was proportionate, at a time when the economic outcome of each estate was still uncertain, while being comprehensive enough to facilitate distributions and progress in the administration of the LBHI2 and PLC estates."

- (4) It was inherent in all these legal and economic uncertainties, that it would not have been feasible or proportionate to try to address every possible permutation of issues that might have arisen from the potential outcomes with respect to any subsequent distributions that might or might not take place within the PLC estate.
- (5) The parties never debated statutory interest on subordinated debts, nor was any thought given to its inclusion on the 'menu' of issues for determination. There was no mention of IR 14.23(7). The focus as to the PLC estate was on priority of claims to principal: even these were uncertain to arise, and any potential for payment of statutory interest on subordinated debts was even more uncertain. The point could have been raised by any of the parties, but none did so. As stated in the PLC JAs' skeleton argument in these proceedings:

"Both applications [ECAPSI and this application] reflected the issues which the interested parties specified at the time as being in dispute. It was not for the JAs in the ECAPSI Proceedings to ask the Court to determine issues which nobody had brought forward."

- (6) There is no suggestion in the evidence, still less anything approaching a demonstration, that LBHI had the point in mind and kept it back for later determination. Although DB and GP1 seek now to portray the issue as one which LBHI must have thought of, there is no evidence that they did so.
115. The process of the Lehman administrations as a whole, and the gradual emergence and refinement of issues previously not identified but which are thrown into higher relief by the emergence of unanticipated or unlikely flows of funds, support the common conclusion that hindsight is a dangerous guide. What might seem an obvious point at an earlier stage might well, at the time, have been thought spectral or unlikely to arise, if indeed it occurred to anyone in a defined way at all. This has certainly been my experience as the assigned Lehman judge for the past six or so years.
116. Taking the evidence as a whole, I do not consider that what Ms Tolaney referred to as the *Aldi Stores* rule is engaged; and, in any event, I do not consider that DB has demonstrated that LBHI adopted the sort of tactic or arrogation by one party to itself of a procedural decision which should have been put before the court. Of course, with hindsight, and with the benefit of knowing the flow of funds after the many uncertainties were resolved, it might have been more efficient for Issue (1) to have been dealt with as part of the *ECAPSI Proceedings*. But that is, in my judgment, a long way from any conclusion that the matter should have been canvassed before such matters had been resolved. At the very least, the fact that it was not put forward is not inexcusable.

117. Turning to (b) in paragraph 112 above and the question whether, if the point had been identified and raised, the Court would have directed it to be heard as part of the *ECAPSI Proceedings*, I consider that DB's submissions overlook the following very important factors present in the particular circumstances of this case:
- (1) However clear (comparatively, at least) the flow of funds may now appear to be, the court would at the time have had to be satisfied that it was appropriate and proportionate to bolt on to an already expanded and long menu, which already included some spectral or uncertain issues, another issue which was even more spectral and uncertain and raised an issue of statutory interpretation which was not required to be addressed for the purposes of the existing 'menu'.
 - (2) All these issues arise for determination in the context of applications by professional administrators. It cannot be known for certain what the PLC JAs would have recommended; but it is perhaps more likely than not, in light of their sceptical attitude to the inclusion of 'the PLC Ranking Issue', that they would have resisted this further extension to the ambit of *ECAPSI*.
 - (3) Reflecting the point I have already made in paragraph [115] above, the Lehman administrations have given rise not only to complex commercial disputes but, to an extreme degree, to a cascade or cats' cradle of economic consequences which are extremely difficult to unravel and may not fully be discerned or emerge until sequential decisions determine the flow of funds in the 'waterfall'. Like the parties and the JAs of the various Lehman companies, the emergence of other issues has always been a known possibility, which has been accommodated by responsible use of a series of Applications under the specific statutory provisions enabling them and the adoption in respect of those applications of efficient and proportionate procedures for defining and confining the issues raised. Of course, this is not to say that the process is infinite; and I would hope and expect this round to be the last. However, I would have expected the court, as matters stood at the time of the *ECAPSI Proceedings*, to have had in mind that there would be consequences which would throw up new issues which would have to be determined subsequently, as indeed the parties all expected.
118. Standing back to consider all the circumstances, I do not consider that LBHI's conduct has been shown to amount to misusing or abusing the process of the court. I do not accept that there is anything smacking of unjust harassment, or what might be termed playing "ducks and drakes" with the court. It would be altogether too harsh to label it in any such way.
119. It follows that, in my judgment, no abuse of process has been established. That renders it unnecessary to consider whether to strike out the Statutory Interest Application: it is to be dealt with on the merits.
120. It also renders it strictly unnecessary to consider whether it would ever be right to strike out an application made by Administrators for directions in order to ensure finality between contesting claimants in the estate. The PLC JAs did deal with this, and in explaining why they did not consider that DB's strike out application was an appropriate or available tool, submitted that:

- (1) The PLC JAs' application seeking directions is not a "*statement of case*" within the definition in CPR 3.4(2), or anything approaching a statement of case, even with all sensible modifications (see IR 21.1).
 - (2) In any event, the seeking of directions to resolve an issue which is disputed, and which the JAs concerned cannot responsibly take to be beyond sensible argument, cannot realistically be characterised as an abuse of process.
121. These seem to me to be cogent points. However, beyond adding that unlike in ordinary litigation, the court is usually content, in the context of an administration, to rely on the good sense and professionalism of professional administrators in determining whether issues require to be referred to the court for decision and in what sequence it is best to determine them having regard to the exigencies of the efficient realisation and distribution of the estate, I do not think it is necessary or advisable to reach any final determination of this point.
122. In the circumstances, therefore, I would dismiss the application based on principles of *res judicata*, cause of action estoppel and *Henderson v Henderson* abuse.