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Case No: HC-2014-002092
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HC-2015-000103
HC-2015-000105

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
The Rolls Building
Fetter Lane
EC4A 1NL

Date: 14/07/2020

Before :

SIR ALASTAIR NORRIS

- -

Between :

JOHN MICHAEL SHARP **And the other Claimants listed in the GLO Register**	**Claimant**
- and -	
(1) SIR MAURICE VICTOR BLANK **(2) JOHN ERIC DANIELS** **(3) TIMOTHY TOOKEY** **(4) HELEN WEIR** **(5) GEORGE TRUETT TATE** **(6) LLOYDS BANKING GROUP PLC**	**Defendant**
-and-	
THERIUM FINANCE No.1 IC Additional Party **(A company incorporated under the laws of Jersey)**	**Additional Party**

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Richard Hill QC Alexander Hutton QC and Sebastian Isaac (instructed by **Harcus Sinclair UK Limited**) for the **Claimants**
Helen Davies QC Tony Singla and Kyle Lawson (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**
Robert Marven QC instructed for the **Additional Party**

Hearing dates: 29 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down via email is deemed to be 10.30 am on 14 July 2020.

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Sir Alastair Norris:

Introduction

1. The issues to be dealt with at the hearing of consequential matters were:-

    (a) What order for costs should be made as between the Claimants and the Defendants?

    (b) What order for an interim payment of costs should be made?

    (c) What orders should be made in respect of interest on costs?

    (d) Should any of those orders be made against Therium Finance No.1 IC ("Therium") which has been joined as an Additional Party for the purposes of costs?

    (e) Should permission to appeal be granted?

2. In considering these matters it will be necessary to have in mind that the action was conducted by reference to a Group Litigation Order dated 6 August 2014 ("the GLO"). There were approximately 5800 Claimants covered by the GLO. Paragraph 10(1) of the GLO provided that the liability of each Claimant to the Defendants for costs should be several and not joint. Paragraph 10(2) of the GLO contained a definition of "individual costs" (in essence, costs and disbursements incurred solely in relation to an individual claim). All other costs were to be treated as "common costs". Paragraph 10(4) of the GLO employs this distinction in relation to costs and disbursements of the Defendants for which the Claimants are liable. Paragraph 10(4) of the GLO provides that an individual Claimant's liability for the common costs of the Defendants incurred in any quarter shall be a several liability for a share of those common costs proportionate to the alleged value of that Claimant's claim as against the alleged value of the overall claims. But paragraph 10(5) then provides:-

> "In the event that a Claimant's claim is the subject of an adverse costs order or… is dismissed... on terms which provide for that Claimant to pay the Defendants' costs that Claimant shall be liable for his or her individual costs and any liability for common costs shall be determined following the trial of the common issues…"

A reconciliation of paragraph 10(4) and paragraph 10(5) is achieved by treating the latter as addressing the situation where an individual Claimant's claim is dismissed on a "one off" basis before the trial of the common issues. The costs with which I am concerned are all common costs.

Costs between the Claimants and the Defendants

3. There are two facets to this issue: the overall order, and the manner of its implementation.

4. As to the overall order, the jurisdiction to make an order about costs is set out in CPR 44. The terms of the discretion which it confers are very familiar and do not need to be recited: I have the provisions of that Part well in mind.

5. By my judgment (the reference to which is [2019] EWHC 3096 (Ch)) I dismissed the claims of the Claimants listed in the GLO Register ("the Claimants"). The Defendants submit that this is a case for the straightforward application of the "general rule" in CPR 44.2(2)(a) and seek an order that Claimants pay their costs of and incidental to the action, to be assessed (in default of agreement) on the standard basis. The Claimants submit that this is a case for making "a different order" under CPR 44.2(2)(b) and argue for an order that they pay only 65% of the Defendants' costs.

6. The foundation of that argument is that although the Claimants failed overall they did succeed on two issues in the case; and that CPR 44.2(4)(b) directs the Court to take into account in deciding what order to make about costs whether (amongst other things) a party has succeeded in part of his or her case even though not wholly successful.

7. I do not accept the argument of the Claimants;-

   (a) It is a commonplace that a successful party will not succeed on every aspect of its case. But notwithstanding that very frequent occurrence in litigation, the general rule still applies. Costs are determined by reference to overall success.

   (b) Although no authority is needed to support that observation, the point was pithily summarised by Gloster J. in HPL Kidson's v Lloyds Underwriters [2008] 3 Costs LR 427 at [11].

   (c) A degree of caution is needed against a too-ready departure from the general rule for the reasons explained by Jackson LJ in Fox v Foundation Piling [2011] EWCA 790 at [62].

   (d) There is no reason in principle why a party who succeeds in establishing one element of his cause of action but fails to establish the others should be regarded as partially successful. The Claimants established that the Defendant directors were in breach of a duty of care in respect of statements and in breach of an equitable duty of disclosure (because the directors did not cause to be noted in the Circular the existence of a specific Bank of England support facility for HBOS or the existence of the facility covered by the Lloyds Repo). But the Claimants failed to establish that such a state of

disclosure was causative of any loss, nor did they establish the amount of any loss in fact suffered.

(e) The Claimants submitted that although they only established breach of duty in relation to two items of disclosure, those allegations lay at the heart of their case. That may happen to be so from their perspective, but it certainly was not so from my perspective. At trial the Claimants attacked the Transaction across an extremely broad front (even after they had abandoned significant parts of their pleaded case pre-trial). They did not abandon their "recommendation" case, so that had to be fought out and adjudicated (and required the bulk of the evidential review and fact-finding): and that outcome had an effect upon the "disclosure" case. They made a multi-faceted case about disclosure; including cases of deliberate concealment, of duties of care in relation to market announcements and briefings, of misstatements about the value of HBOS and about the amount of capital a stand-alone Lloyds would have to raise, and of the obligation of directors to disclose every piece of information they themselves had considered. None of this succeeded. Given the breadth of the attack the degree of success was small.

(f) The Claimants submitted that the Defendants should have conceded the case on the disclosure duty (by which I think they mean "the part of the disclosure case that ultimately succeeded") and that by so doing costs would have been saved. But even the measure of success achieved by the Claimants was so achieved on a fine balance: as paragraph [855] of my judgment and its surrounding paragraphs seek to make clear.

(g) It is, of course, not the law that a successful party can only be deprived of the costs of an issue if he has *unreasonably* resisted that issue: any more than it is the law that he should be deprived of the costs of the issue *simply* because he lost it. In singling out an issue for separate treatment by way of costs I think the court must look for some objective ground (other than failure itself) which alongside failure distinguishes it from other issues and causes the general rule to be disapplied. In F & C Alternative Investments Holdings v Barthelemy Davis LJ described it as "a reason based on justice" ([2013] 1 WLR 548 at [47]). Without seeking in any way to be prescriptive, I think the distinctive ground may relate (amongst other things) to the comparative weakness of an argument (even if not unreasonably maintained) or to the necessity for particular evidence relevant only to that

> issue or to extensive and intensive legal argument directed to that issue which gives it an especial significance in the costs context. But such a factor is missing here. The law both on "misstatement" and "sufficient information" was all but agreed. The Claimants failed to establish the deliberate concealment they alleged. They failed to establish the disclosure duties for which they contended. They succeeded in establishing a breach of the conceded duty by demonstrating that the Defendants had not correctly assessed the materiality of two matters. The key issue of "materiality" was determined by reference to evidence (about the nature of ELA and the Lloyds Repo and what resort to ELA and to the Lloyds Repo told one about HBOS as part of the Enlarged Group) adduced in relation to the "recommendation case".

8. This is a case in which the general rule should apply, and costs should follow the event. But that then raises the question of what this means for individual Claimants. It may well be that many of the 5800 Claimants never foresaw this as a real question because they thought that they were litigating risk-free. But most unfortunately that is not the case.

9. The Claimants (or at least those who were Claimants as at 14 January 2015) have primary ATE cover of £6.5 million in respect of any legal obligation to pay costs to the Defendants under an order of the Court. The costs *claim* of the Defendants exceeds £30 million. For the excess over the £6.5 million primary cover the Claimants are reliant on the provisions of a Deed of Indemnity granted in their favour by Therium. The Claimants' openly stated position has always been that there are no concerns over Therium's ability to satisfy that indemnity (or indeed any direct liability in costs that might be owed to the Defendants by Therium). In part that derives from the fact that Therium has itself effected excess layers insurance in respect of its liability under the Deed of Indemnity to any Claimant against whom an adverse costs order is made. This excess layers insurance totals a further £14.95 million (bringing the aggregate insurance cover available to the Claimants and to Therium to £21.45 million: still short of the Defendants costs claim). Even this level of cover is affected by the insolvency of some of the insurers. In these circumstances there is a (most regrettable) risk that individual Claimants may face a several liability for costs to the extent that it overtops their direct ATE cover.

10. The Defendants seek to smooth the way for this. They seek to define the class of liable Claimants simply as those on the GLO register at the conclusion of the hearing (though they would be equally content with those on the register at the commencement of the trial). Ms Davies QC submits that this would avoid undertaking the "unreal exercise" (as she described it) contemplated by paragraph 10(4) of the GLO (apportioning the costs incurred by the Defendants each quarter on common issues amongst the Claimants on the GLO register at the commencement of that quarter by reference to the size of each such Claimant's claim as a proportion of the aggregate claims at that date).

11. I do not accept this submission. I do not think it is possible as part of the process of settling the terms of the order after trial simply to apportion the costs liability amongst a class of Claimants as at a single date. I agree with Ms Davies QC that the task of identifying the costs of the Defendants quarter by quarter, and then of calculating the several liability of each Claimant for that quarter's costs according to the ratio which his claim bore to the aggregate value of claims in that quarter, is very burdensome; and if the nature and extent of the Claimants' record-keeping makes it impossible to complete, then the terms of the GLO may have to be revisited. But until that point Mr Hill QC is right in his submission that the terms of the costs order made by me cannot change the liability of the Claimants amongst themselves and must reflect the terms of paragraph 10(4) of the GLO.

12. The Claimants will therefore between them severally bear the costs of the Defendants (the Defendants' costs to be the subject of assessment on the standard basis in default of agreement), each several liability for a share of those costs being ascertained in accordance with the terms of paragraph 10(4) of the Order dated 6 August 2014.

13. It is, I think, premature to order an inquiry into what is the several liability for a share of the costs borne by each Claimant. But the order should contain a permission for either party to apply for such an inquiry.

Interim costs

14. Although individual liability has yet to be ascertained the Claimants as a class have the benefit both of ATE insurance and of an indemnity from Therium. The possibility of an interim costs order is therefore a live one.

15. Mr Hill QC correctly accepts that in accordance with the terms of CPR44.2(8) an order for an interim payment on account of costs is appropriate. The issue is as to the amount.

16. For the Defendants Ms Davies QC argued for a payment of £18,750,00 being (i) 50% of the Defendants' pre-budget incurred costs of £9,705,570; (ii) 100% of the Defendants' budgeted costs of £10,903,627; and (iii) irrecoverable VAT at 18.9% (roughly £3m). As I have indicated above, the total costs claim of the Defendants is some £30m, because of increases in budgeted costs arising from a lengthening of the trial and other factors. These factors the Defendants will pray in aid of an increase in approved costs at the assessment (under the provisions of CPR 3.18): but they accept that budgeted costs are what must guide an order for interim costs, although they ask me to stand back and look at the interim costs sought in the context of the total costs claimed.

17. For the Claimants Mr Hill QC accepts items (i) and (iii) but contests item (ii). A payment of 100% of the approved costs is not, he submits, "a payment on account" of such costs. He argued for a payment on account of 80% of the budgeted costs. The reason advanced for the discount was that the incurred costs had still to be the subject of assessment in the traditional way, and the aggregate of the assessed incurred costs and the budgeted costs then measured for proportionality. This might lead to a re-assessment of the proportionality of the overall costs, a real issue notwithstanding that the Claimants' damages claim was of the order of £385m.

18. The task in hand is to assess "a reasonable sum on account of costs": this will not exceed an estimate of the likely level of recovery allowing for an appropriate margin of estimation error. For incurred costs in the instant case that margin has been covered by a discount of 50% on the claimed costs. For budgeted costs a detailed estimation process has already been undertaken to reach a figure which the Court considers both reasonable and proportionate for the Defendants to expend. That affords a large amount of certainty as to what the likely costs recovery will be for those phases of the litigation. That is why Coulson J in MacInnes v Gross [2017] 4 WLR 49 at [25] (in a passage approved by the Court of Appeal in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] 1 WLR 4456 at [40]) said that almost always the approved costs budget provided the starting point for assessing a payment on account, because the costs management process had established it to be a reasonable and proportionate sum.

19. The outcome of the costs management process does not completely eliminate the possibility of an estimation error in the "payment on account" process. First, there is always the possibility that the paying party may on assessment establish that there is a "good reason" (sufficient for the purposes of CPR 3.18) ultimately to assess some costs below the figure approved in the costs budget. Second, there is the theoretical possibility that an aggregation of the assessed reasonable and proportionate incurred costs and the reasonable and proportionate budgeted costs results in a total that is itself beyond what is reasonable and proportionate (to a degree that provides a "good reason" within CPR3.18) But in truth these possibilities are remote and would be adequately covered by a discount of 10% on the approved costs. In MacInnes (*supra*) Coulson J said (at [28]) that he thought that such a discount was the maximum deduction appropriate in a case where there is was an approved costs budget. Although the matter is always one for the exercise of individual discretion in the particular circumstances of the case, I find that guidance helpful.

20. In my judgment a reasonable sum to award by way of interim costs is £17m. (being half of the claimed incurred costs, plus 90% of the budgeted costs, plus VAT thereon at 18.9%, rounded down in the Claimants' favour). That sum will fall due for payment 42 days after the handing down of this judgment.

Interest on costs

21. Two issues arose in relation to interest on costs. First, whether the Court should award pre-judgment interest on costs. Second, from what date should the Court order that interest at judgment debt rate should run?

22. CPR44.2(6)(g) provides that the Court may order interest on costs from a date before judgment. It is common ground that this jurisdiction will generally be exercised where a party has had to put up money to pay its solicitors and has thereby either lost the beneficial use of that money or has had to borrow it. It is also common ground that the rate awarded will be determined by weighing the factors identified by Sharp LJ in Jones v SoS for Energy and Climate Change [2014] EWCA Civ 363 at [17]-[18], generally with the aim of identifying a commercial rate in the circumstances. In the instant case there is no argument about the rate. The Claimants submit (and the Defendants accept) that, if ordered for any period, the appropriate rate is base rate *simpliciter*. The issue is whether interest should be awarded at all.

23. For the Claimants Mr Hill QC submits that it should not. His argument was that the Claimants obtained (in the face of opposition from the Defendants) a costs management order so that they could secure an accurate assessment of the costs risks that they faced and could compare it with the level of ATE insurance available to them. The Defendants did not signal an intention to claim pre-judgment interest on costs at any time when costs budgets were under consideration, and a possible claim for interest was not factored in to the level of ATE cover obtained. The figure at which Defendants invited the Claimants to secure insurance cover (with which request they broadly complied) did not include any element of interest at costs.

24. For the Defendants Ms Davies QC submitted (i) that interest on costs does not form an element of recoverable costs for the purpose of costs budgeting so that it is not surprising that it was not mentioned in the costs budget debates; (ii) there had been no representation that interest would not be claimed; (iii) no-one could during the costs budgeting process know for what period or at what rate interest would run and it was for the Claimants to assess their exposure on that account and (if desired) cover it; (iv) there was no justice in the current shareholders in Lloyds being deprived of compensation for the loss of the beneficial use of their money simply to benefit a group of past shareholders.

25. I accept that the Defendants had a commercial interest in the level of ATE cover obtained by the Claimants because of the great difficulties attending costs recovery under the GLO. But it was ultimately for the Claimants to decide against what risks to insure and what risks to bear themselves. A claim for pre-judgment interest on costs is commonplace, and it was for the Claimants to decide whether any protective measures were required, not for the Defendants to call for them. I shall exercise the discretion in the way in which it is customarily exercised and order the Claimants to pay interest on the Defendants' costs at the applicable Bank of England base rate from the date of payment of each invoice until the earlier of (i) payment of such costs or (ii) the date from which interest at the rate prescribed by the Judgments Act 1838 become payable.

26. This brings me to the second issue: from what date will the judgment debt rate apply? CPR 40.8 provides interest shall run from the date of judgment unless the rules make a different provision or "the Court orders otherwise". The Defendants submit that the general rule (or what they would call "the default position") should apply, whilst the Claimants submit that the Court should order "otherwise" and direct that interest at Judgment Act rate (viz. 8%) should run from a date 6 months after judgment.

27. The essential question is: what, having regard to all the circumstances of the case, do the interests of justice require? That is the distillation of the thorough analysis undertaken by Leggat J (as he then was) in Involnert v Apigrange [2015] EWHC 2834 (Comm) and summarised at paragraph [20]. Normally the interests of justice will indicate that the rate of interest applicable in the event of non-payment of a judgment debt should only run from the time when (i) the amount of that debt is known (or can at least be the subject of fair estimation for the purposes of offers of compromise) and (ii) the essential mechanics of payment can be completed.

28. Given (i) the likely size and complexity of the bill to be submitted for assessment; (ii) the complications inherent in triggering the insurance and indemnity arrangements which it was in the interests of both Claimants and Defendants should be put in place

(because of the terms of the GLO) and the uncertainties that have since arisen; and (iii) the fact that, pending payment, the Defendants are receiving interest on unpaid costs at a commercial rate, in my judgment a period of about four months from the date of this judgment should elapse before interest at judgment debt rate is payable on unpaid costs. 13 November 2020 is a convenient date.

Therium

29. By order dated 13 January 2020 Therium was joined as an additional party for the purposes of costs. Therium accepts, in principle, that as a commercial funder it is liable to pay costs awarded against the Claimants. But it submits that it should be so liable only (i) to the extent that the Claimants do not satisfy the adverse order and (ii) to the extent of the funding that Therium actually provided (i.e. subject to "the Arkin cap": see Arkin v Borchard Lines Ltd [2005] 1 WLR 3055 at paras [38]-[43]).

30. To take the second suggested limitation first: as at 29 January 2020 the true nature of "the Arkin cap" was due for consideration by the Court of Appeal the following month in Davey v Money. For Therium Mr Marven QC submitted that the appropriate course was to adjourn consideration of the extent of its liability to await the decision of the Court of Appeal. For the Defendants Ms Davies QC submitted that the correct course was for me to make an order without the restraints imposed by "the Arkin cap" (following the first instance decision of Snowden J in Davey v Money [2019] Costs LR 39) but to give permission to apply once the outcome of Davey v Money in the Court of Appeal was known.

31. The Court of Appeal's decision in Davey v Money (reported at [2020] 1 WLR 1751) was delivered on 25 February 2020. I have considered its terms. In essence it holds that "the Arkin cap" is not a binding rule, but simply guidance given to individual judges, who retain a complete discretion in relation to third party costs orders: and whilst the extent of the third party's investment may be a factor to be weighed, so also might be the potential return of the third party funder from a successful costs investment (along with other factors). I summarise paragraph [38] of the Court of Appeal's judgment and refer to the factors which influenced the disapplication of "the Arkin cap" recorded at paragraph [19] of that decision.

32. I do not know enough about the detail of the funding arrangements effected by the Claimants with Therium properly to exercise the discretion in relation to the entirety of the Defendants' costs claim (even if I were to do so on a provisional basis and grant permission to apply). But I do know enough to conduct a limited exercise.

33. I do know that Therium funded the Claimants' costs of some £17m together with the premiums on the excess layers insurance above £6.5m (up to £21.45m). It is therefore possible to say that even if "the Arkin cap" were to be applied the amount of the interim payment on account of costs ordered above would fall below that cap. I can therefore safely make an order on that basis, with a "permission to apply" as a "failsafe". The extent of Therium's liability beyond that must be adjourned for further consideration. If the parties (who, as commercial entities, I would expect to engage in an alternative dispute resolution process) cannot resolve the issue and cannot agree directions for a resolution by the Court then I (or another judge) will give directions so that the matter can be resolved.

34. I can now revert to the first issue. It is accepted that a third-party costs order is in principle appropriate. I see no reason in principle why the liability of Therium (which has indemnified the Claimants) should be secondary and not simply joint and several in the usual way. Mr Marven QC accepted that if I made an order for an interim payment of costs in (say) 21 days which the Claimants did not satisfy, then Therium's liability would be triggered (without the Defendants having to seek recovery of a several share from each Claimant). But such "default" on the part of the Claimants would seem to result from a failure on the part of Therium to honour its indemnity to them. I cannot see what is achieved by postponing any liability of Therium direct to the Defendants for 21 days. Therium's liability should be joint and several.

35. I can now outline the costs orders I propose.

36. First, the Claimants and Therium shall pay to the Defendants their costs of and incidental to the action (including reserved costs) such costs to be the subject of a detailed assessment on the standard basis (in default of agreement) PROVIDED THAT (A) the liability of each Claimant shall be a several liability for a share of the Defendants' costs assessed in accordance with the provisions of paragraph 10(4) of the Order dated 6 August 2014 and (B) whilst the liability of Therium is joint and several with that of the Claimants the question whether that liability of Therium is subject to a limitation as to amount shall (save as provided below) stand adjourned for further consideration before 13 November 2020.

37. Second, the Claimants and Therium shall within 42 days of the date of the Order make a payment on account of those costs in the sum of £17 million (with permission to Therium to apply within seven days of the date of this Order to vary the extent of its liability under this paragraph)

38. Third, the Claimants and Therium shall pay interest on those costs at the applicable Bank of England base rate from the payment date of each invoice until the earlier of (i) the date of payment by them of such costs to the Defendants or (ii) 13 November 2020.

39. Fourth, the Claimants and Therium shall pay interest on those costs at the rate applicable under the Judgments Act 1838 on and from 13 November 2020 until payment.

40. Fifth, there will be an inquiry as to the several liability of each Claimant for a share of the Defendants' costs assessed in accordance with the provisions of paragraph 10(4) of the Order dated 6 August 2014 with permission to any party to apply for directions as to the conduct of such inquiry.

Permission to appeal

41. The Claimants do not seek to appeal the outcome of "the recommendation case": but they seek to appeal the outcome of "the disclosure case" on multiple grounds. The Claimants remind me of the relatively low threshold that applies when considering whether to grant permission.

42. The starting point is my holding that, whilst the focus of the EGM was whether the Enlarged Group should be created and what HBOS could contribute as part of it, a fair

and candid account of what was before the EGM required a reference to the existence of what at trial was called the ELA facility and to the existence of the Lloyds Repo facility then being drawn upon by HBOS, even though the use of these facilities would cease when HBOS became part of the Enlarged Group. By the "existence" of these facilities I sought to make clear that I meant just that, not the provision of details of the precise features of these facilities or of the extent of their use: see paragraphs [855]-[856], [869]-[874] and [885]-[889]. That is exactly the way in which SLS was treated in the Circular. So in paragraph [887] I held that the Circular might properly have said that HBOS then relied on "SLS, government issuance and other fully collateralised Bank facilities". The position of the Claimants at trial had been that full disclosure of all details of both facilities and of their use was required, and in particular that HBOS was in receipt of a "lender of last resort" facility provided as an emergency measure to prevent funding insolvency and that the Lloyds Repo relied on unusual collateral. Simply for convenience I will call this case "detailed disclosure" (without thereby suggesting that the disclosure for which I found was insufficient).

43. The next step is that I held that if the disclosure I considered appropriate had been given it would have made no difference: see paragraph [964]. The judgment had, of course, to analyse the causative consequences of the breaches I had found by constructing a counterfactual scenario. But it is important to establish at the outset that my finding as to the outcome in that counterfactual scenario was not dependent on evidence directed to the *specific sort of disclosure* contemplated in that counterfactual. The evidence assembled by the Claimants and the case put to the Defendants related to "detailed disclosure": and my conclusion rests on an analysis of *that* evidence. On evidence relating to detailed disclosure the outcome would not, on the balance of probabilities, have been different: and I applied that conclusion to the disclosure I considered appropriate.

44. The first and second Grounds of Appeal argue that I made an error of law in identifying the sort of disclosure of (to adopt a shorthand label) ELA that was required by the equitable duty to provide sufficient information and a common law duty to ensure that accurate and sufficient information was provided. The fourth and fifth Grounds of Appeal argue that I made an error of law in identifying the sort of disclosure of the Lloyds Repo that was required.

45. The Defendants submit that in truth there was no significant dispute over the law: and that what is complained of is not an "error of law" as such but my application of that law to the facts found by me. There is much truth in that. But what is "sufficient disclosure" in any given case is (though heavily fact dependent) a mixed question of fact and law, particularly given that the law recognises that otherwise desirable disclosure may for other reasons be impracticable: see paragraph [780(f)]. I am prepared to accept that within the factual constraints which I have found existed (e.g. that neither the term "ELA" nor the expression "emergency liquidity assistance" was in general use; that the Tripartite, and in particular the UKLA, would not have approved any wording which ran the risk of destabilising the market; that there would have been a determination to avoid unforced errors and damaging speculation; that SLS itself was used as a "last resort" facility) some other formulation could have been adopted which conveyed the essential information that HBOS was (for the time being and until completion of the merger) reliant on a bilateral facility with the Bank in addition to the mainstream SLS and government issuance. But I do not think that

there is any real prospect of the Claimants establishing what they sought to prove viz. that the only way of performing the sufficient information duty or the common law duty was to provide detailed disclosure.

46. I also accept that within the factual constraints which I have found existed (that banks did not disclose the terms of interbank lending) some formulation other than that suggested at [888] could have been adopted which conveyed the essential information that the Lloyds Repo was a specific facility provided on commercially acceptable terms which was available until completion in order to provide HBOS with a bridge to the funding arranged over the Re-capitalisation Weekend. But I do not think that there is any real prospect of the Claimants establishing what they sought to prove viz. that the only way of performing the sufficient information duty was to disclose the full terms of the Lloyds Repo.

47. The argument advanced in support of the appeal differs slightly from that advanced at trial. Insofar as it is said that the type of disclosure I considered sufficient "materially downplays" the significance of the Lloyds Repo or does not "adequately" bring out the strategic reasons for the Lloyds support of HBOS, I do not consider that there is a real prospect of establishing that my assessment was "plainly wrong" (which the Defendants submit is the correct threshold for re-assessments by the Court of Appeal of intensely complex mixtures of fact and law).

48. But whatever differences of view there might be over the precise terms of the disclosure of ELA or the Lloyds Repo they are only material if they impact upon the causation analysis. If the Claimants cannot establish on the balance of probabilities that disclosure of the type for which they contend would have caused the outcome of the Acquisition to be different then the debate over the terms of disclosure is irrelevant. The seventh Ground of Appeal argues that I made an error of law in holding that the Defendant Directors' breaches were not causative of any loss.

49. On the evidence adduced and my findings based upon it I do not think that there is any real prospect of the Claimants overturning my conclusion that the Acquisition would not have proceeded.

50. The first causal chain was described as "termination". It is argued (for the purposes of appeal) that my conclusion that the Director Defendants would have been willing to proceed with the Acquisition is premised upon the precise disclosure which I have found would have sufficed. But that is not so, as paragraph [893] I think makes clear.

> "The case has been conducted on the footing that the board knew of the use of ELA and of the Lloyds Repo. The board nonetheless unanimously recommended the Acquisition to the shareholders……*Those directors who were asked about the matter (Mr Tookey, Mr Daniels and Mr Tate) confirmed that, if they had been told that disclosure of what they knew of ELA and the Lloyds Repo was required, then they would not on that account have terminated the transaction*...On the evidence the Claimants have not established that the board would have declined to proceed with the transaction."

The case put to those three directors was that detailed disclosure was required: that is what their answers were addressing.

51. As I found (in paragraph [894]) the likelihood is that the board would have put "the disclosure" (i.e. what the board knew of the use of ELA and the Lloyds Repo) before the shareholders if they had been required to do so: and I explained why. The finding does not depend on the disclosure in question being only that which I considered sufficient.

52. The second causal chain was described as "collapse" – if ELA and the Lloyds Repo had been disclosed then the HBOS share price would have collapsed, the share exchange would have become unattractive and the financial press would have characterised the Acquisition as folly, so that the Lloyds board would either have cancelled the EGM or been forced to alter their recommendation. Here again the analysis (leading to my conclusion that on the balance of probabilities the Acquisition would not have collapsed) did not turn on the exact nature of the disclosure, although it incorporated my finding that whatever the disclosure was it would seek to minimise the risk of damaging speculation.

53. The analysis turned in part on a rejection of the proposition that history would have repeated itself. Amongst the differentiating factors were that *any* disclosure was "controlled" (in that it was contained in the Circular and was not leaked) and was "contextualised" (in that it formed part of a narrative which mapped out the long-term future for HBOS). It turned in part on the evidence of witnesses that disclosure of ELA and of the Lloyds Repo would probably not have led to a collapse of the Acquisition. None of the witnesses was contemplating disclosure of the sort which I suggested in the judgment would suffice. The disclosure which the witnesses considered was that which the Claimants advanced as being required - detailed disclosure. In part it turned on objective evidence that disclosure of emergency liquidity assistance (in any terms) does not necessarily have a negative impact. It turned in part upon a rejection of the evidence said to support the proposition that if detailed disclosure had been given the press would have described the Acquisition as "folly" and would have influenced the majority of shareholders to turn against the unanimous recommendation of their board which (having regard to the outcome of the "recommendation case") was itself reasonable.

54. The third causal chain was described as "rejection". The level of support at the EGM for the board's recommendation (as endorsed by RiskMetrics) was 96%. The Claimants sought to prove that if "fully and properly informed" it was probable that about 1.4bn shares would have been voted differently ("the swing vote"). The analysis of this causal chain therefore assumed that detailed disclosure had been given. My conclusion that there was insufficient evidence to ground an inference that the "swing vote" would have occurred did not depend on the nature of the disclosure I thought sufficient. My conclusion that such evidence as there was tended to point against the inference (see paragraph [948]) did not depend on the nature of the disclosure I thought sufficient. My acceptance that disclosure of ELA or of the Lloyds Repo would have had a "mildly negative" effect did not turn on something less than detailed disclosure being given: the evidence of the witnesses that I was analysing was evidence given in response to the case put to them that detailed disclosure needed to be given (see, for example, the evidence of Mr Trippit in cross-examination quoted in paragraph [925]). My conclusion that the general body of shareholders would have

acted on the advice in the Chairman's letter to focus on Lloyds and to compare Lloyds as part of the Enlarged Group with a standalone Lloyds as it emerged from the Recapitalisation Weekend (and not upon HBOS as it currently was) does not depend in any way on the nature of the disclosure given. My conclusion that the risks which the Claimants say would have been exposed by the detailed disclosure for which they contend were in fact spelt out amongst the "Risk Factors" set out in the Circular did not depend on the nature of the disclosure given. My acceptance of evidence that overwhelmingly shareholders follow the recommendations of management does not depend in any way upon the nature of disclosure given.

55. I do not consider that there is any real prospect of establishing that my conclusion on causation depended upon the precise nature of the disclosure made (and so cannot be sustained if the nature of the disclosure altered).

56. The third Ground of Appeal argues that I made an error of law in failing to hold that ELA was required to be disclosed as a "material contract" of HBOS under the Listing Rules. The sixth Ground of Appeal argues that I made an error of law in failing to hold that the Lloyds Repo was required to be disclosed as a "material contract" of Lloyds under the Listing Rules. The key part of the argument is "under the Listing Rules". I have, of course, held that these were contracts about whose present existence it *was* material for the shareholders to learn when they came to consider the business before the EGM. But if they were material contracts "under the Listing Rules" then specific details of their terms were, under the Listing Rules, required to be disclosed.

57. I do not consider that there is a real prospect of the Claimants establishing that I erred in law in that respect. My concern at trial was to consider whether the Claimants were entitled to damages because the Director Defendants had committed legal wrongs. The Listing Rules are regulatory in nature and a breach of them does not found any claim for damages by an individual against a listed company or the directors of a listed company. So whilst I considered "materiality" so far as relevant to establishing liability in equity or at law, I did not consider "materiality" for the purpose of finding a regulatory breach (save insofar as it was necessary to understand and explain how the issues had arisen for consideration at the EGM). Further, the alleged breaches of the Listing Rules were said in any event to be breaches of some other equitable or legal duty.

58. The last Ground of Appeal argues that I erred in law in holding that the evidence was not sufficient to sustain an award of damages (though in what respect is not identified).

59. Once it was established that the recommendation of the Acquisition was reasonably made, there was no sufficient evidence of the impact upon the Lloyds share price (either at the date of the Circular or at the date of completion) of *the failure to make the disclosure* for which the Claimants contended.

60. Their whole damages case had been built around the success of the "recommendation case" (i.e. that the recommendation should not have been made) and around the propositions (i) that HBOS was worthless; and (ii) that Lloyds ought not to have participated in the Recapitalisation Weekend. But the recommendation case failed: and I rejected the propositions that HBOS was worthless, and that Lloyds could have avoided participating in the Recapitalisation Weekend. This meant that the evidence

of the Claimants on damages had to be examined to see if it was possible to extract from it some probable loss on the basis (i) that the Acquisition was reasonably announced and a Circular was reasonably put before the shareholders but (ii) (on the hypotheses that my view on causation could be sustained) that the board of Lloyds decided to change their recommendation or their recommendation was (in the light of press comment or otherwise) rejected by a majority of the Lloyds shareholders and the Acquisition abandoned at the date of the Circular or the date of the EGM. What would the value of a share in a "standalone" Lloyds have been as compared to the value attributed to it by the market in the light of the Acquisition?

61. I cannot see that my assessment that there was an insufficiency of evidence to establish that loss embodies an error of law. I cannot see that I erred in law in taking the starting point for the assessment of the value of a Lloyds share as the market value of Lloyds' shares as at 3 November 2008 (which took into account the reasonable recommendation and all of the general market events down to that date) rather than accepting that the starting point for the valuation process should be the pre-Announcement value of Lloyds' shares in the market conditions that existed on 17 September 2008 (with the consequence that the Claimants were to be insulated from market events from then until 3 November 2008). I cannot see that I have made an error of principle in finding that if, for comparative purposes, one has to assess the price of a share in a "standalone" Lloyds at the date the Acquisition completed, then it would be necessary to find (i) when and how and on what terms Lloyds could have raised the additional £7bn capital (which I have found would have been required); (ii) what impact upon the market generally the failure of the Tripartite's strategy for the stabilisation of the market would have had on that process and upon the value of banking sector shares; and (iii) whether (and if so to what extent) there was an idiosyncratic impact upon the Lloyds share price because of loss of credibility of the Lloyd's board (through the reversal or rejection of its plan for the enlargement of Lloyds).

62. Finally, Mr Hill QC submitted that there was a "compelling reason" to grant permission to appeal because my decision sets some standard for disclosure. I held that directors, when considering the materiality of items for disclosure, must not focus only on material supportive of the recommended outcome but ought, when laying out the proposal and in enumerating the risks attendant upon it, to set out in a balanced way material which shareholders might see as indicating disadvantages. That cannot be controversial. My application of that principle to the particular facts and extraordinary circumstances of this case I would not have seen as setting any standard or as providing any useful guidance (other than perhaps in a comparable global financial collapse). I am unpersuaded that there is a compelling reason to grant permission to appeal.

63. For these reasons I refuse permission to appeal.