Lendy & Saving Stream Security Holding Ltd

Day 3

June 30, 2021

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(10.30 am)

THE CLERK: This is in the matter of Lendy Ltd and Saving Stream Security Holdings Limited, case number CR−2019−BHM−000443 and 444.

Can I remind parties that they should be in a private, quiet area if possible so that you are not overheard and can hear. Whilst this hearing is being recorded by HMCTS, you must not make any personal or private recordings or publish any part of this hearing. It is a criminal offence to do so.

Thank you.

Discussion Re Equitable Allowance and Default Interest

HIS HONOUR JUDGE RAWLINGS: Yes. I have some additional documents in relation to default interest.

I did raise at the end of the hearing yesterday, I think the question of whether the applicants' case would be best suited by the Applegate application to recover the costs that incurred post administration in recovering these loans, or the equitable allowance, in the event that the default interest issue went against the administrators.

It occurs to me that there is an additional reason why that might be a better way forward. I'm pretty sure it is a better way forward, but an additional reason why

it would be, or possibly might be.

That is that the authority on which the applicants rely, or one of them, is Phipps v Boardman. The rationale of that authority is that the trust made a profit out of the actions of the fiduciaries, and it was fair in those circumstances that the fiduciaries should recover the costs incurred in making that profit for the trust.

Having looked at the schedule, and it is no surprise to me, I think that the investors have made a loss in relation to all of the loans that they have made. There may be one or two exceptions there. But on that basis, I wonder whether the case for an equitable allowance in circumstances where the fiduciary has acted in breach of their fiduciary duty, if I were to find that, that their case for an equitable allowance is a strong one where their actions have actually resulted in the investors here suffering the loss.

So I just raise that at the start. I don't know whether some thought was put to it. It is a point that Ms Toube may want to come back on once −− at an appropriate time, I suppose, after Mr Gledhill has made his submissions or I don't know if any thought has been put to it by the administrators as a result of what was said yesterday? Ms Toube?

MS TOUBE: Yes, I think we need to say something about the point your Lordship has raised. I'm happy to deal with that now or after Mr Gledhill has made his submissions. But the short answer to that is twofold.

First of all, the equitable allowance has potentially two elements to it. First of all, paying for the work done, and you will recall from O'Sullivan, also potentially paying for a share of the profits. So it's partly you pay for the work done in recovering the funds at all, and then it's open to get a share of the profits.

Now in this case, of course, what we're saying is that there has been a recovery from these borrowers. The fact that there has been a loss overall on the loan doesn't mean that the default interest that has been recovered, which is what we're talking about here, is not recovered by the efforts of those recovering it in.

Put that the other way around. The reason why that default interest has been paid is as a result of what on this basis we're assuming is the actions of the fiduciary.

So, the loss is caused not by anything that Lendy does, but is caused by the borrowers not paying overall, but nevertheless there is a gain, because the default interest has been collected in at all.

So that, I think, is the answer to that point which is the equitable allowance would still be open to Lendy to claim for the work that it has done, and for a share of the default interest which it has collected in.

So that, I think, is the answer, the short answer to that point, which is that it is −− effectively it isn't a killer point that they suffer a loss overall as a result of what the borrowers have done.

HIS HONOUR JUDGE RAWLINGS: It may not be, but it's potentially another factor that would act on the operation of the −− of that equitable allowance but anyway.

MS TOUBE: Your Lordship is absolutely right. When the court is determining the question of an equitable allowance, it could say: well, you can recover the costs of you doing the work you did to get in the default interest, but in this particular case I'm not going to give you a share of the default interest on top of that because actually the investors made a loss overall. Or the court could say: well, I am going to give you a share of the default interest on top of that, but I'm not going to give you all of it or a large part of it.

So, effectively, I'm going to say without what Lendy did, the losses would have been worse, but I'm not going to give Lendy a big chunk of it. So effectively it does

operate, your Lordship is right, it does operate, does come into the mix, but it doesn't mean that Lendy gets nothing.
HIS HONOUR JUDGE RAWLINGS: Okay. All right.
MS TOUBE: The other point just to make, and in relation to the documents which your Lordship received overnight. Those you will have seen relate to the non−default interest, not the default interest.
So your Lordship is absolutely right that the schedules which we were talking about yesterday were the default interest schedules and those are the ones that show there weren't recoveries in full of those loans.
The schedules which I hope your Lordship has got this morning relate to the non−default interest, and I mentioned to Mr Gledhill I would just make these points to you.
As you recall, as we set out in paragraph 92.5 of our skeleton, there was this announcement on the website about how Lendy makes its money. And your Lordship raised the question: well, it says, on the website, that the investors receive 1% and Lendy gets 1.5%; and you asked the question: what are the actual figures?
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: And so these two schedules, your Lordship will see the first one, which is DFL, relates to development

loans.
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: And in fact it is true that the investors' interest rate was about 1% on average. None of them is over at 1% but some are below.
Lendy's interest rate, split between the land loan which was the initial loan which is drawn down in full on completion and the build loan which was then called down in tranches, if you add those together, that's only about 0.6%.
So Lendy was saying we're charging 1.5% but the non−default interest was only about 0.6%.
The second table which relates to bridging loans, again, it is true that the investor interest rate is about 1%. Again, nothing higher than 1%, a few a little lower.
Lendy's interest rate, below 0.4%. So again a non−default rate well below what the interest rate was that it was being told to the investors.
So it follows that the investors knew that Lendy was charging interest rates. It said it was charging interest rates about 1.5%, but the non−default interest rates were well below that. It therefore leaves open the possibility in relation to default interest, that the investors knew that some sums in relation to

interest well above that 0.5% were being charged.
HIS HONOUR JUDGE RAWLINGS: You will have to try that again.
MS TOUBE: So the investors were told that Lendy was getting about 1.5% interest.
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: In fact, non−default interest was somewhere between 0.4 and 0.6% interest, so the investors knew that Lendy was charging interest of somewhere between 0.9% and 1% interest above that.
HIS HONOUR JUDGE RAWLINGS: Or would have known if they'd got the loan agreement.
MS TOUBE: Well, knew from the FAQs on the website that Lendy was saying it was charging interest at 1.5%.
HIS HONOUR JUDGE RAWLINGS: I know that, but they wouldn't have understood that there was only one 1.5% interest and the loss of that against the lenders. [audio distorted]
MS TOUBE: Your Lordship is absolutely right. They wouldn't have known what elements of that was non−default or what elements of that was default. But they knew that the interest charged without explaining whether it was default or non−default was 1.5%.
HIS HONOUR JUDGE RAWLINGS: Yes. Well, they thought it was.
MS TOUBE: Lendy said it was.
HIS HONOUR JUDGE RAWLINGS: Yes, they knew that Lendy said

it was, yes.
MS TOUBE: In fact, that statement isn't accurate either in relation to non−default or default.
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: But the point I was making was, in fact Lendy's non−default interest was well below that 1.5%.
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: So the point I was making was, there is room for Lendy to say: well, that, when we said interest, we didn't say interest default, non−default, we just said interest. We said we were charging you interest; we were charging you interest.
Now obviously the wrinkle with that is that the default interest was 3%.
HIS HONOUR JUDGE RAWLINGS: Well, it was more than that, wasn't it.
MS TOUBE: Well, 3% above the aggregate rate, you're absolutely right. An extra 3%. But nevertheless the point I'm making is that when I talk about the missing fee, in fact what Lendy was telling its investors was, we are charging interest at 1.5%, and its non−default element of that, if I can put it that way, was between 0.4% and 0.6%.
HIS HONOUR JUDGE RAWLINGS: Your submission borders upon suggesting that the difference would be −− the

difference between what they were actually charging as a non−default rate and the 1.5% would be an element of the default rate. It's bordering on that. But I'm not sure what you are telling me.

MS TOUBE: The point I'm making is particularly where we get to the question of informed consent, what the investors were being told was here is the interest that is being charged to the borrowers of 1.5% by Lendy. If they looked at the loan agreements, they would have seen 0.4% simple interest, or non−default interest, if I can put it that way.

They would have seen the provision on default interest. They would have asked or could have or should have asked even, according to the cases, the question, "What's the interest in fees that you are charging?" and the answer they would have got was, "We are charging non−default interest and default interest, and this is what it is".

HIS HONOUR JUDGE RAWLINGS: All right. I'm just not sure how much further the existence of that discrepancy between what they told the investors they were charging and what they were actually charging for non−default interest, how much further that takes you.

MS TOUBE: I think it only goes to this. When we were discussing the point yesterday, your Lordship was

saying, what the investors were told was that the interest, meaning non−default interest, was 1.5% and that there were fees. But they weren't told anything about default interest. And the point I'm making is they were told about what the interest was without specifying whether it was non−default or default, and if you looked at the loan agreement, which you were entitled to do, you would have seen the non−default wasn't 1.5. The only point I'm making on this was to deal with the point your Lordship made to me yesterday, which was the investors were only told about non−default interest.

HIS HONOUR JUDGE RAWLINGS: Fine. As long as it's my fault, that's fine.

MS TOUBE: Not at all, my Lord. That was the only point I wanted to make.

HIS HONOUR JUDGE RAWLINGS: All right, thank you. So, the bottom line in terms of my first question, when I went around the bushes, is that the administrators still see some advantage in pushing their case in relation to equitable allowance, in spite of the fact that one would have a stronger case built upon Berkeley Applegate.

MS TOUBE: Yes, although recalling that the Berkeley Applegate version of this issue will come up later, if your Lordship is not with us on the equitable

allowance point. But, yes, we still wish to make this as an alternative submission.

HIS HONOUR JUDGE RAWLINGS: Thank you. Are we over to Mr Gledhill now?

MR GLEDHILL: My Lord, I am supposed to be dealing with issue 8 but before I do that, there are a couple of things I need to say arising out of that exchange.

The first of which, I'll come back to this later, but there is a confusion setting in here about the scope of the issue in relation to equitable allowance. The issue in relation to equitable allowance is nothing to do with recoveries that have been made since the date of administration. It's purely to do with the question of whether or not Lendy is entitled to an equitable allowance for its collections in the period prior to administration. I'll come back to that and make that good by reference to the documents later. But I just want to be clear that there is a fundamental difference here which needs to be paid regard to.

Secondly, in relation to the table that you were sent overnight in relation to the non−default interest charges, I think with respect there is another serious confusion creeping in here.

Can I ask you to take up my learned friend's skeleton argument and turn up page 31?

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: Paragraph 92.5, you can see sets out the announcement on the website that we are talking about, reading the paragraph in italics:

"Since its launch by Lendy Ltd in 2013, [Lendy] has made its profit from the difference in interest rates charged to borrowers and paid to investors. All [Lendy] investors receive fixed monthly interest amount of 1%, whereas Lendy Ltd charges interest at 1.5% per month on average."

So, the way that I have read that is that the borrower is paying 1.5% per month. Investors are getting 1% per month. So Lendy is keeping 0.5% per month. And that is consistent with the table that your Lordship has been sent indicating a range in −− figures in the range of 0.4% to 0.6%. And I'm not alone in having read it like that. Because if I can take you to the way that Mr Webb dealt with this in his witness statement, so we are now in bundle B −−

HIS HONOUR JUDGE RAWLINGS: Hang on, that's an average of which Lendy gets 0.5%.

MR GLEDHILL: That's right. So what that is telling the reader is that there is effectively a 2:1 split as between the investors and Lendy of the interest that Lendy charges and Lendy charges 1.5%, and that is borne

out clearly by the tables your Lordship was sent overnight.

If my Lord looks at Mr Webb's statement, tab 1, in the B file. Turn on to bundle page B53. You will see that's exactly how the administrators themselves understood this and put this in preparation for this hear.

So you have there the example of a £2 million loan. 1% of 1 million is £20,000. So 1% per month to the investors gets you £60,000. You see that figure in the second box. Interest at £60,000. That's the non-default interest payable to the investors. And then beneath that, the contractual entitlement due to Lendy, interest of £30,000.

So the suggestion that the website suggested that Lendy was going to be keeping for itself non-default interest of 1.5% is simply wrong. It's not what the website says. It's corroborated by what your Lordship has been told overnight Lendy in fact did, and it's precisely how the administrators themselves understood the position. So there is simply no basis for saying that, well, Lendy actually charged less interest than it said in this website announcement, from which it must follow that that must have been referring to something other than non-default interest. It's simply a --

MS TOUBE: My Lord, I'm so sorry to interrupt. That is completely my misunderstanding, and Mr Gledhill is absolutely right on that, that it is -- Lendy were saying it got 0.5%. But I would just invite your Lordship nevertheless to look at these figures, because you will see that in fact even with that misunderstanding, which I absolutely accept and was entirely my fault, you will see that Lendy's interest rate was actually less than 0.5% in a number of these cases, particularly in relation to the bridging loans. The point I was making was wrong but not entirely wrong.

JUDGE RAWLINGS: Okay. All right. On the basis that the average would be about 0.5%, according to the schedule, then what they were actually charging is in line with what they told investors they would charge, at least according to the FAQ answer.

MS TOUBE: Not in relation to the bridging loans. There it was still considerably below but the other ones your Lordship is right.

JUDGE RAWLINGS: It says on average, so if it's between 0.4 and 0.6, 0.5 is average about. I think. But fair enough. Sorry to take everybody around that particular swing and roundabout. All right, yes.

MR GLEDHILL: I just wanted to make two other preliminary points, if I may, before turning to fiduciary duty.

Before I do that, that was absolutely in no way a criticism of Ms Toube. There is a lot of very complicated evidential material, and I'm sure I will make mistakes as well. It's just one of those things.

I just wanted to make two preliminary points before we get to the main agenda of the morning, which is our submissions on issue 8. I may take slightly more than my allotted two hours on issue 8, and I notice I'm already 20 minutes into my allotted time already. If I do, your Lordship doesn't need to be unduly concerned, I hope.

My learned friend and I have had throughout some very helpful discussions to try to assist your Lordship in narrowing the issues and we both agree, for reasons which we can explain this afternoon, that issue 6, so that's the point about incorporation of contractual terms, just doesn't arise. So we will both, I suspect, tell your Lordship why it doesn't arise, just so that you can be satisfied on that.

And then issue 9, which is the question of remedy that follows, if there has been a breach of fiduciary duty by Lendy, Ms Toube and I are in agreement on the principles. Ms Toube will show you the controlling decision of the Supreme Court recently on that point, and she will make to the point to you that even if we

have a proprietary claim, we have to establish proprietary claims in accordance with ordinary tracing principles. We accept that. And she'll make the point that if and to the extent you were to grant an equitable allowance, that might be a charge upon our proprietary claims, and we accept that as well.

So there is not going to be any dispute about that. And that's quite a timesaving tomorrow morning, because I think from memory we had about 1.5 to 1.75 hours docketed for that issue, so that's got effectively --

JUDGE RAWLINGS: All right. We can move the timetable around. Am I still being asked in relation to issue 6 and 9 to make a declaration, as I am on issues 1 and 2?

MR GLEDHILL: Yes, I think your Lordship will be.

JUDGE RAWLINGS: All right. Okay. Fine.

MR GLEDHILL: So, my Lord, that was the first preliminary point I wanted to make. I just wanted to make one other preliminary point before turning to fiduciary duty, which is in relation to some more work that the administrators' solicitors Shoosmiths have very helpfully done overnight in relation to one evidential point that cropped up during the course of, I think it was yesterday.

Just so your Lordship is clear what we are talking about, if you take up file E3, and turn up tab 187.

This document is the document to do with the bonus accrual feature. My Lord remembers that in relation to issue 5, the administrators' primary case is that they're entitled to keep all of the default interest and they relied on this document.

And I made the point to your Lordship that it was very unclear to us when this web page was up on the Lendy website. Your Lordship will remember that Shoosmiths helpfully did some enquiries and the position that was established yesterday was that the Lendy home page on the web, had a link to a section about bonus accrual in September and October 2017. We did not know what that link took you to.

So I made the point to your Lordship, first of all, we don't know whether that link took you to the document you have open in hard copy in front of you. Secondly, we don't know if it was even there for more than that two months' period. Overnight, my learned friend's solicitors have very fairly and very helpfully done some further searches on this, the upshot of which, as I understand it, is that the home page no longer had a link to a page about bonus accrual as at February 2018. So on the evidence your Lordship has at the moment, all you know is the home page had a link to a page about bonus accrual for two months in autumn

2017.

HIS HONOUR JUDGE RAWLINGS: September and October.

MR GLEDHILL: Correct.

HIS HONOUR JUDGE RAWLINGS: 2017, yes.

MR GLEDHILL: The other point to note from the e-mail overnight is that the page that you have at 938, the only copy of that, as I understand it, Shoosmiths have been able to find is dated 20 May 2019, four days before the date of administration. So we don't know whether the page that was on the home page in September or October 2017 took you to this or something like it. This document pre-dates administration by four days. As I have said to your Lordship before, we know that Lendy stopped writing new loans in September 2018.

JUDGE RAWLINGS: September 2018. There was another document. We have nailed that one, have we?

MR GLEDHILL: Which document was that?

JUDGE RAWLINGS: We nailed the date on which the recovery and collections policy, or whatever it was --

MR GLEDHILL: There are two recovery and collections policies, my Lord. The one at tab 194, at page E963 in the bundle. I made the point to your Lordship that we don't know when that came out. But there is an agreement of facts in the statement of agreed facts, paragraph 13.5.5(b) and it looks like it derives from

summer 2018. In late summer 2018.

JUDGE RAWLINGS: And on the basis they didn't write any loans after September 2018, that would on the face of it not apply to very many loans?

MR GLEDHILL: No.

JUDGE RAWLINGS: Yes, all right.

MS TOUBE: I am sorry to interrupt Mr Gledhill before he goes into issue 10(sic), just to deal with that point. I know this is really a very small point, but in fact I'm told that on the Wayback Machine, you can click on the link on the home page. So we know that the link in September 2017 from the home page did go to the bonus accrual page. The point that we were making in relation to the bonus accrual page is that we can see that the bonus accrual page is still there in May 2019. So in fact it was there, as far as we can tell, from September 2017 to May 2019.

We have also seen some discussion on the investor boards back in 2017 of the bonus accrual question. None of this is hugely central, but I believe that the evidence shows that this document on bonus accrual on the website, saying what it said, was there from September 2017 to May 2019. But again, it's not the greatest -- the largest of our evidential points but I think it is important to get it right.

JUDGE RAWLINGS: Okay.

Submissions on Issue 8 by MR GLEDHILL

MR GLEDHILL: Your Lordship knows that under issue 8, three issues arise and I'm going to take them in this order. First, did Lendy owe the Model 2 Lenders relevant fiduciary duties which it breached by charging and collecting default interest? Secondly, if it did, did it seek and get Model 2 Lenders' informed consent to do that? Third, if not, should Lendy now be allowed to hold on to some part of the default interest it charged and recovered pre-administration by way of equitable allowance?

I wish to be absolutely clear on one point at the outset, which your Lordship in fact touched on with Ms Toube at the beginning of her submissions on this topic yesterday. We say that issue 8 arises whatever conclusion you arrive at on issue 5. As you have seen from our skeleton in relation to non-default interest, we rely on what's generally referred to as the no conflict principle, and it's key for your Lordship to appreciate that that principle is simply a facet of the broader duty of loyalty which the fiduciary owes to the principal.

And we say that will have been breached in this case irrespective of whether your Lordship decides under

issue 5 that the party contractually entitled to default interest was in truth Lendy on Ms Toube's case, or the Model 2 Lenders on mine, because the indisputable fact is that Lendy conducted itself and plainly believed itself to be entitled to levy default interest for its own account, and that created the risk of conflict entailing, as we say, the breach of fiduciary duty. So that is why the two issues are to that extent discrete.

JUDGE RAWLINGS: Yes.

MR GLEDHILL: So turning to the question first of breach of duty. The first thing to discuss with your Lordship is the circumstances in which fiduciary duty arises as a matter of principle.

Your Lordship has already had a good deal of case law about that, but I'm going to suggest that for your purposes it suffices to look at three things, which I say tell you all you need to know about the principles. And the issue is not a dispute about the authorities or what the authorities do or don't show you; it is a question of how you apply the authorities of facts.

The first of the relevant authorities I take you to is in tab 44 in the authorities bundle. It starts at bundle page F1307. I am taking your Lordship to this because this represents the most recent word by the

Supreme Court on this point. Your Lordship doesn't need to know very much about the facts. So far as material, the issue here was whether a member of a charitable company limited by guarantee owed a fiduciary duty of loyalty to the charitable purposes of the company. And the reason that raised issues of difficulty is because, as your Lordship will know, shareholders in a company that is not a charity do not ordinarily owe fiduciary duties in respect of the powers that they hold qua shareholders under the articles.

On the facts of this case, the Supreme Court held that the respondent to the appeal owed such fiduciary duties. But we don't need to trouble with the facts at all, because what matters is the discussion of principle in Lady Arden's speech at bundle page F1321. There is a disagreement between Lady Arden and other members of the court on a point that does not matter for your Lordship's purposes today but they agreed with her on this point.

May I start by asking you to read paragraph 43 through to the end of paragraph 46 over the page. If I can invite your Lordship to read that to yourself.

JUDGE RAWLINGS: Okay.

MR GLEDHILL: Your Lordship sees from that Lady Arden notes that the legal relationship of agency often also imports

equitable fiduciary duties. You see that at 475, letter E, and where it does, the core duty of the fiduciary at 475, letter F, is the duty of single-minded loyalty to the beneficiary.

Over the page at 476, you see that the corollary of that as part of that core responsibility is that the fiduciary owes the no -- what is referred to as the no conflict principle, the obligation not to put himself into a position where his interest and that of the beneficiary conflict. And he also owes the -- or is confined by what is described as the no profit principle. He must not make a profit out of his trust.

And then continuing after the extract I've just asked your Lordship to read at paragraph 47, her Ladyship goes on to say this:

"The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in Grimaldi ...

"'a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest ...'"

She goes on:

"This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty."

So Lady Arden says that a reasonable expectation you will act exclusively in my interests is a relevant criterion although not necessarily in all cases.

And there is this point to make about that. Where there is a contract between the parties, whether there is such an expectation or not, and if so whether or not it is reasonable will plainly be influenced by the terms of that contract. But, and this is important, those terms will not exhaustively determine that issue, and it has been said time and time again that fiduciary duties, where they exist, sit alongside contractual obligations. The point is that fiduciary duty is an equitable concept. The whole point of equity is that it imposes a gloss on the legal rights of the parties.

So that's the latest word from the Supreme Court. If I can now ask your Lordship to turn on in the authorities bundle to tab 46, I can show you the most recent pronouncement on the same topic by the

Court of Appeal. That's a case called Company v Secretariat Consulting. Your Lordship doesn't need to trouble about the facts here at all. It's sufficient to dive straight into the body of the judgment, picking it up at bundle page F1403.

And you are, as it happens, in the judgment of Lord Justice Coulson, and you can see towards the top of the page a subheading in italics, "Fiduciary duties", running from paragraphs 40 through to 42. Could I again ask you to read those to yourself.

JUDGE RAWLINGS: Yes.

MR GLEDHILL: So your Lordship can see there that Lord Justice Coulson bases his analysis heavily on previous authority from Lord Justice Leggatt in a case called Al Nehayan v Kent. Lord Justice Leggatt, of course, is now in the Supreme Court, so these are fairly authoritative pronouncements. The key point to pick up from this is that for the -- it stands as authority for the principle that it's not enough for the purposes of establishing fiduciary relationship that one individual has simply reposed a high degree of trust and confidence in another. What is required, see the quotation from Lord Leggatt just above paragraph 42, is that that other has accepted a role which requires exercising judgment and making discretionary decisions. That's important.

I'll come back to that. And has undertaken in doing so to put aside his or her own interests and act solely in the interest of the principal.

Again, picking up the point I made a moment ago by reference to Lady Arden's speech in the Supreme Court case, if there is a contract between the parties, the terms of that contract will, as Lord Justice Coulson notes in paragraph 42, always be very relevant but they are by no means the end of the analysis.

Now, your Lordship has -- forgive me, I've lost my place. Your Lordship has seen from the two cases I have just shown you, both have made reference to the fact that agents will often owe fiduciary duties to their principals and the reason for that is obvious. The essence of the relationship of agency at law is that the principal confers upon the agent an authority to do certain things that bind the principal. And the point is that the power that is so conferred must be exercised by the agent for the good of the principal, and not some other collateral purpose.

And the corollary of that is that while it is conceptually possible to have an agent who is not also a fiduciary, that will be an unusual outcome. And if your Lordship needed authority for that, you will find it in some extracts from Snell's Equity, which we've

included at tab 62 of the authorities bundle, and this is the last of the three things that I wanted to show you before getting into the facts.

So within tab 62, if my Lord turns on to page 1582 -- sorry wrong reference. Paragraph 7004 which you find at 1579. Under the heading, "Settled categories of fiduciary relationship":

"The paradigm example of a fiduciary relationship is the relationship between trustee and beneficiary: an express trustee owes fiduciary duties to his or her beneficiaries."

Then skipping down three lines, you can see:

"Several other categories of relationship are well-settled as fiduciary relationships. In these relationships there is a strong, yet rebuttable, presumption that fiduciary duties are owed. Agents normally owe fiduciary duties to their principals."

And then if you just keep a finger in there, but turn on to page 1582, you can see that Snell cites a fairly extensive roster of English and other Commonwealth authority in support of those propositions. It's notes 13 and 14 at the top of page 1582, 13 citing a case of the Supreme Court of Canada, 14 citing English House of Lords authority, including most recently

Kelly v Cooper, 1993.

Turning back to the bulk of the commentary and looking now then, please, at page 1580. So the discussion here is of ad hoc fiduciary relationships, "(1) Principles". But I'm looking at the bottom of the page, about five or six lines beneath the second hole punch, text starting just after footnote 45 where the commentary says:

"It is clear that it is possible for fiduciary duties to arise in commercial settings. Agency, which is frequently a relationship between two commercial actors, provides a clear example: the primary source of duty between principal and agent is a matter of contract law, often applied in a commercial setting, and yet fiduciary duties will be owed by the agent unless they have been excluded."

And again, giving a figure in there, you will you find the cases that back that up on page 1584. Note 48, again citing Kelly v Cooper, Privy Council decision from 1993.

JUDGE RAWLINGS: Yes.

MR GLEDHILL: So the starting point for your Lordship's enquiry is consequently whether and purportedly for what purposes Lendy acted as agent for the Model 2 Lenders.

I'm going to take the original and amended Model 2

lender terms separately. But before I come on to those, the regulatory background is again important. I keep coming back to this. The contracts that your Lordship is concerned to construe are all in the context of regulated activities, and the regulated background is consequently of some importance in approaching the obligations and duties which those contract impose.

My Lord finds that in the authorities bundle at tab 41. So we are back in the regulated activities order. Sorry, did I say 41? I meant 51. I made the point to your Lordship in the course of my submissions on issue 5 that article 36H precluded Lendy from itself providing credit. But it would be very wrong to conclude from that that Lendy acted purely as a facilitator, introducing lenders to borrowers.

And your Lordship sees that most clearly if you look at F1442, paragraph 3, about a fifth of the way down the page.

"The following are specified kinds of activities if carried on by A ..."

I should just remind you, in this regulation, A is the platform operator, B is the lender, and C is the borrower. So it says:

"The following are specified kinds of activities if carried on by [the platform operator] ... in the course

of, or in connection with, the carrying on by [the operator] ... of the activity specified by paragraph (1)...

"(a) presenting or offering article 36H agreements to [lenders or borrowers] ... with a view to [lenders] ... becoming the lender ..."

And borrowers becoming borrowers.

"(b) furnishing information relevant to the financial standing of a person ... with a view to assisting in the determination as to whether another person should ——

"(i) enter into ... an article 36H agreement ..."

Important:

"(c) taking steps to procure the payment of a debt due under an article 36H agreement,

"(d) [taking steps to perform duties, or exercise or enforce] rights under an article 36H agreement on behalf of the lender,

"(e) [taking steps with a view to] ascertaining whether a credit information agency ... holds information relevant to the financial standing of an individual or relevant person ..."

So the ambit of the regulated activity goes significantly beyond simply providing an electronic platform and leaving the lenders and the borrowers to

get on with it between themselves.

And consistently with its regulatory position, Lendy was in broad terms entitled to do credit checks on lenders and take steps on behalf of lenders to enforce the loan agreement subsequently entered into. And you can see that again if you turn back a page to page F1441. I showed to you under issue 5, paragraph 1, so to be within the ambit of the article, you have to satisfy the conditions of 2, 2A and C, and there have to be 36H agreements. And look at the condition at 2A:

"The condition in this paragraph is that ..."

The platform operator or another person under arrangement with the platform operator, undertakes to (a) receive payments in respect of interest or capital or both, (b) make payments in respect of interest or capital or both due to the borrower.

JUDGE RAWLINGS: The borrower is B?

MR GLEDHILL: That's right. You get that if you look back at sub—paragraph (1), second line, the operator, Lendy, is A. B, the Model 2 Lenders. C, the Model 2 borrowers.

And that is a pre—condition. That's not an option. That is a pre—condition to carrying on this regulated activity.

JUDGE RAWLINGS: Okay. So you're saying they have to do

that?

MR GLEDHILL: Yes. And they did.

JUDGE RAWLINGS: I know they did it, yes. Okay.

MR GLEDHILL: And that is reflected and feeds into the terms of Lendy's agreement with Model 2 Lenders and also what we know it did for them by looking at this more general marketing materials.

I started off by showing your Lordship the key provisions in the original Model 2 Terms. So we're back now in the C file at tab 14 and there are a range of provisions in this agreement whereby Lendy undertakes specific agency roles. And I should just say that your Lordship of course saw that towards the tail end of this agreement, there is a boilerplate provision saying nothing in this contract gives rise to a relationship of agency. It cannot possibly stand with the multiple other provisions of this agreement referring to agency.

And of those provision, there are four that are particularly important for the purposes of the submission that I'm developing to your Lordship, and they were provisions which your Lordship was not taken to. I don't say that by way of criticism, just by way of fact, in the course of my learned friend's argument on this point yesterday.

The first is at page C265, clause 1.2:

"Saving Stream will act as agent on behalf of the lenders in relation to the Loan Contract."

On its face in very general terms indeed. The second material provision, turning over to page C266, my learned friend showed you clause 2.3 but stopped before we get to what we say is the material part. So it says:

"Saving Stream's principal role is to perform introductory functions on behalf of borrowers and lenders in order to bring together prospective borrowers and lenders ..."

That's where she stopped reading, but it goes on:

"... to provide a stream-lined process for entering into loans and to facilitate the payment and collection of sums due under or in connection with those loans..."

Third relevant provision, over to page C272. 49.6:

"Notwithstanding any ... clause in these terms you agree that, in certain circumstances, for example a change in the borrower's circumstances, and in its absolute discretion ..."

Note those words:

"... Saving Stream (acting as agent on your behalf) may agree with the borrower to restructure the loan and amend the Loan Contract and you will be bound by these amendments."

So confers on Lendy a discretionary power in

relation to restructuring the loan or not. And then fourth key provision that I think your Lordship needs to look at is on page C276, clause 13.1:

"Saving Stream (acting as agent on behalf of the lenders) and [SSSHL] ... may enforce payment of the debt and enforce the security against the borrower."

And those provisions were then carried over into the amended terms. And for this purpose it's probably easiest to show your Lordship, there is a track changes version in the bundle that shows the differences between the original and the amended terms. You haven't had to look at it yet, I think. It's in the second of the E files, E2, tab 107.

I should just say, this is exhibited to Mr Powell's statement, and it seems to have been a track changes version prepared by a user of the P2P independent platform. I should say it's not entirely accurate. There are some changes which aren't shown in highlight, but for the purposes of what I'm about to show your Lordship, it's good enough and correct.

And so the relevant provisions, you see the first at E439, you can see clause 1.2:

"Lendy is authorised by the lenders to enter into the Loan Contract as agent for the lenders."

E440, slightly amended, so the reference to it being

Lendy's principal role to operate an electric platform has been amended. It says:

"Lendy operates an electronic platform in relation to lending in order to bring together prospective borrowers and lenders, to provide a stream-lined process for entering into loans, to facilitate the payment and collection of sums due under or in connection with those loans ..."

JUDGE RAWLINGS: Where are you reading from?

MR GLEDHILL: I'm sorry, E440, paragraph 3, just by the first hole punch.

JUDGE RAWLINGS: Yes.

MR GLEDHILL: And it's pretty much the same as before but the point I just made to you was the first three words, "Lendy's principal role", has been removed.

And then the third of the four provisions you see on page E445. It's paragraph 9(6), last two lines of the page. That's remained in the same form as before. Actually no, sorry, that's not quite right. If you turn over the page, you see there has been a slight amendment to that as well on page E446. You can see some green words have been added in parentheses, "including, for the avoidance of doubt, to agree to extend the term of any loan".

And then the fourth and final one of the provisions,

just so you can see what happened to that, is on page E450. Clause 13(1), by the first hole punch, bar a few drafting points, has remained the same:

"Lendy (acting as agent on behalf of each lender) and Saving Stream Security Holding shall enforce payment of the debt and enforce the security against the borrower."

Those are what we suggest are the material provisions of the agreement in relation to agency. And that is a convenient point to pick up with your Lordship on a submission that my learned friend advanced to your Lordship yesterday. We have been getting transcripts, I hope your Lordship has as well.

JUDGE RAWLINGS: Yes.

MR GLEDHILL: And if I can take you back to the transcript of yesterday's hearing, so I'm looking at Day 2, and as usual these transcripts you get four pages on a page. I'm looking for page 111, page 111 in the transcript. It's at the top right-hand corner of the relevant page.

JUDGE RAWLINGS: Yes, I have that.

MR GLEDHILL: So this is a passage in my learned friend's submissions in relation to issue 8. And your Lordship sees at page 111 she says, between lines 7 and 9:

"Now, what is said is that Lendy had a duty to procure for the Model 2 Investors the best terms

available in respect of interest."

And then building on that, your Lordship will remember that she made a submission to your Lordship on a point about timing, and you can get the essence of that most clearly if you turn on until you get to transcript page 118. 118 is the bottom left quadrant of this particular page. So this is —— your Lordship had an exchange with my learned friend during the course of this submission. Picking it up at the last line of page 118, you said:

"Your distinguishing feature here appears to be that because everything had already been negotiated and what was being presented to the investors was an opportunity to enter into this particular loan on these particular terms, and Lendy here weren't negotiating on behalf of the borrowers, they were just —— sorry, the investors, they were just presenting a loan [agreement] to the investors, that there's no fiduciary duty. That seems a little bit odd."

The response is between lines 18 to 24:

"Yes, that is what we're saying, because of course you'll recall that the agent does [not] enter into the contract on behalf of the lenders, but no one's actually invested in it by then and then they say, 'Here's a loan, who wants to have a piece of it, this is the

interest you'll get under it' and the investors then say, 'Well, I want to be a lender'."

There are three things to say about that submission. The first is this. There are of course cases where I go to an agent and I say to the agent, "Get me the best deal on offer in the market". There is a case in your Lordship's bundle called Hurstanger at tab 20 in the authorities bundle, which is precisely such a case, where a sub—prime borrower goes to a mortgage broker saying, "I want to remortgage, get me the best deal I can get".

And what happens there in fact on the facts of that case is that the mortgage broker goes out to the market, and one of the prospective lenders pays him a commission. And he doesn't disclose that to his client. And that of course risks the consequence that the mortgage broker's recommendation is improperly influenced by the fact that they have made a secret profit out of popping the client into that particular lender. And they will be in breach of the fiduciary duty, in fact the no profit rule, if they do that without disclosing the commission.

That is not the case that we are advancing to your Lordship at all. We do not suggest that Lendy committed that sort of breach of fiduciary duty. We accept that

lenders made their own decisions about which loans to invest in, and that Lendy repeatedly said they were not giving advice about which loan, as between the available loans on offer, lenders should put their money in.

Our point is a completely different one. Our point is that Lendy agreed to act as the Model 2 Lenders agent in relation to collections and recoveries, and we say that as such it assumed a fiduciary duty of loyalty to act in their best interests in discharging that role, and we say that what it did in relation to default interest, charging it, electing it, using it for its own purposes, placed it in the clearest possible breach of its duty of loyalty under the no conflict principle.

The second point to make about that exchange from yesterday afternoon to your Lordship is that the fiduciary duty that we rely on kicked in at the point at which there were decisions to be taken by Lendy about what to do about a loan that looked like it might go into default. For example, once a loan had gone into default or looked as if it might go into default, should Lendy start immediate enforcement action to recover the principal? Or should it wait around a bit to see if borrowers could work things out or restructure, with Lendy in the meantime pocketing interest at the rate of 54%?

My learned friend's timing point does not begin to be an answer to that problem. A problem necessarily only arises once Model 2 Lenders have already invested. Our point is about how Lendy had to behave down the line after investment at the point at which it was facing a potential contentious recovery situation.

JUDGE RAWLINGS: Okay.

MR GLEDHILL: The third point. The suggestion that Lendy encouraged investors to believe they could trust Lendy to act in their best interests only after the point at which they had already invested through the platform is, in point of fact, we say simply incorrect. Again, this is not like the case of the mortgage broker that I'm reminded your Lordship of a moment ago. There is a one—off transaction. The evidence before your Lordship is that investors were entitled to put amounts as low as £100 into an individual loan. Mr Powell's evidence is that he made a significant number of such investments. Mr Melton says the same thing. Specifically one of the attractions was that they could diversify risk.

So the process of investment by all of these investors was a continuous and ongoing process. These were not one—off transactions. So, I'm going to take your Lordship in a moment to some representations that

Lendy made from time to time. And any lender who invested after any of those representations on an ongoing basis will have been influenced by them. It is to be presumed that most investors were, and even those investors who came into the site for the first time will undoubtedly have seen some of the materials I'm about to show your Lordship.

So what were those claims? A broad thrust of it, as your Lordship has seen from our skeleton argument, was if investors put their money into this platform, Lendy would do its best to ensure that they got back their principal and the agreed return. It would use its best endeavours to do that. And we've made the important point to your Lordship in our skeleton in another context that this was not some benign expression of benevolent altruism. Representations along this line were fundamental to Lendy's ability to attract capital and sustain business. This was a highly competitive market. There were many other peer-to-peer platforms lenders could have gone to. And it was key to the message that Lendy relayed to investors and potential investors that it was seeing to it that they were not exposed to the undue risk of loss of capital.

And your Lordship knows from our skeleton that we say that there were two broad aspects to that general

point which are particularly relevant for your Lordship's purposes.

The first is what Lendy told investors about the steps it took to make sure that borrowers admitted to the platform were creditworthy and that loans on the platform had adequate security coverage. And your Lordship may remember that that was a point Mr Melton expressly referred to in the course of his cross-examination.

The second relevant aspect is what Lendy told investors about how things would work in a situation in which the borrower went overdue. And there was consequently a risk that capital might not be recouped in full. And I am going to take your Lordship through the material evidence in relation to both of those two aspects now.

You can put away the transcript, and if you would be so good as to take out our skeleton argument and paragraph 28 which you will find at page 25. I won't read all of this back to your Lordship, you've already seen it but I'll just highlight some of the points just to remind your Lordship of the flavour.

Picking it up at paragraph 28, first line:

"... Lendy consistently assured both lenders and prospective lenders that investments made through its

platform had a high degree of protection from loss, because Lendy saw to it on their behalf that only creditworthy borrowers were admitted to the platform and only loans with acceptable security headroom were put up on it by Lendy for investment."

Then at 28.1 we refer to a page on the website which had the subheading, "How it works" and I'll just remind you of what it said. At 28.1.2:

"Under a sub-heading, 'Where is the risk?': 'we make every effort to minimise the risks for our investors and to ensure, where possible, that all investments are repaid in full and on time. To date we have a 100% success rate with our repayments ... we feel confident that we have a thorough and robust system in place to protect all Saving Stream investors' ..."

Then starting at 28.2, we detail some of the e-mail updates that were sent to lenders.

The evidence for your Lordship's note suggests that Lendy sent e-mail updates to investors on a fortnightly basis. I can't say for certain that it did that throughout its life, but certainly for significant portions of it, it did.

And over the page, at page 26, we quote from one particular one at paragraph 28.2.1, at the top of the page:

"The 25 August 2017 weekly update reassured [investors] ... that while Lendy was 'not able to protect investors from capital loss, we do take our responsibilities very seriously ... Lendy already has a robust due diligence process, which includes a five phase, multi-step (49 in fact) credit assessment overseen by our Credit Committee'..."

And what you see there in the due diligence process that Lendy held itself out to be conducting is reflected in the terms of two Lendy documents concerning how it dealt with borrowers and loan propositions at the outset, at the stage of admitting them to the platform. And it will be helpful to show your Lordship both of those two documents quickly.

The first is a document we've already looked at in another context in the C file, tab 7. This is the standard form agreement between Lendy and the borrowers and under issue 5, I made the point to your Lordship this is the agreement which Lendy concludes as principal, not as agent.

And at the top of page C113, I showed you the function of this agreement from the first three lines, top of C113:

"If you decide to become a borrower with Saving Stream you must comply with these terms and

conditions (the 'Terms')."

Look down at paragraph 2, three quarters of the way down the page, "How to become a borrower":

"To be a borrower with Saving Stream you must meet the following criteria ... "

It sets various ones out. The key one is over the page, C114, paragraph 2.1.5:

"... meet minimum credit and fraud risk criteria as determined in Saving Stream's sole discretion."

Note the words "discretion".

"2.2. Saving Stream may in its sole discretion refuse any prospective borrower from becoming a borrower with Saving Stream regardless of whether the prospective borrower meets the criteria ... "

So who is it conducting these checks on behalf of? Plainly it is conducting them on behalf of prospective lenders because it wants to maintain its reputation within the market as a platform through which lenders can lend safely.

And as your Lordship sees from that passage, it is conducting what it describes as a detailed process in which it makes an evaluative discretionary decision.

And in fact the provisions I have just read to your Lordship run all the way down to paragraph 2.8 at the bottom of the page. I don't want to take you through

those, but I do just want to show you clause 8.2 in the agreement, page C118. What I have just shown you is relevant to the discretion Lendy has to admit borrowers on to the platform in the first place. Clause 8, you can see from the heading, is relevant to the separate question of when Lendy can terminate borrowers.

Clause 8.2:

"We may end your membership of Saving Stream at any time and for any reason, including but not limited to ... "

Then it has a whole series of conditions. Turn over to C119 and again, I ask you just to note the last one, 8.2.14:

"... your financial position deteriorates to such an extent that in our opinion your capability to adequately fulfil your obligations under these terms and conditions has been placed in jeopardy."

And the second document that your Lordship could usefully look at in this context, putting away the C bundle for the moment, is in the first of the E bundles. E1, tab 69, bundle page E223. What you looked at a moment ago is the terms of the agreement between Lendy and borrowers. This is a different document. This is an internal credit policy. It's not an outward-facing document, and you can see the date of it at the top.

Version 1, August 2016, version 2, February 2017.

And I show it to your Lordship to underline the extent to which in managing credit risk and subsequently taking issues in relation to recovery, Lendy was exercising an evaluative and discretionary role. Picking it up at page E223, you can see, first of all at 2, the credit committee comprises Mr Brooke. He is one of the co-founders who as your Lordship has heard is now being sued by the administrators for fraud. And three others. And then (3), "Credit Risk", last line:

"It is imperative that Credit Risk is mitigated as much as possible."

Over the page, E224, under the heading "Principles", just above the first hole punch, third paragraph:

"We will conduct credit searches on the Borrower and connected parties to ascertain any adverse credit bureau information in order to determine their credit risk. We shall only lend to borrowers that have a good credit rating."

And so it goes on. And the only other point to note, paragraph 8 on page E226. This slightly bleeds into the second point I'm coming on to your Lordship with, which is what happens upon prospective default:

"8. Loans Past Due for Repayment

"We will obtain updates from our borrowers during

the loan term ...

"If the Borrower requests the loan term be extended ... or if we become aware or consider that a loan extension may be required, we will liaise with the Borrower and/or broker accordingly ... to obtain an update of the Borrower and/or property circumstances..."

Next paragraph:

"Loan extensions, for a term of more than one month past the original loan maturity or due repayment date, need to be approved by Credit Committee."

Then at 10, you can see that all of that is subject in any event to the discretion of the credit committee:

"Any exceptions to this Credit Policy need to be approved by 2 of at least three 3 people forming a quorum at a Credit Committee meeting."

So, those are the borrower-facing agreements internal policies that they had in play.

So far as the marketing materials are concerned, and what they relayed to potential investors and existing investors about that, that topic is dealt with in very helpful detail in Mr Powell's witness statement, and I'm just going to take your Lordship very quickly through the material passages in that, just elaborating on the quotations we made in our skeleton argument. There are six relevant passages in all, six.

JUDGE RAWLINGS: Just in terms of time and I'm not asking you to stop now, we were looking at a break around about 12 noon, so about ten minutes?
MR GLEDHILL: Yes. I'm entirely happy to break whenever suits your Lordship. If you would rather break now we can. It's entirely a matter for you.
JUDGE RAWLINGS: I wasn't sure whether you'd get to a useful position in 10 or 12 minutes or so.
MR GLEDHILL: Let me just finish. So your Lordship remembers I said there were two aspects I'm particularly concerned with. One is credit control on the way in, and the second is collection on the other side. Let me perhaps finish that first point, which is credit control on the way in. And there are six material passages in Mr Powell's evidence about this. He wasn't cross-examined about any of this. No criticism intended, I'll just state it as a fact.

And the first one your Lordship picks up at bundle page B104, you see at the bottom of the page, paragraph 56, he quotes from the Lendy website during the currency of the original Model 2 Terms and conditions, and it had a page called "How it works". And you see he quotes that, starting at paragraph 56.1 at the bottom of the page and continuing over at the top, B105:

"[Lendy] ensures this [lending] process is fast, simple and secure, and delivers a fixed interest rate of 12% per year. All proposals are fully assessed before being made available for investment, with several levels of protection in place meaning you can invest your capital with complete peace of mind."

That and the next five citations, I will show your Lordship all making the same point. This is not purely an arrangement of facilitation.

Then in the next paragraph, paragraph 56.2 on the same page, you can see he is there referring to a page entitled "Where is the risk?" And he quotes from it:

"To date we have a 100% success rate with our repayments. In the event that a borrower defaults on their loan we have the following protection in place."

Skip to the second bullet point:

"Loans do not exceed a maximum of 70% of the Open Market Value. This means that if the borrower cannot repay the loan it is highly likely that we will be able to recoup all funds from the sale of the security, as there is a substantial amount of equity."

Moving on to the next page, the third relevant section you need to look at, paragraph 57.2 on B106, Mr Powell is quoting here from what's called the risk investment statement. In 57.2:

"Under the heading 'Borrower Default', the Original Risk Statement noted that any lending was secured ... It continued, stating as follows: 'If the borrower does not repay their loan then we can sell the property to cover any shortfall. We only lend to borrowers who have a good quality property that we believe could be sold readily' ..."

So all of that is discussing the position under the original Model 2 Terms. And then there are three further points that Mr Powell makes in the later period where the amended terms have come in. And you can pick that up at page B123. At paragraph 90.1:

"In its 'Weekly Update' email dated 14 July 2017, Lendy stated ...

"'All investment carries some risk, and P2P is no different. But responsible platforms like Lendy mitigate that risk through their detailed due diligence on investment loans, having a maximum loan to asset value of 70%, an ongoing monitoring of development loans, and features like the Provision [Reserve] ..."

Then fifthly, the next paragraph, paragraph 90.2 quoting from a weekly update of 25 August 2017:

"'While we're not able to protect investors from capital loss, we do take our responsibilities very seriously and have in place a number of measures to

protect against any [capital loss] ..."

And then finally over the page at B124:

"In an email 9 October 2017 [saying] ... Lendy's five today! ..."

We made a passing comment in our skeleton that I'm not even sure that was true, because as far as we understand it, it started business in 2014. But never mind. The quotation reads as follows:

"Five years on, we are one of the only profitable fintech property platforms, generating over [2.7 million] ... in profit ... This success is partly because we have always taken a cautious approach scaling up only when we felt the business could sustain the expansion. But we've also managed risk carefully, and always striven to strike the right balance between loan supply and investment demand. We are also privately owned, with no bank debt or venture capital investment'."

So those are the six references in Mr Powell's evidence to the topic of what Lendy told investors about the steps it was taking on their behalf to ensure that only suitable loans or suitable borrowers were admitted to the platform in order to ensure that loans were repaid on time and didn't go into default. And as we said in our skeleton, it then also said quite a lot

about what it did to ensure its powers to recover loans were exercised in the investors' best interests in the event of any recovery situation. And that, if your Lordship is happy with it, might be a convenient moment to break for the transcriber.

JUDGE RAWLINGS: So afterwards you're going to deal with some issues in relation to recovery.

MR GLEDHILL: Exactly.

JUDGE RAWLINGS: Okay, that's fine. Yes, if we break there and if we could come back at 12.05, please.

MR GLEDHILL: Very good.

(11.55 am)

(A short break)

(12.05 pm)

HIS HONOUR JUDGE RAWLINGS: Yes, Mr Gledhill.

MR GLEDHILL: I was coming on to the second aspect I wanted to take you through some evidence on, which is what investors were told by Lendy about how it would conduct itself in relation to a loan that was potentially going to go past the due date.

So far as that is concerned, we dealt with some of the evidence in relation to that in paragraph 29, at page 26 of our skeleton argument. If I can start by taking you quickly through that.

If you have that, at paragraph 29.1 you can see that

weekly updates of 25 August 2017 refer to the allegedly robust due diligence process that Lendy had and went on to say, in the last three lines:

"'But Lendy is not stopping there. It's committed to having the best recovery processes in the P2P industry, to help protect investors' hard-earned investments' ..."

Later in the paragraph you see there is reference to the first recovery policy, which is a document that we placed considerable reliance on under issue 10, and we'll come back to that. And that was sent under a round robin e-mail of 13 April, stating that the purpose of it was "to give our investors comfort about the robust procedures Lendy has in place to protect them in the case of the borrower's default".

And we set out, over the page, a couple of the representations made in the policy. But just dipping into 29.3.1, last three lines, you will see says:

"'... Lendy is careful to ensure that in granting an extension it is not increasing the risk profile of a particular loan' ..."

So clear recognition there that the longer the loan remains outstanding potentially the higher the risk profile, the longer the loan remains outstanding. Of course if Lendy is charging default interest and not

accounting for it, the more money it makes.

And this at paragraph 29.4:

"In an 'Investor Update Special' ... 23 February 2018 ... we have never taken the support of our investors for granted, and nor shall we ever. You are our number one concern and protecting your interests and hard-earned capital is our top priority ... Our job is to be the champion of our investors and protect your interests. And it is for this reason that we take any potential losses very seriously ..."

I showed you a moment ago the passage in the Court of Appeal decision, the Secretariat case, and you saw the reference there to Lord Leggatt in Al Nehayan, talking about the hallmark of the fiduciary relationship being assuming to act for somebody else in a capacity that conferred discretion upon you, where the party on behalf of whom you are acting is entitled to expect your single minded loyalty.

I respectfully suggest you could not get clearer than that statement.

There are, however, a few other documents that I just wanted to take you to to supplement what we say in our skeleton argument, I think three in all, and I will take them in date order. The first is one that you find in E bundle, E1, tab 71. If my Lord has that

it's an overdue loans default policy. And we note from Mr Powell's witness statement, paragraph 73 that this was circularised to lenders on 10 February 2017. So this was conveyed to lenders. And you can see it's dated at the top to be effective 1 March 2017. And I'm particularly showing your Lordship this because it brings out yet again the extent to which Lendy was tasked with exercising considerable discretion on behalf of the lenders in exercising its enforcement powers as agent. And my Lord can pick that up. I'm not going to read it in any detail, but just the main references are on the first page, "Saving Stream Default Policy":

"Our default policy sets out the principles that govern decisions made by the company on whether to default a loan or whether to grant some tolerance in circumstances where a loan is not repaid ..."

Under that:

"Saving Stream will default a loan when ..."

You see 1, 2, 3 and look underneath that:

"At our absolute discretion we will default a loan at any time throughout the Tolerance Period."

Moving on to the next page. Under the heading, "When we may extend a loan", at the top, paragraph 6:

"At our discretion, a loan may be extended before or by the original repayment date."

Moving on to E231, at the top of the page again under the heading, "What action do we take upon default?", at paragraph 12:

"We may take any action we deem appropriate to ensure the repayment in part or in full of a defaulted loan."

And then on the final page, E232, paragraph 23:

"Exceptions may be made to this policy where deemed appropriate by our Credit Committee."

But not a whisper anywhere in this document, which was circularised to lenders, of the fact that during the currency of a default loan, Lendy was charging default interest at a rate of 54% on the paradigm figures of 3% per month for non-default. Forgive me 1.5% per month for non-default interest plus 3% for default.

So this document emphasises the extent to which Lendy's enforcement powers were discretionary.

And my submission to your Lordship is, it is clear as it possibly could be that in exercising those discretionary powers pursuant to the express agency relationship your Lordship has seen in the loan agreement, it owed an undivided loyalty to its principals.

And so interesting light on that is shed by the second of the three documents that I wanted to show

you in this context, which is a passage in the amended Model 2 Terms that we haven't yet looked at. So, if you put away the E1 bundle and take out now the C bundle and the amended Model 2 Terms are at the back, tab 15. They start at page 286. And just pause there for a moment to note, at the very top of this page you can see this is a document updated 5 March 2018. So the overdue loans policy we just looked at dates from February 2017. These amended terms date from a bit over a year later, one year and one month, March 2018.

You've looked at many provisions in this already, but the one I want to take you to now is on page 299 and you see towards the foot of page C299, there is a paragraph saying, "Opinion of lenders".

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: And this whole section 16 was an innovation in the amended terms. It wasn't in the original terms. 16(1):

"Lendy may on certain matters (to be chosen by Lendy in its absolute discretion) choose to seek a Majority Opinion of the Eligible Lenders ... via the Lendy Platform before it takes or refrains from taking action in connection with certain matters which affect or are likely to affect, whether adversely or otherwise, the 'Lenders rights in connection with a Loan (the 'Lender

Matters')."

And then over the page, you can see some of those matters set out there at (2). It's worth just glancing at (1), (4) and (5):

"1. Selling or arranging for the sale of any property or assets secured pursuant to the Finance Documents for any sum which is equal to less than the accrued interest owing to the Lenders pursuant to all the relevant Loan [agreements] ...

"4. Taking any steps to accelerate a Loan, place a Loan on demand and/or enforce security for a Loan, following an [EOD] ... or potential [EOD] ... considered by Lendy (in its absolute discretion) as material ...

"5. Determining whether to extend the term of the Loan beyond its maturity date."

We don't need to look at it but you see from paragraph 4 onwards there's then a fairly elaborate provision that rolls on for the best part of two pages about how the voting process at these meetings is going to work. I'll stand to be corrected if I'm wrong, but I recall from the evidence I think that there never was any such meeting pursuant to this provision.

I'll come back in a moment to the precise significance we attach to it but for the time being I simply make this point. Why provide this detailed

mechanism for consultation with lenders if Lendy was entitled to consult its own interests in any enforcement situation?

Then the third of the three documents, and the last in point of time that I wanted to take your Lordship to, is a document we've already referred to. We're going to come back to it again tomorrow. It's the first recovery policy. My Lord finds that in file E2, tab 111.

HIS HONOUR JUDGE RAWLINGS: Yes, I am there.

MR GLEDHILL: So tab 111 starts with page 486. This first recovery policy was circularised under cover of an e-mail which if your Lordship wanted to, if you turned over one tab to 112, that's the e-mail that was sent to the investors to which this was linked. So this was sent to the whole community of Lendy investors as at its date April 2018.

And if you look at page 489, right-hand column, under the blue heading, "Priority of payments":

"Unless Lendy is receiving a payment from a borrower in connection with an extension, the funds forwarded by the borrower shall be put to the amounts owing with the following priority:

"1. Capital (loan) amount

"2. Interest accrued

"3. Bonus accrual

"Lendy will only take any portion of interest or fees owing to them once all of the above have been satisfied."

So, the clearest representation that in a shortfall case Lendy realised that its rights were potentially in conflict with those of the lender. The clearest possible representation that in the event of such a conflict, lenders' rights would take priority to those of Lendy. Your Lordship knows that we place particular reliance on this document in the context of issue 10. So that is in the context of the question about how the court should exercise its discretion as a trustee under the security trust of which SSSHL is the trustee. And I'll come back to that when I deal with that issue. But I just wanted to remind your Lordship of the key point we made about this document in our skeleton.

This document, the first recovery policy, was circularised by Lendy at a point at which it had interim permission but did not have full FCA authorisation.

Specifically, after concerns expressed by the FCA in March 2018 about the potential for conflict between Lendy's interests and the interests of Model 2 Investors in a shortfall case.

I'll show your Lordship tomorrow a relevant e-mail in that context but this publication to the investors

followed hot on the heels of that exchange. It followed one month afterwards. This was sent out on 13 April 2018.

Lendy then got its full authorisation in July 2018. And as your Lordship will see tomorrow, having assuaged the FCA's concerns, got full authorisation. It then quietly reneged on the assurances that it had given both to the authority and to investors by withdrawing this recovery policy and substituting a different one. And that different one was one that your Lordship looked at yesterday. We're calling it the second recovery policy. It appears to date from about August 2018 and that was the recovery policy that said that what would prevail would be clause 13 in the Model 2 amended terms which prescribe something very different to what the document your Lordship has open before you now said.

We'll come back to that.

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: But for now the question is whether in the circumstances that I have outlined to your Lordship, Lendy can possibly be heard to say, that in exercising its contractual right as agent to getting the amounts owed to investors, it was entitled to have regard to its own commercial interests rather than exclusive regard to the interests of the Model 2 Lenders.

So far as that is concerned, I've made the point to your Lordship that Lendy was expressly constituted an agent for the purposes of effecting recoveries by the terms of the contract. I've made the point that it consistently represented that lenders could rely on it to safeguard their interests, both in relation to what borrowers and loan proposals it would allow on to the platform, and in relation to how it would behave in a recovery situation. And in those circumstances I respectfully suggest that it is as clear as it possibly could be that it stood in a fiduciary relationship to lenders in respect of its management of loans that either were overdue or that were at risk of becoming so.

Paraphrasing the Court of Appeal in the Secretariat Consulting case I showed your Lordship earlier, it assumed a role which required exercising judgment and making discretionary decisions on behalf of Model 2 Lenders in circumstances where it had to put aside its own interests and act solely in the interest of those lenders.

And if your Lordship accepts that I'm right about that, it follows that at all material times Lendy was under the overriding duty of loyalty to its principal which relevantly for your Lordship's purposes expresses

itself in the "no conflict principle" that you saw in Lady Arden's speech in the Children's Investment case in the Supreme Court. A prohibition on putting itself in a position where its interests and the interests of its beneficiaries, the Model 2 Lenders conflicted.

If your Lordship is with me thus far, it then becomes necessary to consider the circumstances in which the no conflict rule is potentially engaged and whether or not it was breached on the facts of this case. And so far as that is concerned, I don't understand the principles to be in dispute, and they are set out clearly and authoritatively in a passage from Bowstead on Agency which your Lordship finds at tab 65 of the authorities bundle, F1657, please. Bowstead Article 44, heading at the top of the page, "Duty to Avoid Conflicts of Interest, Unless with Consent":

"Agents may not put themselves in a position or enter into transactions in which their personal interest, or their duty to another principal, may conflict with their duty to their principal, unless the principal, with full knowledge of all the material circumstances and of the nature and extent of the 'agents interest, consents.

"Comment

"The foregoing statement is derived from Lord

'Herschells judgment in Bray v Ford. Equally well known is Lord Cranworth ... in Aberdeen Railway Co ...

"'No one having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.'

"While it is clear from this that potential conflicts of interest are within the proscription, there must be 'a real sensible possibility of conflict' before 'equitys rules commence to operate."

So the test is whether the facts give rise to a real sensible possibility of conflict. And the question for your Lordship becomes: was there such a possibility on the fact of this case in circumstances where Lendy believed it was entitled to charge default interest and retain it for its own account and conducted its business on that basis?

And I repeat the point I made at the beginning, that for this purpose the outcome of issue 5 just does not matter. It does not matter if Lendy was acting wrongfully in retaining those monies, in the sense that the lenders were contractually entitled to them, because what is in issue here is a breach of the fiduciary duty of loyalty. So if the agent is being or may be being

disloyally influenced by considerations of personal pecuniary gain, it makes no difference as a matter of analysis that if you look at the contract under which he thinks he is gaining, the correct position is that in fact he was never entitled in the first place.

HIS HONOUR JUDGE RAWLINGS: But in theory at least it would require me to determine that Lendy on some basis thought that it could have the default interest?

MR GLEDHILL: Well, your Lordship knows for an absolute certainty that it thought that because it levied default interest and it did not account for it, and the only concession that it appears to have made in that regard was in its pronouncements about bonus interest.

And I make the important point to your Lordship, which I suspect will be uncontroversial, it is not necessary for this purpose on the evidence for your Lordship to determine that any particular officer of Lendy at any particular time did any particular thing having been improperly subverted by considerations about the money that Lendy stood to gain in the event that a loan were allowed to go into default. What the rule controls is the risk. And if you have created the situation in which there is a risk that your duty of undivided loyalty to your principal will be subverted, you have placed yourself in a conflictual position and

you have breached the duty of loyalty.

HIS HONOUR JUDGE RAWLINGS: Okay.

MR GLEDHILL: Your Lordship knows the administrator's primary case is Lendy was entitled to keep all the default interest payable by borrowers. I made the point to your Lordship that it certainly acted on that basis subject only to what it appears to have regarded as an extra contractual bonus policy. And if that is right then at all material times it was plainly in Lendy's interest to see loans go into default so that it could earn the very substantial sums that resulted from that.

I illustrated the extent of the problem in opening by reference to the example given in Mr Webb's witness statement. And perhaps we could go back to that, back in the B bundle. It's at tab 1, and it was at page 53. So he's taking the example of a loan for £2 million of principal using the paradigm interest rate of non-default interest of 1.5% per month, 1% going to the investors. You see that in the £60,000. 1% is £20,000. So that is where the £60,000 figure in the fourth line comes from. That's the investors' slice of non-default interest. And then you see Lendy's slice of non-default interest, £30,000.

And the default interest rate is 3% a month, so 36% a year on top of the non-default interest rate of 18%.

So that gets you to an aggregate default interest rate of 54% per annum. And on a £2 million loan, as I said to your Lordship in opening, that gets you to a figure of roughly £3,000 per day. Irrespective of whether Lendy is doing anything at all to get it in, it earns £3,000 a day on this £2 million loan.

And I made the point to your Lordship that at that rate, within roughly three weeks of going into default, Lendy will already have made more out of this transaction than the £60,000 which the lenders stand to get if repayment had been made on the due date. And the £500,000 figure that your Lordship sees there is the illustrative figure for default interest would total eight times the amount that Lendy would have got in the loan had been repaid on the due date. Loan repaid on the due date on this table, £30,000 of non-default interest to Lendy, £10,000 exit fee, £40,000.

HIS HONOUR JUDGE RAWLINGS: Yes. I take into account what you say. But I suspect it probably isn't worthwhile looking at that because it will be then said in other cases, well of course there has been a shortfall in a whole load of cases in which therefore the default interest hasn't been anything like that in terms of what has been recovered. But I take the point that it is the risk of that conflict that you say engages the no

conflict rule. The reality of whether in a particular case or cases of the loans the conflict actually occurred is not necessary for you to show.

MR GLEDHILL: That's right. But actually can I take that point head on. Because your Lordship remembers that these loans were supposed to be 70% loan to value. So, £2 million loan. If adhering to the maximum 70% LTV ratio, the security here should have been £2.8 million. So just assume for the moment that the default interest charge is £500,000. First of all, Lendy has a real prospect of getting that money out of the head room in the security. And secondly, as your Lordship knows, in the case of corporate borrowers they also have a third party guarantor that they can go over.

So, your Lordship is right to say that it may well be the case that they did not always and could not always recover all of their default interest but according to the model as it was sold to the investors there was certainly the potential for them to recover very substantial sums over and above the amount which was secured in favour of the lender principles.

HIS HONOUR JUDGE RAWLINGS: All right. Thank you.

MR GLEDHILL: In our submission to your Lordship, any entitlement on the part of Lendy to participate beneficially in this huge default interest charge under

the loan agreements embodied the very clearest possible danger of a conflict of interest for a fiduciary.

Test it this way. I took your Lordship a moment ago to the provisions of clause 16 of the amended Model 2 Terms which provided for issues to do with recoveries to be put to a vote of interested lenders. How might that possibly have worked if Lendy was properly entitled to charge and keep default interest for itself? How could lenders conceivably take a view as to whether or not it was in their best interest to press for immediate action or defer action until later if they were unaware of the fact that the longer they delayed, the more Lendy stood to earn by way of default interest, with the ultimate conclusion, as your Lordship will hear when we come on to issue 10, that Lendy had a very substantial claim in its own right in competition with their claims under the trust of the security assets held by SSSHL as trustee.

My Lord, that is what I was proposing to say on the topic of whether or not Lendy was in breach of fiduciary duty.

I am now turning to the question of whether or not it ever sought or got the informed consent of the Model 2 Lenders.

As my Lord knows, there are different formulations of the test for informed consent in different places.

For your purpose I'm going to suggest that a short and helpful starting point is to take you to an authority at tab 18 of the bundle of authorities. It's a case, Gwembe Valley v Koshy, which rumbled on for many years and is authority for many propositions, but for present purposes, the only material thing your Lordship needs to see in this, the facts don't matter at all, but if your Lordship turns to page 489.

On the facts, this was concerned with a —— the extent of the fiduciary duty of a company director and the extent of his obligation to disclose to shareholders, and it's slightly interesting to this extent, that some of the authorities which Ms Toube took to you yesterday concerned the situation where you have a single principal acting for a single agent.

The situation in the case before your Lordship is that you have a very large class of principals. And Koshy, like this case, is concerned with the situation where the director is making disclosure to a class through the medium of the board. And on page F489, you see what Lord Justice Mummery said at paragraph 65:

"The requirement of the general law is that, although disclosure does not have to be made formally to the board, a company director must make full disclosure to all the shareholders of all the material facts. The

shareholders in the company, to which he owes the fiduciary duty not to make an unauthorised profit from his position, must approve of, or acquiesce in, his profit. Disclosure requirements are not confined to the nature of the director's interest: they extend to disclosure of its extent including the source and scale of the profit made from his position, so as to ensure that the shareholders are 'fully informed of the real state of things', as Lord Radcliffe said in Gray..."

And again, I say this is a particular interest because like the case in front of your Lordship, what Lord Justice Mummery is dealing with here is the question of disclosure to an extended class of persons. And in this case, that extended class of persons may feature people with a very range of ability, a very wide range of financial acumen, a very wide range of life experience.

You have read Mr Webb's fifth witness statement, for example. You will see in that reference to the fact that Ms Taylor, the representative defendant, is herself a woman with a formidable track record in high finance and institutional investing. You saw the two witnesses who we adduced and your Lordship will see that they were people of a very different stripe. It will be a very wide class of persons. And I say that because some of

the authorities that your Lordship was shown by Ms Toube relate to situations where the principal and the agent are both dealing in a situation where they both understand well the customs of the business, for example the customs of brokers on the Lloyds insurance market.

Some other of the cases in your Lordship's bundle concern situations where a high net worth individual deals with an investment manager, and the court says: well, high net worth individual, very experienced and very astute. The obligations are not as stringent as they might be for somebody, for example, like the sub-prime borrower in the Hurstanger case. The point I'm getting at at the moment is that what your Lordship is concerned with is a wide class encompassing a very broad spectrum of abilities and attributes.

A second point that I make by way of preface to what I am going to say about disclosure is this. The first is the point that your Lordship is dealing with a very wide class of persons, with widely ranging attributes. And the second and the critical aspect for your Lordship, and it's in fact a reflection of that, is the point that this was regulated activity and conducted in accordance with a regulatory framework.

Lendy had interim FCA authorisation throughout the currency of the Model 2 Loans, full FCA authorisation

from July 2018 onwards, and as such, it was under well-known heightened obligations of disclosure and fair dealing which, as your Lordship may see when we get to issue 10, was a point the FCA repeatedly made to it in the correspondence.

And of the those duties, the single one that is the most important is the one that your Lordship finds at tab 56 in the authorities bundle. On a number of occasions in the correspondence in the bundle, the FCA wrote to Lendy, complaining that some parts of their literature were not clear, fair and not misleading.

One of those instances your Lordship may have seen in our skeleton argument. It originally traded under the name of Saving Stream. It had to change its trading name to Lendy because the FCA consider that that was a misleading allusion that mistakenly gave investors the impression that this was something akin to a bank deposit.

That's by the by. I wanted to show you the provisions of the rule at page F1506. Your Lordship will, I'm sure, have seen this many times before, COBS 4.2, sub-rule 1:

"A firm must ensure that a communication or a financial promotion is fair, clear and not misleading."

Then look at the guidance at 4.2.2:

"(1) The fair, clear and not misleading rule applies in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. So a communication addressed to a professional client may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client."

And that feeds into the point that I have just made to your Lordship, because although many of the people Lendy will have been communicating to may have been sophisticated, very, very many of them will not.

Now, the question then becomes: did Lendy convey to investors what it needed to convey about its conflictual position arising out of the default interest charge in a way that was clear, fair and not misleading?

HIS HONOUR JUDGE RAWLINGS: I think I know this, but how precisely do you rely upon the regulatory framework in relation to the duty of full disclosure which Lendy would have as agent of fiduciary, as you put it? What role does the regulatory framework play in that?

MR GLEDHILL: Well, I should just flag where I'm going just so your Lordship has notice of this.

There are actually two aspects of the regulatory and statutory framework which were relevant to the question

that your Lordship gets to by the point that you're asking: has proper disclosure been made to the fiduciary and has the fiduciary consented? The first is that because this happens in a regulatory framework, that regulatory framework is itself relevant to the question of whether or not consent has even been sought.

If consent has been sought by means of a communication that does not meet the fair, clear and not misleading test, then in our submission to your Lordship, it hasn't been properly sought at all. If it is sought in such an oblique, confusing and cloudy way that people don't understand what they are properly being asked to consent to, the regulatory context is relevant because consent hasn't even been sought, that is the first point, and that is why COBS becomes relevant.

I'm also going to say, just to trail where I am going in relation to issue 7, to the extent the administrators rely on repeated references in the investor terms and conditions along the lines of: well, you can look at the loan agreements and the loan agreements set out what our interest and charges are. There is still a residual issue for your Lordship under issue 7 about whether those were consumer notices that can stand consistently with the tests of fairness and

good faith in the Consumer Rights Act 2015. That's a separate point that I'm going to come back to.

But the answer to your Lordship's question is, that the content of the regulatory duty to communicate in a way that is fair, clear and not misleading feeds in directly into this question of whether or not they sought, let alone obtained, the consent of the Model 2 Lenders to the conflictual position that we say they were in.

HIS HONOUR JUDGE RAWLINGS: Doesn't a breach of the regulation simply create —— or means that you are in breach of a Statutory Declaration and consequences flow from that; you're seeking to incorporate that as part of the requirement as to what an agent must do in relation to their principal in order to obtain their informed consent. But does that follow? You seem to be treating a breach of the regulation as meaning in terms that, as you say, consent wasn't sought. Why does that follow? Do you have to comply with the regulation in order to seek consent from your principal as agent?

MR GLEDHILL: Let me be clear. So in the event that Lendy has breached the COBS principle in relation to fair, clear and not misleading, potentially there would be a claim under FSMA for damages. That's not what we are talking about.

The point I am making to your Lordship and this much is common between my learned friend and I, is that in any given situation, the test of whether or not the agent in the position of conflict has sought and obtained the consent of the principal to act, despite that conflict, is an acutely fact—sensitive question.

So, for example, just going back to the cases about mortgage brokers. In Hurstanger, the Court of Appeal case, where a sub—prime mortgage broker turns up and asks his mortgage broker for the best deal, and the mortgage broker gets a backhander from one of the societies with loans on offer, the Court of Appeal says it's not enough that the client may have suspected you were getting commission. It's not enough even if they know that you did. Because of the vulnerability of the client, they have to have actually known the amount, because then they can take an informed decision about whether or not your recommendation is or is not tainted by the benefit that you, the agent, are getting out of it. And precisely the same applies in this context.

The bench set by the FCA in relation to communications is the benchmark of fair, clear and not misleading, and that applies to the broadest possible spectrum of communications. Your Lordship has seen the terms of the rule. It's not confined to prospectuses or

advice documents or anything like that. It is a general obligation in relation to the way in which regulated persons are required to communicate with their clients, and our submission to your Lordship is that when your Lordship asks the first of the two questions, "Has Lendy sufficiently conveyed the fact that it is in a conflictual position to its borrowers, to its investors, to its lenders?", that question has to be informed by the obligation set out in COBS to communicate in a way that is appropriate within a regulatory context. That's the way it feeds in.

So your Lordship is absolutely right to say: doesn't it give rise to a claim for breach? Of course it does. This doesn't help us very much; it merely gets us an unsecured claim in the insolvency. But it remains directly relevant to the question: how is consent sought and how is it got, if it was got at all? Because if consent was got by means of communications that were not fair, clear and not misleading, we say it wasn't a real consent.

As it happens, for reasons I'm going to come on to, we're going to suggest to your Lordship that the position is absolutely crystal clear that on no possible view was consent obtained. But I do need to make that point to your Lordship in relation to the relevance of

the regulatory framework because it is, I suggest, part of the background.

HIS HONOUR JUDGE RAWLINGS: Okay. Thank you.

MR GLEDHILL: So, what do the administrators rely on in support of the proposition that sufficient informed consent for the purposes of the no conflict rule was obtained? I can show your Lordship that by taking out my learned friend's skeleton again and showing you two passages in that. The first is at paragraph 92, which my Lord will find at page 30. The first of the two points is the one that you see starting at paragraph 92.2, where the administrators say the Model 2 Investors knew that Lendy didn't charge them fees. 92.3:

"Both of Ms Taylor's witnesses make it clear that they were in fact aware that Lendy operated in this way."

At the bottom you see a quote from Mr Powell's witness statement where he said:

"... borrowers interest above that which it was providing to Model 2 Investors and Model 2 Transferees and taking the delta ..."

And then over the page there is another quote from Mr Melton to not dissimilar effect. And then at 92.5, there is that passage from the website, from the FAQ section of the website, which your Lordship looked at

this morning.

So that is the first point that is made. And just before I engage with the merits of that, can I just address quickly the evidential value of that quotation at paragraph 92.5. This isn't a point of great importance but I just want to be clear about this.

What you see at paragraph 92.5 is in evidence because Mr Powell exhibited it to his witness statement. And if you read on in the administrator's skeleton, paragraph 92.6, they say this:

"This FAQ appeared on the Website when the Original Model 2 Terms were in force. When the Amended Model 2 Terms were introduced, the above FAQ was deleted."

And if you read that, you might be left with the impression that it is common ground that the passage you've just read at 92.5 was up on the web for the whole period of the original Model 2 Terms. The evidence doesn't actually say that, and if I can take your Lordship to what Mr Powell in fact said about it.

Just put the skeletons to one side for a moment. We'll come back to that. But if we can take out the witness statement bundle B, tab 4 which is Mr Powell's evidence. And the material passage is at bundle page 104. And picking it up at paragraph 56, you can see that he says the Lendy Website displayed a web page

called "How it Works".

Skip the next sentence.

"However, the exhibit contains the versions that appeared on the Lendy website on 16 April 2016 ..."

And then you see at 56.1:

"The Original HIW relevantly stated as [follows]... "

And then over the page you can see it set out. That's what the administrators quote in their skeleton argument. So Mr Powell's evidence is that that was there on 16 April 2016.

Then if you move on to bundle page B106 —— no, forgive me. Yes, so April 16, and this is the material passage at paragraph 56.4. That is what the administrators quote in their skeleton. Mr Powell is telling you that that chunk you see there in 56.4 by the first hole punch is what was on the website on 16 April 2016.

And the only other thing Mr Powell tells you is if you turn on to his paragraph 65.1, and by the second hole punch you can see (b), so he is now talking about the introduction of the amended Model 2 Terms, and he's referring to what the website looked like on 17 February 2018 and he says at (b):

"The questions 'What are the fees?' and 'How do [Lendy] make money?', and the answers to those

questions, did not appear in the list."

So I just make that point to your Lordship, just so your Lordship is absolutely clear that the full extent of what you actually get out of the evidence from Mr Powell is that that page in relation to what he calls the delta between the 1% that goes to the investors and the 0.5% that goes to Lendy, that was on the website on 16 April 2016, and it is not correct to suggest that it was on the website for the entire period that the original Model 2 Terms were. That's what the evidence says.

That's a point of detail, for which you won't be surprised to hear that my main point is that neither the understandings which Mr Powell and Mr Melton accept that they had about the differential and interest, the delta in relation to non—default interest, nor the statement on the website about that, however long it was actually there for, begin to turn the vague statements in the investor terms into an adequate disclosure of the default interest charge that Lendy was purporting to make for its own account.

Both Mr Powell and Mr Melton say they suspected there was a delta on the non—default interest, but the critical point is, as your Lordship knows, the investors' position wasn't compromised in any way by

Lendy taking a slice of the non—default interest because it was deducted upfront. And the borrower didn't have to pay it. And it was relatively modest in amount. So your Lordship has seen on the £2 million example by Mr Webb, it totalled £30,000.

But a default interest charge at a rate of 54% had obvious potential to undermine the investors' ability to recover their principal in full for the reasons I have already given to your Lordship. And that being so, for a disclosure to be fair, clear and not misleading, or to be fair even on ordinary equitable principles, the risk that that default interest charge in Lendy's own favour posed to the investors had to be made clearly and unambiguously apparent to them. And we say to your Lordship that it was absolutely plainly not so.

HIS HONOUR JUDGE RAWLINGS: Yes, I think one of the authorities that Ms Toube relies on suggested that there was —— once a principal knew that a charge was being made and they had the ability to find out what that charge was, then a responsibility fell on that principal to find out for themselves what the charge was.

MR GLEDHILL: Yes, and your Lordship knows that that statement was made in the context of the FHM case in relation to a relatively sophisticated single principal investor. And this is very different. And there is the

world of difference between Mr Powell and Mr Melton being aware in general terms that Lendy might be charging a delta on the interest rate that it was charging in a pre−default situation, and Lendy charging a 54% interest rate following default, yielding, as your Lordship has seen, a charge of £500,000 within five and a half months on a £2 million loan.

But we have another answer to that in any event and it is the second point I was coming on to make to your Lordship, and since it's going to run on for a little bit more than three minutes, I don't know whether that would be a convenient moment?

HIS HONOUR JUDGE RAWLINGS: Possibly. How much longer ——

MR GLEDHILL: I think I'm going to take about another 30 minutes, which would mean that I would be keeping within the two hours I had, given that I started about half an hour later. I don't say that in any critical way. There were certain issues your Lordship had to deal with for the first half an hour. But I suspect I'm going to be going for about another 30 minutes after lunch.

HIS HONOUR JUDGE RAWLINGS: All right. And in terms of what else we had ambitions to deal with today, we were looking at dealing with issues 6 and 7.

MR GLEDHILL: Yes, and your Lordship has already heard that

issue 6 has pretty much gone. Issue 7, there are issues about the Consumer Rights Act, and whether it applies to what I'm going to characterise as various notices in Lendy's terms and conditions, but it's not going to take —— the whole argument on those two issues is very unlikely to take the time that we have docketed for it in the trial timetable.

HIS HONOUR JUDGE RAWLINGS: So an hour and a half would be, I'm getting the impression, sufficient to get through issues 6 and 7?

MR GLEDHILL: Certainly.

MS TOUBE: My Lord, just to remind you, I'll also need probably about half an hour for my reply on issue 8.

HIS HONOUR JUDGE RAWLINGS: Therefore an hour will be sufficient to go through 6 and 7.

MS TOUBE: It certainly will.

HIS HONOUR JUDGE RAWLINGS: Fine. Let's come back at 2 o'clock then. Thank you.

(12.59 pm)

(The short adjournment)

(2.01 pm)

HIS HONOUR JUDGE RAWLINGS: Yes. Mr Gledhill.

MR GLEDHILL: Thank you. Before we rose for the short adjournment, your Lordship put to me the authorities relied on by my learned friend in relation to the

situation when it is sufficient for a principal who would otherwise be in breach of fiduciary duty to put —— for an agent who would otherwise be in breach of his fiduciary duty to put his principal upon inquiry.

When your Lordship looks at the cases, you'll find that they generally deal with one of two things. Either participants in a well−known market with no market practice, or they deal with a case of an agent of one principal or a limited number of principals where the principals are relatively sophisticated persons.

There are no cases that say that where an agent acts for a large class of persons, including unsophisticated and potentially vulnerable people, that it's enough to simply give a few oblique hints here and there and let them go and work it out for themselves.

But even if that were not the case, there is an even more compelling answer to that suggestion, and that is the second point that the administrators rely on, and I was going to come on to that now, if I may.

So back in their skeleton argument, it is at paragraph 104, page 34 of my learned friend's skeleton. Starting at paragraph 103, the administrators say:

"... Mr Powell or Mr Melton were aware that Lendy charged interest and fees to the Borrowers, but did not take any steps to make enquiries as to the amount of

interest and fees that Lendy retained ..."

104, second sentence:

"They could have asked Lendy to produce a copy of the Loan Agreement ..."

And then if you look at the bottom of page, it says, 104.3:

"Clause 7.4 of the Original Model 2 Terms provides that 'each time you purchase or sell a loan part, you will be shown the Loan Contract which will detail the legal terms of the loan'. Contrary to what is suggested by Clause 7.4, the Loan Agreement was not in fact shown to the Model 2 Investors before they invested in a Model 2 Loan. However, [the administrators say] Lendy was happy to provide a copy of the Loan Agreement to Model 2 Investors on request."

I'll come back to the rest of that paragraph in a moment.

That claim in that paragraph is flat wrong on the evidence. On the evidence properly understood, it in fact tells the court precisely the reverse.

Let me take your Lordship through the relevant documents in relation to that in a little bit of care. We started off with the provision in the original Model 2 Terms, dating from October 2015 which you find at C14. So original Model 2 Terms enforced between October 2015

and March 2018, if you turn on to page 271, you see clause 7.4 towards the top of the page, claiming:

"Each time you purchase or sell a loan part, you will be shown the Loan Contract which will detail the legal terms of the loan."

So when Lendy switched from Model 1 to Model 2, that is the commitment that it gave to prospective Model 2 Lenders.

Your Lordship now can put the C bundle aside, but I will come back to it in a moment. Take up Mr Powell's witness statement in the B bundle, tab 4, page B113. So my Lord remembers that Mr Powell was a keen follower of peer—to—peer websites, and he was a participant in the P2P independent users' website and as a result of that did some beta testing and other product testing for various providers. He refers to that in his statement. Paragraph 69, he tells the court this:

"In about September 2015, Lendy provided a draft version of the Original Model 2 Terms ..."

That's the document you've just looked at:

"... to all P2P Independent users (including me) to review before finalising the document and posting it to the Lendy Website. I recall reading those draft terms, posting to the forum about them, and then reading the final Original Model 2 Terms after Lendy released them.

I read the final version of Original Model 2 Terms in detail, rather than just skimming them.

"To the best of my recollection, at the time I noticed two clauses ..."

Skip 70.1 and look at 70.2:

"I also took note of clause 7.4 [that is the one you have just looked at] which stated: 'Each time you purchase or sell a loan part, you will be shown the Loan Contract which will detail the legal terms of the loan'. After reading this clause, I recall that I emailed Lendy about it (though I cannot locate a copy of the email) but Lendy did not respond. However, I note the following ..."

And he then goes on to refer to various exchanges between him and other users of the P2P independent discussion forum, and I want to take your Lordship through those exchanges, or through the material parts of them. So if you put aside Mr Powell's witness statement and take out E1, the first of the E bundles, and we can start it off at tab 11.

Just so your Lordship understands, you're going to have to orient it around the right way. It's in landscape rather than portrait. The first point to note, and this is important, you see at the top of the page, the first post is 21 September 2015, at 10.19 in

the morning, "Representative of Lendy". So Lendy are in on this discussion group. 10.19:

"Morning, We tend to release the update if we have interesting things to say."

Beneath that, you see a post of 11.20, and on the left, you can just about make out it's by a poster called ilmoro. That is Mr Powell. So Mr Powell is commenting on that 10.19 post from Lendy and he says this:

"Thanks. Seems sensible."

You can skip the rest of that paragraph. And then he goes on like this:

"When composing the next update could you possibly give thought to including comment on the following points

"status of the Trust structure ..."

Don't need to worry about that, but pick up in the next line, new terms and conditions, and over on the right:

"... no display of loan contract [clause 7.4] ..."

So, Mr Powell has seen the draft. He has noted that although the draft provides for a link through to the loan contract, you can't actually do that. And he has raised the point with Lendy. And as your Lordship sees, they do nothing about it. If you now go over to tab 12,

tab 12 is another exchange on the same day, still on 21 September 2015. And this is an exchange between Mr Powell and two others called mikes1531 and SteveT, and underneath the white rectangular box you can see what Mr Powell is saying:

"Would that be shown in the loan agreement which will apparently provided each time you invest or purchase a loan part ie reference to SSSH? Unfortunately the link to the loan contract that was to be included in the [terms and conditions] in the draft version hasnt materialised in the final version so cant check."

That's quite important. What it's telling your Lordship is that the draft Model 2 Loans had a hyperlink through from clause 7.4 to the loan terms, and that that link has been removed from the final version. And that suggests there has been a positive decision by Lendy in the intervening period not to facilitate the provision of loan agreements to lenders.

And if your Lordship turns on to tab 28 in the bundle, the exchange we've just been looking at dated from September 2015, we're now moving on about six months to March 2016. And again there's an exchange here to which Mr Powell is one of the parties. And reading about a third of the way down, after the white

rectangular box, you can see there's a user called homes119, is saying this:

"I contacted Saving Stream."

So's he's been on to Lendy direct.

"Good news, they said that it is a topic they are discussing internally at the moment. They will be putting the contracts onto the platform in the not so distant future and they'll be sending out some more information on it soon."

And at the bottom of that page, so towards the end of that day, you can see what a poster called star dust says to that:

"A new 'Contract' column has sprouted on My Loans/Live Loans Tab next to each loan —— there's nothing in it yet though ..."

So the first of those two posts tells you that Lendy has told homes119 that they will be putting contracts on to the platform in the not too distant future. And they don't. That simply has to have been a deliberate decision by Lendy. And if there were any scope for doubt about it, I suggest that it's put to rest. If your Lordship now looks at the amended Model 2 Terms, taking back up the C bundle again.

So the last page that I have just shown you, if we go to tab 15, page 286 is the start of the amended 2

terms. The last post I just showed your Lordship dates from March 2016. Nobody suggests that in the period between then and the launch of the amended Model 2 terms in March 2018 were any terms —— were any loans provided to any lender.

HIS HONOUR JUDGE RAWLINGS: Yes, is that loan agreements, the loan agreement that was eventually provided to Mr Powell, that was after this, was it?

MR GLEDHILL: I'm going to come on to that in a moment and what it tells you.

HIS HONOUR JUDGE RAWLINGS: That's consistent with what you just told me anyway. Fine.

MR GLEDHILL: Quite. But what I wanted to show your Lordship —— so we have moved on. I just want you to understand, we've moved on two years in the chronology. Nobody suggests any loan agreements have been put up, despite the express promise in the original Model 2 Terms. No one suggests any lender has asked for them and got them. And critically, what you see in this, if you turn on to page 286 —— no, wrong reference. Page 291, clause 7(4), in the middle of the page:

"The Loan Contract will detail the legal terms of the loan made directly by you as lender to a Borrower and the Loan Amount shall be detailed in your Lender account on the Platform."

Now, if you keep a finger in there and just compare that to the original, you can see what's been changed. The original is back in the previous tab at page 271. So on 271, the original promise was each time you purchase or sell a loan part, you will be shown the loan contract which will detail the legal terms.

March 2018, they delete that promise. Again, as I suggest, unequivocally consistent with a decision not to give lenders the loan agreements, for the obvious reason that it would have told them about default interest.

So if I can show your Lordship the one example that the administrators give in their skeleton argument. That's back on paragraph 104.3 of their skeleton, top of page 35. So I showed you a moment ago the claim that Lendy was happy to provide a copy of the loan agreement to Model 2 Investors on request. This is shown, they say, by the evidence of Mr Powell who explains he asked for a copy of the loan agreement on a particular Model 2 loan in late 2018 and was provided with an unredacted copy of the loan agreement shortly thereafter.

Can I show your Lordship the evidence of Mr Powell on that point. So back in the B bundle. You can put away the C bundle if you still have that open. Back in B, tab 4, Mr Powell's witness statement, page 121.

Paragraph 81. Start at the beginning of 81:

"... Lendy did not at any point whilst the Model 2 regime was operating post on the Lendy Platform a copy of any proposed or actual Model 2 Loans ... or any proposed or actual security documentation..."

And then in 81.1 through to 81.4, he says:

"In an update in about September 2018, Lendy informed investors that the borrower under Loan DFL 017 was threatening potential legal action against all Model 2 Investors and Model 2 Transferees who had invested in that loan.

"81.2. As such, on 27 and 28 September 2018, I emailed Lendy asking it to provide me with a copy...

"81.3. In its response email dated 2 October 2018, Lendy said I should request a copy ... from Harrison Clark Rickerbys ..."

The solicitors Lendy had sourced:

"... for the purposes of advising Model 2 Investors and Model 2 Transferees."

Pausing there. Mr Powell and the rest are Harrison Clark Rickerbys' clients for this purpose. He says:

"Shortly thereafter, I contacted HCR and they provided me with an unredacted copy of the loan agreement for Loan DFL 017."

Now, we haven't been able to work out for sure

whether the proceedings that Mr Powell is referring to in this paragraph 81 are one and the same as the Lederer case of Mr Justice Zacaroli that you saw, but I can make the point that the timing would work, because Mr Justice Zacaroli's decision, the one you saw, was dated 29 March 2018.

HIS HONOUR JUDGE RAWLINGS: Well, let me know by reference to loan DFL 017.

MR GLEDHILL: Yes. We don't know from Mr Justice Zacaroli's decision whether that was concerned with loan DFL 17.

HIS HONOUR JUDGE RAWLINGS: We do not know that but I presume Lendy will know.

MR GLEDHILL: They may well. It doesn't much matter. The point I'm making to your Lordship though is that nothing in the provision of this agreement to Mr Powell tells you anything about Lendy's preparedness to make loan agreements freely available to investors. Even at this point, Lendy don't give him the agreement. Lendy say: go and ask the solicitors. And the solicitors happen to be his solicitors. They give him a copy of the agreement because he's being sued and he is their client. Nothing in this incident corroborates the claim in the administrator's skeleton that Lendy was "happy to provide" loan agreements to investors.

And I make this point to your Lordship, that this

is, as far as the evidence goes, the only loan agreement that any lender ever got from Lendy. And we know that it was provided after Lendy had stopped writing active business. Webb 2, paragraph 80 tells us that Lendy wrote its last loan on 18 September 2018. So by the time Harrison Clark Rickerbys gave Mr Powell a copy of this loan agreement because he was being sued on it, Lendy had stopped writing new loans all together.

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: So even if we were in the territory of, well, there are references in the agreements which could have put you on inquiry and you could have asked, the evidence is that the enquiries wouldn't have got them very far. Mr Powell also refers at a number of places in his evidence to enquiries from him and other people to Lendy simply going unanswered. And there is nothing to support the suggestion that Lendy was willing to give out these agreements.

There is, on the contrary, the evidence that I have just taken your Lordship to that shows that it was not. They made a policy decision in that respect on at least two separate occasions, the first time between the date of the draft amended 2 terms and their final publication. The second time, between the date of the amended 2 model terms and the revised model terms in

2018.

So, my Lord, for those reasons, we say Lendy did not ask for and manifestly did not get the consent of their principals to the position of conflict. And even if any of those principals had discovered the default interest charge, we say that would not have been enough. Because to bring home the full extent of the conflict, Lendy would have had to have explained clearly the extent to which that default interest charge could end up in practice being paid by them in a shortfall case, because it was secured on the same security and in competition with their claim.

So even if, even if Lendy had indicated to lenders the full extent of its default interest charge and what it was taking, given that it was required to make fair, clear, and not misleading communications to its investors, it was incumbent upon it to bring home the nature of the detriment which that charge potentially represented to them, in circumstances where many of them will have been unsophisticated and many of them will not have been experienced investors. My Lord, that is all I'm going to say about the second of the three topics in relation to fiduciary duty.

The third and final one is much shorter and that is the question of equitable allowance.

So if your Lordship is with me in concluding that there has been a breach of the no conflict principle and there has not been a sanction of that breach by the principals, with relevant consent, we get to the question of whether or not Lendy can claim an equitable allowance against the monies that the Model 2 Investors would otherwise be able to lay a proprietary claim to.

And your Lordship saw that we dealt with that in a very succinct skeleton argument that we filed on Friday afternoon. And I'll just remind you of the commentary from Lewin which we've set out to that, which I suggest is as much as you need to know about the applicable principles.

Once again, the principles are not the issue here; what is in issue is their application to the facts of this unusual case. And page 3, we set out the relevant commentary from Lewin, 45—049:

"Allowance for skill and labour. In ordering a trustee to account for profit, the court may make an allowance for his skill and labour in making the profit. The basis of this jurisdiction is that it is inequitable for the beneficiaries to take the profit without paying for the skill and labour which has produced it."

Note the words, "take the profit".

"The jurisdiction is to be exercised only in

exceptional circumstances and where to do so cannot have the effect of encouraging a trustee to put himself in a position of conflict of interest and duty. The conduct of the trustee will be taken into account in determining the scale of the allowance. For a trustee whose conduct is blameless, the scale might be liberal and might include a profit element. For a trustee whose conduct is open to criticism, the scale is likely to be less liberal, and for a trustee guilty of dishonesty or surreptitious dealing, there might be no award at all."

So much for the principles.

Can I make clear at the outset that it is important to distinguish two different things when one gets to this stage of the argument.

To the extent that we are talking about collections that have been made by the administrators since the beginning of the administration on 24 May 2019, the charge for that is going to be dealt with separately by means of a service charge referred to in Mr Webb's second statement which the administrators are proposing to agree with the conflict administrators. And there may be issues about that down the line, but they are not before the court at this hearing, and there is no need for the administrators' costs of working out the loan book to be dealt with by means of an equitable

allowance.

So what we are actually talking about at this stage of the argument is more narrowly whether Lendy should be entitled to make a deduction by way of equitable allowance in respect of default interest recoveries which it made pre-administration.

And just so your Lordship sees how this was dealt with in the run-up to this hearing, can I show you for the first, and, I hope, only time a letter in the correspondence bundle. So that is file D, and if you turn up tab 46, which -- it has a letter from the administrators' solicitors, Shoosmiths, to mine. The material passage is over the page. If I can just ask you to read under the heading, "Issue 8 (fiduciary duties)", paragraphs 2.5, 2.6 and 2.7 to yourself.

HIS HONOUR JUDGE RAWLINGS: Okay.

MR GLEDHILL: So that was the agreed position coming into this hearing. There is no issue about Berkeley Applegate. There is no issue before your Lordship in relation to the prospective agreement between the administrators and the conflict administrators. All your Lordship is concerned with is the question: can the administrators chip away at the proprietary recovery that the Model 2 Lenders would otherwise make, claiming that that should be allowed to

Lendy for its pre-administration conduct.

HIS HONOUR JUDGE RAWLINGS: Okay. Does that money actually exist?

MR GLEDHILL: Well, it may do. Because there may well be sums which Lendy recovered in the run-up to administration which are traceably the product of default interest, which it charged and collected before the curtain came down. But your Lordship is right. There may not be very much of it. But there may well be some of it.

HIS HONOUR JUDGE RAWLINGS: Yes, well, I suppose it assumes that there was a credit balance in some accounts somewhere.

MR GLEDHILL: Yes. You can also contemplate situations like this. Your Lordship remembers at an early stage, I referred you to the fact that there were fraud claims against the two principals. One of them, for example, had taken company money, and used it to do various things with it. It is not inconceivable that we may get to a situation where we are able to trace from receipts of default interest into assets that have been paid out to other people. It's all hypothetical on the facts. We just don't know. But it is a possible issue that arises.

HIS HONOUR JUDGE RAWLINGS: So just to contain my

excitement, you're effectively telling me that the equitable allowance may not amount to a great deal of money. There are some routes by which it may amount to a material amount of money, but it may well not do.

MR GLEDHILL: The subject matter of the proprietary claim.

It is more likely to be the case that the monies recovered by the administrators are going to be viably the subject of a proprietary claim, but I can't rule out the possibility that there may be monies that Lendy collected which may traceably represent the proceeds of default interest, and if they do, we will be entitled to recover them if your Lordship agrees with us on issues 8 and 9.

So the question is whether Lendy should be entitled to an equitable allowance in relation to its pre-administration activities which could be deducted from the proprietary claims which the Model 2 Investors would otherwise be unable to make. And I respectfully suggest to your Lordship that that will be a very surprising conclusion indeed if that were the case for five reasons.

The first is effectively the point that your Lordship made to my learned friend this morning. If you look at cases like Boardman v Phipps, what they are concerned with is the situation in which the trustee,

the fiduciary goes off and does a stonking deal, and the beneficiaries intervene and then say: that is trust property and we're going to claim it. So equitable allowance in that situation intervenes to prevent the principal from accruing a windfall gain without having to pay anything for it.

And this case is a world away from that. The investors in this case only need to assert proprietary claims at all in an attempt to recoup the very substantial losses they are otherwise facing. They will not be making any profit, windfall or otherwise, if your Lordship were to decline to grant an equitable allowance to Lendy. The lenders' proprietary claims are simply seeking to recover part of the losses which Lendy has itself been instrumental in bringing about.

Second point. As I said in our supplemental skeleton argument, there can be no possible scope for doubt that Lendy has already wrongfully helped itself to large sums of default interest before administration, to which the Model 2 Investors will be unable to make any proprietary claims because the money has gone, Lendy has used it. And in those circumstances we say it cannot possibly be right to reward Lendy even further by deducting an equitable allowance from monies which the Model 2 Investors would otherwise be able to make

proprietary claims against.

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: The third point. In Boardman v Phipps and cases like it, the choice was between the trustee who was liable to account getting nothing at all and getting an equitable allowance. And again, that is not the situation. Lendy has already been remunerated for the services that it provided pre—administration under the non—default interest which it took, and in respect of the exit and arrangement fees which it charged.

The administrators have adduced no evidence to your Lordship that if the —— if Lendy is confined to those charges and recoveries only, that it will have been undercompensated for the services that it in fact provided. And absent such evidence, there is no proper basis for giving Lendy more by giving it an equitable allowance.

Fourth point. If your Lordship were to permit an equitable allowance, it would effectively sanction what we say is a pretty egregious breach of the no conflict rule. The extract from Lewin I took your Lordship to tells you the conduct of the fiduciary is always a relevant consideration. At the very lowest, Lendy failed to supply Model 2 Investors with copies of the loan agreements in breach of the promise that it made in

the original Model 2 Terms, clause 7.4. At worst, for the reasons I have given, the material suggests that Lendy made a quite deliberate decision to suppress those agreements to prevent Model 2 Investors finding out what Lendy was charging by way of default interest, and since the probity of the fiduciary is always a relevant concern, I remind your Lordship of the point that I made in opening that the administrators are now suing the two principals on behalf of (inaudible). The point I made in opening, that the administrators are now suing the two principals behind Lendy, Mr Brooke and Mr Gordon, for fraud.

The fifth point. I suggest that Lendy's non—disclosure was particularly egregious, given that all of this took place in a regulatory context. And we suggest that to reward Lendy with an equitable allowance would send out an inappropriate signal to the market more generally.

I respectfully suggest that it would be quite wrong to encourage regulated persons in the position of Lendy to believe that if they act in breach of their fiduciary obligation to avoid conflict and fail to get proper authorisation for so doing, they can later look to the court as a safety net to see them right.

My Lord, those were my five points on equitable

allowance.

I think once you allow me the half an hour at the beginning of the day which wasn't allocated to this point, I've come in five minutes over time.

HIS HONOUR JUDGE RAWLINGS: All right, well, I'll add that later. Yes, Ms Toube.

Submissions on Issue 8 by MS TOUBE

MS TOUBE: Yes, so we start back at the beginning with the question of the existence of the fiduciary duty. And in that respect, in a number of cases during his submissions, my learned friend repeatedly elided the question of whether or not there is a fiduciary duty owed by Lendy to the Model 2 Investors with the question of whether or not there was any fiduciary duty owed in relation to enforcement of the security. So in other words, what he said was: well, there is a fiduciary duty owed in relation to enforcement of the security. And so it follows that default interest falls into that same fiduciary duty. But in fact that is an elision of two points.

One is about enforcement and what to do with the proceeds of enforcement. The other is in relation to the default interest which I think it's common ground already existed in the loan agreement at the time at which the investors invested. And your Lordship will

recall that that timing point we said was important.

Now, if Lendy did not owe any fiduciary duty in relation to entering into the agreement under which default interest was charged, and negotiating those default interest provisions, it's difficult to see why it owes a separate fiduciary duty in relation to collecting in that pre-existing contractually agreed sum.

And in that context, it's of particular relevance that the question of enforcement was not actually a question for Lendy but a question for SSSHL. And we can see that from the Model 2 Debenture in bundle C. If we go to tab 10. So here we have the Model 2 Debenture. If we look at clause 16.2, page 175, your Lordship will see that:

"After the security constituted by this deed has become enforceable, the Security Agent may, in its absolute discretion, enforce all or any part of that security at the times, in the manner and on the terms it thinks fit, and take possession of and hold or dispose of all or any part of the Secured Assets."

So that question of enforcement, and indeed the decision about whether to enforce, was a question in the sole discretion of the security agent, SSSHL, not Lendy.

So once we separate out that elision between

enforcement of security and who had the discretion to do that, we can see that this is a case about collecting the default interest that had already been agreed prior to the involvement of the Model 2 Investors. So we say in this respect, there is no more a fiduciary duty in relation to default interest than there is in relation to non-default interest or fees, which of course that latter point is conceded.

HIS HONOUR JUDGE RAWLINGS: Yes.

MS TOUBE: And in particular your Lordship will be aware that one of those fees, which was the exit fee, of course would be paid at the end of the term. There is no suggestion that there is any fiduciary duty owed in relation to that. So similarly there is no fiduciary duty owed in relation to collecting in the default interest due before the end of the term.

And so one can't say: ah, well, there would have been a conflict between the obligation to collect in the default interest and the obligation to collect in the capital. And that means there must have been a fiduciary duty because that's to start the wrong way round. You have to ask yourself the question about the fiduciary duty, whether it exists, before you can decide what its content would be and whether there is any breach of it.

So, with that in mind, dealing with some of the specific points raised by my learned friend. First of all dealing with his three new authorities. We start in authorities bundle 3, tab 44. That's the Children's Investment case. And your Lordship will see that the first question in this case, we were looking at paragraphs 42 onwards. The first question was, as your Lordship will recall, whether there was a reasonable expectation that Lendy would act in the interests of the beneficiaries.

And here, of course we know there was a reasonable expectation that Lendy would charge fees and interest. And a reasonable expectation that Lendy would make a profit. And so we know that there are certainly interests which Lendy has of its own. So all of that is inconsistent with my learned friend's case, which is that this was a case where Lendy would only act in the interests of the Model 2 Investors.

In fact we know it would also act in its own interest. And that goes back to the point I made to your Lordship in opening about the manner which Lendy acted as agent but also acted as principal.

Now, it is true that this case says that fiduciary duties sit alongside contractual duties. But that's not to say that one can ignore the contract when looking at

the nature of those duties. If the contract delimits the duties, then there is no fiduciary relationship which goes wider than the contract. And if we are right that the question of default interest is governed by the loan agreement, which is common ground, and if the loan agreement says default interest has to be paid to Lendy, which is our case on issue 5, either in whole or in part, it will follow that there is delimiting in the contract.

So what we say is in the light of all this, the Model 2 Investors in fact had no reasonable expectation that Lendy was acting in their interests in relation to default interest.

So those are the points I wanted to make on the Children's case.

Then my learned friend took you to the Secretariat case in tab 46 of the same bundle. And your Lordship will recall that my learned friend asked you to look at paragraphs 40-42 of that judgment. And your Lordship saw again that the question in that case, as indeed in our case, is whether a fiduciary duty is owed and at paragraph 42, the question of what the contract says is of considerable importance here. And I think my learned friend again seemed to suggest that the contract could be sidelined, but not if the contract itself explained

what was going to be paid to Lendy in relation to default interest in whole or in part.

Now, was there a high degree of trust imposed in Lendy that required it to exercise its discretion to act solely in the interests of the principal? We'll come back to the facts later. But the first obvious point in relation to the law is that it's not enough to say that Lendy was exercising its discretion in any regard. It had to be exercising its discretion in relation to the default interest. So all the clauses which your Lordship saw which contain the word "discretion" don't help us answer this question.

So we need to ask ourselves a different question, which is: how could investors, how could Model 2 Investors have assumed that Lendy was acting solely in their interests in the face of the contract which said default interest was to be paid, and in circumstances where they knew Lendy to be a commercial entity making a profit, and they knew it was charging interest and fees?

So again, those are the points I wanted to make on the face of Secretariat.

Then we go to the passage from Snell's which my learned friend asked you to look at, which is at tab 62 of the same bundle. And your Lordship will recall we

were looking at page 1579. Now, we of course agree that agents generally owe duties to principals, but the question is, what is the extent of the agency in any particular case, and what are the fiduciary duties imposed on that agent?

And we see that from Snell's itself at 1582. My learned friend, I think referred your Lordship to footnote 14, but your Lordship will see the final sentence:

"Like others, an agent's fiduciary duties must be moulded around the duties which the agent has undertaken in his or her retainer ..."

And that cites the Kelly v Cooper case and your Lordship will recall I took you to that yesterday. And is cited in paragraph 70 of our skeleton. And your Lordship will recall from my submissions yesterday that not all agents are fiduciaries, as Kelly v Cooper makes clear.

Now your Lordship will also recall the Eze v Conway case which I showed your Lordship yesterday which is referred to in our skeleton at paragraph 73, where the Court of Appeal makes it clear that not all agents owe fiduciary duties. So, if Snell is suggesting anything different from that, which I don't think it is, that the correct principles from the case law are that agents owe

duties to principals in relation to those matters where they are acting as agents and where they have undertaken fiduciary duties.

HIS HONOUR JUDGE RAWLINGS: All right.

MS TOUBE: Not wider than that.

HIS HONOUR JUDGE RAWLINGS: So as I understood it, Mr Gledhill's point, at least in this respect, was that Lendy were acting as agent for the investors in taking recovery action, and within that context, they had put themselves in a position of conflict in that in a recovery context, they wanted to claim a large part of the pie, which would reduce the size of the pie available to investors, and therefore they were putting themselves in a position of conflict in relation to the duty that they were performing of recovery action, collections.

MS TOUBE: Yes, I'll come back to that point. I will deal with that point. But the first point in relation to that is the one I've already made, which is insofar as recovery action is said to extend to enforcement of security, it plainly can't go that far because that was SSSHL's discretion.

Insofar as it relates to chasing the monies in a different way, I'll come back to the factual position in a moment, if I might. But I will deal with that head

on.

HIS HONOUR JUDGE RAWLINGS: Do you in a real world sense manage to escape that by saying, well, SSSHL was exercising the discretion, when in fact, as I understand it, SSSHL effectively subcontracted to Lendy all of that?

MR GLEDHILL: I hesitate to interrupt, but I think it's important for your Lordship to see a provision in relation to that which neither of us have taken you to in the original and amended Model 2 Terms. If you have tab 14 and look at the original terms. The evidence is SSSHL had nothing and was a vehicle for keeping ——

HIS HONOUR JUDGE RAWLINGS: Hold on just a second. You referred me to what?

MR GLEDHILL: Tab 14, C271, the original Model 2 Terms. C271, clause 8.1.3 at the bottom.

HIS HONOUR JUDGE RAWLINGS: Yes. Well, I kind of had that in mind when I was asking the question.

MR GLEDHILL: And the same point in the amended terms, just for your note, in tab 15 at page C292.

HIS HONOUR JUDGE RAWLINGS: So my point, and that, I suppose, provides the foundation for me, is that in the real world, it may well be said that Saving —— SSSHL had discretion, but on the face of it, it was really Lendy that was exercising it.

MS TOUBE: But ultimately the party that had the legal discretion was SSSHL, regardless of what it was told to do by Lendy.
HIS HONOUR JUDGE RAWLINGS: All right, let's, just using our imagination for the moment, did SSSHL actually have any employees?
MS TOUBE: I don't know the answer to that.
HIS HONOUR JUDGE RAWLINGS: Let's suppose for the moment the only employees who were dealing with recovery action were employees of Lendy, and they are authorised to take all the recovery action that is being taken. Does the fact that on the face of the documents, SSSHL has the discretion, really make any difference if in reality it was Lendy that was exercising that discretion?
MS TOUBE: Well, if it could be shown that Lendy itself was factually exercising the discretion that SSSHL had, and that it somehow had undertaken that liability, then it would owe a fiduciary duty in relation to the enforcement.
I'll come back to the questions about what it did and didn't do in relation to enforcement, what the evidence actually is.
HIS HONOUR JUDGE RAWLINGS: That's fine, thank you. Yes, all right.
MS TOUBE: I was then going to move on to the regulatory

background. Now in that context, my learned friend took you to, again, back in authorities bundle 3, tab 51, and he took you to article 36H. Now I don't know if I misunderstood my learned friend but I thought the point he was making was that this meant that because Lendy was operating an electronic system, it was not entitled to retain default interest. If that's the point he was making, that is not what article 36H says.
HIS HONOUR JUDGE RAWLINGS: Which tab am I at?
MS TOUBE: Tab 51.
HIS HONOUR JUDGE RAWLINGS: Where in there?
MS TOUBE: It's the first page he was showing your Lordship. Which were the points about SSSHL -- I'm sorry, the points about Lendy as the operator. And you'll see that the conditions were that A, so in other words Lendy or another person acting under arrangement with Lendy, undertakes to receive payments in respect of either interest or capital or both from C, and make them to B.
But then if we look down at (2B)(b):
"It is immaterial that --
"(i) payments may be subject to conditions;
"(ii) ... X [Lendy] ... may be entitled to retain a portion or the entirety of any payment received from C."
So it is entitled to recover these sums, but 36H

doesn't tell you that it's not entitled to retain part of it. In fact it says it's immaterial. That it is entitled to retain a part of it. So 36H doesn't take us any further.
Then your Lordship looked at these terms and in addition to the point we've made about what was actually in the loan agreement, and we'll come back in a minute to look at some of those terms in relation to the misrepresentation point that my learned friend was making, what is being suggested is that Lendy did or might have delayed in recovering loans in order to run up default interest for itself.
HIS HONOUR JUDGE RAWLINGS: I think what point was being made is that that created a conflict in which it would be an advantage to them to do that. Whether they did it or not is another ...
MS TOUBE: Yes, it created a circumstance in which they might have done that. And in that context, adding in the point your Lordship just made which is let's assume that SSSHL, despite having the discretion imposed on it in relation to enforcement, nevertheless agreed with whatever Lendy said, and said: I'll delay enforcement for no good reason. That would give rise or might give rise to a breach of duty claim against SSSHL. But it doesn't follow that Lendy had a duty not to charge

default interest.
And just to remind your Lordship, before we get further into this point, if we are right, that the fiduciary relationship doesn't go as widely as my learned friend has suggested it does, then the fact that it might have put itself in a position of conflict in relation to something where it didn't owe a fiduciary duty wouldn't matter. So this is already at stage 2.
So the first point is a factual point which is there's no evidence that Lendy ever did, and I'll come back to whether it would have made sense for it to do, delay recovery to recover default interest for itself.
Now, in this respect I think it's just worthwhile looking at one table in bundle E3 at tab 196, and that is the document which we put together in relation to recoveries made on the investments of various people involved in this case. You'll see Ms Taylor, Mr Powell, Mr and Mrs Melton. The other people to the right are the members of the creditors' committee.
Now, some of those people have recovered back quite a lot of their loans, including in particular Mr Powell, and some of the members of the creditors' committee. Some of theme people have recovered a lot less of their loans; for example, Mrs Melton has recovered a lot less than Mr Melton.

So factually, we know that there were quite a lot of recoveries made by people against their loans. And we also know, as your Lordship will recall from Monday, that from the witnesses and from the documents we've seen, that Lendy was repeatedly saying that it hadn't made any losses. And in fact it was Lendy's business model to draw upon the fact that there weren't losses that have been made in relation to loans.

So it doesn't make any sense to suggest that it would have put itself in a position of conflict in circumstances where it only got people to invest if it showed it was recovering.

HIS HONOUR JUDGE RAWLINGS: I think, as I said to Mr Gledhill, that I was all very interested in what he might say about particular examples, but the principle appeared to be whether or not you put yourself in a position of conflict, not whether or not you acted in your own interest in a position of conflict.

MS TOUBE: Yes, I think the point I'm making is that the position of conflict itself makes no sense, because if Lendy had put itself in a position of conflict of this sort, where it was recovering default interest because of defaults, it would in fact be putting itself in a very difficult position to exist at all.

HIS HONOUR JUDGE RAWLINGS: Well, again, not if I take

Mr Gledhill's point, which is it was saying we're taking it at 70% loan to value and therefore there's a fair degree of head room in there for you to take your default interest out of. So I think that it's potentially an argument there about not whether there was a conflict of interest, but the degree of the conflict of interest. That there was a conflict of interest would seem to be true. Whether it was a material one, you might argue it was an immaterial one, and would hardly ever arise, but at least the theoretical possibility of the conflict of interest is there.

MS TOUBE: In that respect, the theoretical possibility of a conflict of interest wouldn't be there if we are right on our alternative case on default interest, which is that it goes partly to the investors, and partly to Lendy. In that case, there can't even be a theoretical possibility of conflict. Because in fact the interest would be entirely aligned.

HIS HONOUR JUDGE RAWLINGS: Okay.

MS TOUBE: So that deals, I think, with that point.

Then we deal with the misrepresentation point. And the first point is the point I made yesterday, which is this is a misrep claim and not a claim which relates to the extent of the fiduciary duties.

But in any event, although there were statements made, and your Lordship has seen them, by Lendy, about checking the creditworthiness of the borrowers etc, what we know from the Model 2 Loans is that even in those Model 2 Terms, there were repeated statements by Lendy that it was not checking the creditworthiness and that that risk was to be taken by the investors themselves. And we can just look at a few examples of these.

If we take the original terms, bundle C, tab 14. If we look at page 266, and invite your Lordship to look at clause 2.5:

"A lender must form its own opinion regarding the creditworthiness of a borrower and undertake its own research ..."

2.6:

"... Saving Stream accepts no responsibility for the likelihood of a borrower meeting its financial obligations ..."

2.7:

"Saving Stream accepts no responsibility and disclaims all liability for any information about a borrower made available to prospective lenders through the Saving Stream platform."

2.13:

"Lending money on the platform involves risk to your

capital. If you suffer a loss ... you are not entitled to compensation ..."

And then if we look at 279, 15.1:

"You agree that Saving Stream is making no warranty or representation as to the ability of borrowers to repay loans or pay interest or fees on those loans, and their credit risk, and that we are in no way liable for the debts of borrowers to you. You acknowledge that you are lending entirely at your own risk."

And even from the witnesses and from the documents we saw on Monday, that risk and that repeated warning about risk to capital was known and understood by the investors.

So at best we say the points about the representations are relevant to misrepresentation claims, not to expanding the fiduciary duties.

Now, in relation to the three additional documents which my learned friend took you to, the first was the overdue loan default policy. Again, that was a document really about enforcement of security. It says nothing about collection of default interest. The second was clause 16 of the amended model terms which related to Lendy's enforcement obligations or amending the terms etc, and does not tell us anything about default interest. And the first recovery policy doesn't tell us

really anything at all, because if it continued to govern, it would have meant default interest had come out after capital. So there wouldn't have been any position of conflict. But as we know, the waterfall was replaced by clause 13 of the second recovery policy which reversed it. And we're going to have a lot more to say about this in the context of issue 10.

So that means that we say that we are in the same position in relation to the existence of the fiduciary duty, in that it doesn't extend to the collection of default interest, and therefore there is no position of conflict because there is no duty at all. And if we're wrong on that, then there is no breach of that in the context of the division of default interest point.

HIS HONOUR JUDGE RAWLINGS: Sorry, what is that?

MS TOUBE: That's the point about if default interest was both for Lendy and for the investors, there can't be a breach of the conflict. Because there is no conflict. Because if you're doing something which is in both your interests ...

HIS HONOUR JUDGE RAWLINGS: Okay.

MS TOUBE: Then my learned friend moved on to the duty of disclosure. Again, we need to make clear that there are actually two separate questions here. The first question is, is there a duty of disclosure? The second

is, is there a defence to it?

Now, if we are wrong, and there was a fiduciary duty owed, there would be a duty of disclosure. Prima facie that would only be met by making full disclosure. And in that context, the regulatory framework would be relevant, but it would be relevant to those who were not sophisticated investors. And we'll come back to who is and who isn't a sophisticated investors when we look at issue 7. But as my learned friend candidly accepted, some of the investors, including in particular Ms Taylor, were sophisticated.

Now, my learned friend then said there was some criticism in particular about the dates —— the evidence and for example the date of the frequently asked questions on the website. It's a little surprising to us to hear that criticism because my learned friend's skeleton itself accepts that the frequently asked questions were on the website at least for some of the material time. That's the way in which it's put in paragraph 17.4 of their skeleton. And also in circumstances where at least in relation to the facts, we were supposed to be acting collaboratively, it was surprising to hear it for the first time.

But in any event, as your Lordship knows, the frequently asked questions related to the non—default

interest and fees. So we're not quite sure why there is any issue about this evidence at all.

So that is disclosure. What about informed consent? This really boils down to two points. First of all, does the case law that we rely on only apply in one agent, one principal cases? And we say there is nothing in the cases which suggest that it's so limited. And just because some of the investors were unsophisticated shouldn't mean that all of them are able to avoid having asked any questions. Now Mr Powell, for instance, asked lots of questions on lots of things repeatedly.

Now, the second point was that it was flatly inconsistent, I think my learned friend said, a number of times, that —— our suggestion that the loan agreement could have been obtained from Lendy, that was flatly inconsistent, flatly contradicted, he said, by the evidence. And he showed us the question about whether or not the loan agreements were put on the website.

Now, we didn't rely on that point. What we said was that it was clear from the Model 2 Loans —— sorry, the Model 2 Terms —— that the relevant question in relation to interest, in particular, was contained in the loan contract, because it was the loan contract that governed the terms. And we know that the loan contract governed the terms because the Model 2 Terms expressly said that.

We saw that from clause 9.1. We can look at that just briefly in tab 14, page 272:

"The Loan Contract governs the terms of repayment and payment of interest by the borrower."

And the same at 292 is where it appears in the amended Model 2 Terms. And what we said was, given that, questions should have been asked like, "Can I see the loan contract, please?"

Now, the fact that the loan contract was not on the website, even if it's suggested that that was a deliberate decision by Lendy, as to which that's only speculation in any event, given the state of the books, incompetence seems to be at least equally likely. But even if it were a deliberate decision by Lendy to hide the loan contracts from its investors, the investors knew that the question of interest was governed by the loan agreements.

And the point we make, based on the case law, is, where you know that, you should have asked to see them. And the only evidence that we have from Mr Powell is that he did ask to see one loan agreement. Absolutely accept it was not to see the loan agreement, it was because he thought he was going to be liable under it. But when he asked, he was referred to the solicitors, and the solicitors gave him a copy.

So that is really the only point we make on informed consent, which is the contracts told you that the interest was governed by the loan agreement. You could have asked for it. Mr Powell did ask for it once and he got it.

HIS HONOUR JUDGE RAWLINGS: Who does the burden lie on to deal with that evidential point in relation to whether or not loan agreements would have been available if asked for?

MS TOUBE: Well, the burden is on Lendy because this would be a defence. And the evidence that we have shows that Mr Powell asked and was given.

HIS HONOUR JUDGE RAWLINGS: Okay.

MS TOUBE: So that is that. And that leaves us only with equitable allowance. We do agree that the principles are as set out in Lewin. We do agree that this does not relate to what the administrators have done. We have already dealt with the question of profit, which is the recovery of the default interest is the recovery of that profit. It doesn't mean, did they make a loss overall. In other words, should you pay somebody for having got in your money?

And then the rest of my learned friend's points really boil down to Lendy acted very badly and it would encourage people to act very badly if you gave them an

equitable allowance.

HIS HONOUR JUDGE RAWLINGS: Can I just ask you about the last point, which is you say that there is some advantage in default interest being obtained, and because it was obtained, an equitable allowance should be made out of that to lending in relation to pre-administration collections of default interest. But isn't it the case that if that default interest were not collected, then it would have been paid to the lenders in any event, because they were owed principal and interest, and the default interest has simply been deducted from monies that would have been paid to them in any event?

MS TOUBE: Well, it depends, is the answer. In some cases yes and in some cases no. It depends on how much you recover on the loan overall.

HIS HONOUR JUDGE RAWLINGS: Yes, but the schedule you have given me, just generally speaking, shows a position where quite heavy losses were incurred on each of the loans. There might be exceptions to that, but I think that is generally the case. Then what the administrators have done is they have set the default interest to one side, and then they paid everything they could pay out to the lenders, having deducted the default interest. But if they hadn't deducted the

default interest, then they would have paid that cash to the lenders anyway.

MS TOUBE: Yes, but it would have been partly for default interest. So, the answer is it depends on how the numbers work out. So that there will be capital and non-default interest and default interest, and if the point is that they paid capital and interest first, I suppose is the point your Lordship is making, and then the question is how much default interest would be left, they might still be paying over an element of default interest.

HIS HONOUR JUDGE RAWLINGS: All right. I'm not sure I understand that. But in any event, it seemed a lot more straightforward than that in that the columns were there, and default interest seemed to come off what would otherwise have been paid to the lenders, but even if you accept that it might depend on the particular loan, nonetheless, in some cases, it would seem that the default interest has come out of what the lenders would otherwise have received, and therefore it's no advantage to them for default interest to have been charged. Because even if they get all of it, they would have got it -- they would have got that element of cash anyway, because that default interest has been deducted from what they would otherwise have received.

MS TOUBE: So your Lordship is right to say that what we have done is worked out what element of it would amount to default interest. We certainly have worked that out. If when they get paid -- let's imagine you've got a £100 loan and £10 non-default interest and £20 default interest. I know that's not anywhere near what the figures will be, but let's imagine that for a moment, and what you recover is £120. You will recover your loan plus your non-default interest plus part of your default interest.

So the work done by Lendy will have recovered in an element of capital plus non-default interest plus default interest. And if they then pay over that default interest to the investor, some of the work that they have done has been to get in that element of default interest which they are paying over to the investor. That's the only point I'm making.

HIS HONOUR JUDGE RAWLINGS: All right.

MS TOUBE: But that will be a quantum question which will require further evidence, obviously.

HIS HONOUR JUDGE RAWLINGS: Yes. So -- okay. Fine. I'm still not entirely getting it, that if we have a shortfall, as to why the default interest would be of any benefit to lenders. But that aside.

MS TOUBE: I'm not sure I can help you any further on that

point.
HIS HONOUR JUDGE RAWLINGS: If I go and get one of the schedules, we can have a look at it.
MS TOUBE: Sir, I'm looking, for example, at the first one. Gross loan, 120 -- 192,000. Gross or anticipated proceeds, 230,000.
HIS HONOUR JUDGE RAWLINGS: You are looking at the first one -- gross loan is how much on yours?
MS TOUBE: Sorry, I was looking at estimated further default interest, but let's look at the first one, first one, first one. Yes, these are all -- the proceeds do look like they are all less. They are not quite. There is one where it's more. So if we look at DF031 for instance, there the loan is 1338 etc. The net proceeds are higher.
So you would have to work out what of those net proceeds were non-default interest and what was default interest.
HIS HONOUR JUDGE RAWLINGS: Okay, fine. Maybe. Maybe. But in a very few cases probably.
MS TOUBE: I think that's right. I can see two on the first page. So it is true to say that more often, there will have not been a full recovery even of the capital.
HIS HONOUR JUDGE RAWLINGS: Yes. Okay.
MS TOUBE: So, my Lord, I'm sorry, that did take much longer

than I thought, but that is the end of issue 8.
That takes us to, and I should say it's also an hour and 20 minutes in.
HIS HONOUR JUDGE RAWLINGS: Well, can we do issue 6 in ten minutes?
MS TOUBE: We can do both issue 6, and it may be, subject to my learned friend, we can also do 9.
MR GLEDHILL: I am just wondering about the transcriber.
HIS HONOUR JUDGE RAWLINGS: That's why I was wondering whether we can do issue 6 in ten minutes.
MS TOUBE: Yes, we can do issue 6 in less than ten minutes, I think.
HIS HONOUR JUDGE RAWLINGS: Let's do that and then have a break.
MS TOUBE: Issue 6 is about whether any of the relevant clauses were not properly incorporated because we put this case not on the basis of particular terms but in reliance on the entire factual background, what the terms say, what the facts are etc.
We are not relying on any particular terms, and therefore the question of incorporation does not arise. And my learned friend accepts that if we do not put our case on the basis of the incorporated terms, then the question of incorporational terms does not arise, and therefore there is no issue between us on issue 6.

HIS HONOUR JUDGE RAWLINGS: Okay.
MS TOUBE: I think I have put that correctly for both of us.
MR GLEDHILL: Ms Toube has. She remembers the provisions of -- this issue 6 only goes to Lendy's standard terms. So to the extent under issue 5 Ms Toube relied on some other reasons for saying there might be a contractual entitlement, she didn't rely on any provision to the standard terms, so I don't need to attack those.
The standard terms may become a relevant point in relation to questions of investor consent, but the relevant provisions are not promissory conditions; they are just the statements that you have seen in the standard terms that you can find the interest and fees in the loan agreement, and that arises under issue 7, not under issue 6.
HIS HONOUR JUDGE RAWLINGS: Fine. What do we have left on the agenda to do today?
MS TOUBE: Well, we have issue 7. I don't have a huge amount to say on issue 7, although I may need to come back and reply once I understand exactly how issue 7 is put by Mr Gledhill. And it may be that we can also deal today, depending on how long we still need, or alternatively deal today if you prefer, with issue 9, because issue 9, as my learned friend said, we set aside two hours to deal with tomorrow and it's going to take

us about four minutes.
HIS HONOUR JUDGE RAWLINGS: Okay. Right. How long is issue 7 going to take us?
MS TOUBE: That, I think I'm more in Mr Gledhill's hands. I don't think I'm going to be more than about three or four minutes on issue 7. I may be longer in reply though.
HIS HONOUR JUDGE RAWLINGS: Mr Gledhill?
MR GLEDHILL: I may need about 20 to 30 minutes on issue 7. So if we break now, we may be able to finish before 4.00 pm but it's very much a matter for your Lordship.
HIS HONOUR JUDGE RAWLINGS: We can take issue 9 swiftly whenever we take it so let's come back in five minutes, if that's all right, at 3.30, and deal with issue 7 and we'll finish that off today as planned. Back at 3.30 then, please.
(3.25 pm)
(A short break)
(3.31 pm)
Submissions on Issue 7 by MS TOUBE
HIS HONOUR JUDGE RAWLINGS: Yes.
MS TOUBE: I think I might start briefly on issue 7.
HIS HONOUR JUDGE RAWLINGS: Fine, all right.
MS TOUBE: So issue 7 is whether or not any of the relevant clauses constitute unfair terms. In our skeleton we

dealt with the terms in the agreements themselves. My learned friend I think has an additional point in relation to the terms of the underlying loan, and I'll wait, if I might, to see how he is putting that point. But you'll see that the first point we make is that none of the relevant clauses arise because we're not putting our case in relation to the terms themselves, and so for the same reason as issue 6 this point doesn't arise.

The second is that this relates only to circumstances in which the Model 2 Investors were consumers. And if there were Model 2 Investors who were consumers, then there is the question of whether or not there was a term that causes a significant imbalance in the parties rights and obligations. We deal with this in paragraph 140 of our skeleton.

Now, in relation to whether or not investors were or were not consumers, that's not an altogether straightforward question and I don't think one your Lordship can currently determine. And I can make this good just by reference to Mr Webb's fifth witness statement which is in bundle B at tab 5. I just invite your Lordship to look at paragraphs 10 to 14.

"Though not all of the investors were in fact consumers". And over the page at 133, again the same persons we looked at in the earlier table. Here we can

see, so Ms Taylor, Mr Powell were sophisticated, but Mr Melton and Mrs Melton were consumers. And then in relation to the creditors committee they were mostly sophisticated but some of them, one of them at least didn't select whether he was a consumer or not. And Ms Taylor, as my learned friend noted, was very sophisticated; in fact her professional background made her very clearly not a consumer. And we can see that just from one document, if we look at bundle E1, tab 94, page 321. Your Lordship will see from that final paragraph what her background was.

HIS HONOUR JUDGE RAWLINGS: So where does that leave us?

MS TOUBE: Well she plainly was not a consumer. And so insofar as an issue does arise on issue 7, which as I say I'll have to hear what my learned friend says in relation to that, it cannot apply to all Model 2 Investors it would only apply to those who were consumers.

HIS HONOUR JUDGE RAWLINGS: So if I were with him, but also accept the point you make, then I'd have to effectively make a declaration it only applies to consumers and leave the administrators to sort out who were consumers or some similar?

MS TOUBE: Yes, or we might need to trouble your Lordship if there is any issue in relation to those.

HIS HONOUR JUDGE RAWLINGS: Okay. Yes.

MS TOUBE: So other than that I don't make any additional points to the points made in our skeleton; in other words, it's got to be express terms, not implied terms. And it's the loan contract and not the terms themselves that we're looking at. So other than that, I think I'll have to reserve my position until reply.

HIS HONOUR JUDGE RAWLINGS: Mr Gledhill.

Submissions on Issue 7 by MR GLEDHILL

MR GLEDHILL: If your Lordship agrees with me that Lendy breached its fiduciary duty to the lenders in relation to default interest, the administrators' fall-back position as you've heard today is of course Lendy sought and obtained the informed consent of the Model 2 Lenders. And for that purpose your Lordship knows that the administrators rely on various provisions in the original and Model 2 Terms which they summarise in their skeleton. If you can take that up, you will find a summary of the provisions that they rely on on page 34. And paragraph 104 has a load of subparagraphs running over the page but you can get the flavour just by looking at 104.2:

"The Original Model 2 Terms expressly stated that 'the Loan Contract governs the terms of repayment and payment of interest by the borrower' ..."

So the case that they are making on that is that when you get to the question about informed consent, there are various provisions in the original and amended Model 2 Terms which flagged for the investors that if they called for the loan agreements, they could see what the default interest charge was. And if my Lord turns on now to page 45 in their skeleton argument, you can see that that is where they begin to discuss this issue 7.

Turning over the page, you can see how they put it at paragraph 144:

"The Model 2 Terms state that 'the Loan Contract governs the terms of repayment and payment of interest by the borrower' (see the provisions ... quoted ... above)."

That's the paragraph I've just shown you. And they say:

"This is a statement of fact, not a contractual promise or exclusion clause. The statement of fact is accurate, since the applicable interest rates are indeed governed by the Model 2 Loan. A statement of fact ... cannot properly be characterised as unfair within section 62 of the 2015 Act."

And we say that that is incorrect for the short reason that we gave in our skeleton argument. And I'll

just remind you of that. It's on page 33 of our skeleton argument. We made our case on this clear at paragraph 40.5. So looking at that provision, we say clause 9.3 constitutes a "consumer notice".

HIS HONOUR JUDGE RAWLINGS: Where are you?

MR GLEDHILL: Page 33 of my skeleton argument show the administrator's position is it's not within the Act because it's not a promissory condition. And the point we're making is you are right about that but it doesn't matter.

"... the final sentence of clause 9.3 constitutes a ... 'consumer notice', and as such, is not binding on Model 2 lenders ... unless it satisfies the 'requirement of good faith' ... but since lenders were never allowed by Lendy to see the loan contracts to which that sentence referred, it cannot possibly do."

Let me make that good by reference to the provisions of the Act. If my Lord takes out tab 53, your Lordship will remember that on Monday I took you through this fairly quickly because it had potential application in its predecessor, the 1999 Regulation, to the position of the Model 1 Investors. And I showed you some of these provisions.

In light of what's just been said, can we just start off reminding ourselves on page F1452 of some core

definitions. You saw the definition of "trader":

"'Trader' means a person acting for purposes relating to that person's trade, business, craft or profession ..."

So Lendy is plainly a trader.

"'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

"4. A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession must prove it."

Now, the reason I just remind your Lordship of that is Ms Toube has just taken you to a passage in Webb 5 which concerns the question of whether individual Lendy investors who went on the platform certified themselves as being sophisticated investors or not.

HIS HONOUR JUDGE RAWLINGS: You say that's not relevant.

MR GLEDHILL: It's a different question. It's got nothing to do with it. You can be as sophisticated as you like, but a consumer within this definition, and critically sub-paragraph 4, subclause 4, the onus of proving the contrary is on Lendy.

Now if your Lordship got to granting preparatory relief about this, your Lordship would undoubtedly

confine any declaratory relief to persons who were traders, but the position on the present state of the evidence before your Lordship is that there is no evidence that any of the Lendy investors were not traders. There is no evidence that any of them were on that side in the course of their trade business craft or profession.

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: Page 1455, I also showed you this on Monday. 61(1):

"This Part applies to a contract between a trader and a consumer."

But then importantly (7) and (8):

"A notice to which this Part applies is referred to in this Part as a 'consumer notice'."

And then importantly:

"In this section 'notice' includes an announcement, whether or not in writing, and any other communication or purported communication."

So a notice is framed in the widest terms of generality. So I entirely accept -- I started off with a paragraph in my learned friend's skeleton, paragraph 144, in making the point that the provisions they are relying on are not promissory contractual provisions, they are merely statements of fact is the

way it was put. But those statements of fact are quite plainly consumer notices within the meaning of the 2015 Act, and as such if, if, if only if you are against me on the submissions I made about whether Lendy got informed consent, at that point it will become material to determine whether or not those statements upon which the administrators rely pass the test set by the consumer rights legislation. And your Lordship sees the test over the page at 1456, section 62, subsections 6 and 7:

"(6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer."

And:

"(7) Whether a notice is fair is to be determined --

"(a) taking into account the nature of the subject matter of the notice, and

"(b) by reference to all the circumstances ..."

So, you see there that there are two components in subsection 6. First of all the notice has to cause "a significant imbalance in the parties' rights and obligations to the detriment of the consumer". And, secondly, it has to be contrary to the requirement of good faith.

What does that mean? So far as that is concerned there is —— all of this legislation derives from European Directives as a significant body of Strasbourg jurisprudence that is applicable. But very happily your Lordship doesn't have to get into any of that because there is a helpful, clear and succinct summary of the position in the authority that you find at tab 33 of your bundle. This is the Supreme Court's decision in Cavendish Square Holding, and it was principally, or to a large extent, concerned with the question of penalties, the common law of penalties under English law. And then also with the applicability, as you see from the beginning of the headnote, of the "predecessor to the 2015 legislation, the unfair terms and consumer contracts regulations".

The only passage in this that you have to look at is at page F964. The speech of Lord Neuberger and Lord Sumption jointly summarises the Strasbourg jurisprudence in a way that provides a helpful one—stop shop to your Lordship. Between letters C and D, so by the first hole punch, they say:

"The effect of the Regulations was considered by the House of Lords in Director General of Fair Trading v First National Bank ... But it is sufficient now to refer to Aziz ... which is the leading case on the topic

in the Court of Justice of the European Union."

And then beneath that, just beneath E, you see their Lordships say:

"The judgment of the Court of Justice is authority for the following propositions ..."

And all you need to trouble with is (2) and (3). Perhaps I can just ask you to read those to yourself.

HIS HONOUR JUDGE RAWLINGS: Okay.

MR GLEDHILL: So two questions for your Lordship. The first is, whether the notices that we seek to impeach have caused significant imbalance to the detriment of the Model 2 Lenders. And the decision that you have just read tells you that the starting point for that, and indeed the ending point is to ask what the position would be aside from these notices. So by this stage of the analysis your Lordship has accepted —— I'm just getting it through hypothetically —— your Lordship has accepted my primary submission that there has been breach of fiduciary duty but we are met with a successful argument that there has been informed consent to that based upon the notice given in the standard Model 2 amended and original terms to the effect that the terms of the loan agreements set out the interest and charges.

So by that stage of the argument the effect of those

notices will be twofold.

Firstly, it will knock out the claims for equitable compensation that the Model 2 lenders would have had against Lendy for breach of fiduciary duty. And second, and critically, it will knock out their proprietary claims to recover default interest. Both of those rights we would have in this hypothetical scenario if it were not for the notices in the original and amended Model 2 Terms that we're now discussing.

So when you come to ask the question: do the notices create a significant imbalance in the parties' rights to the detriment of the consumer, in this case the Model 2 lender, the answer to that is a clear "yes".

And that then takes you to the second question, which is whether that result has been brought about in breach of the obligation of good faith. And that, as your Lordship sees looking back at Cavendish Square, page 1228 at letter H resolves into this question. Sorry, F964. So at letter H, the question is whether the trader could reasonably assume that the consumer would have agreed to the term in individual contract negotiations.

Obviously that's framed by reference to terms not by reference to notices, but the test is the same. The requirement of good faith is present both in relation to

notices and in relation to terms. And so the question is whether or not Lendy could really have assumed that the Model 2 Lenders would consent to the conclusion that I have just indicated. So, before these notices they have personal and proprietary claims against Lendy, but as a result of these notices they have waived them.

And when we get to that stage of the argument I suggest to your Lordship that there can only be one answer to that question, which is "no". And I make two specific points.

First, the very fact that Lendy never put the loan agreements up on the website, despite contractually promising to do so in clause 7.4 of the original Model 2 Terms is, I suggest, the clearest possible indication that they perfectly well knew that if they had done that, and Model 2 Investors had found out as a result what Lendy was charging for itself by way of default interest, there would have been uproar. Lendy's failure to publicise the loan agreements is of itself the clearest evidence of a lack of good faith on its part.

Second point in this context I want to take you back to something Mr Powell said about this in his witness statement. Put aside the authorities bundle and take out bundle B again. Tab 4, page 127 please. You should have a page which has a paragraph 97.2 in it. Mr Powell

said this about default interest, picking it up at the top of 97.2:

"Lendy says it is entitled to default interest pursuant to clause 6.3 ... That said:

"(a) Before Lendy's collapse, I did not know that it was claiming any right to recover default interest on its own behalf ...

"(c) If before investing I had known that Lendy was entitled to such a high rate of default interest (or even a proportion of that rate), I would not have invested using the Lendy Platform. In my view, default interest is properly payable to lenders, as it represents compensation for being kept out of their money in risky circumstances."

He wasn't cross-examined on that. You will find very similar evidence -- I'm not going to take you to it -- but in Mr Melton's statement at paragraph 52.2 at bundle reference B, tab 3, page 84.

HIS HONOUR JUDGE RAWLINGS: Yes.

MR GLEDHILL: So would Mr Powell, would Mr Melton have consented to it? I accept that is a statement of their subjective view. That is not determinative of the objective question, but I suggest that it is both compelling and eminently credible.

I only make one final point in relation to the

application of the Consumer Rights legislation to your Lordship. You will remember at the outset of my opening remarks on Monday I made the point that the FCA originally expressed an interest in intervening in these proceedings, and that one of the issues it was particularly concerned would be addressed was the application of the 2015 Act to Lendy's standard agreements with its lenders.

If I can ask you to take out bundle E3, tab 167 and within that turn on to page 845. You will see that the authority in fact provided to the administrators a detailed analysis running on for five or six pages, settled in discussion with Richard Coleman QC of Fountain Court -- you can see that at the end of the first paragraph -- setting out its analysis of the applicability of the 2015 Act. I'm not proposing to take up your Lordship's time going through it in any level of detail. But if it is of use to your Lordship, I will just show you. It starts at page E847. It has a header, "Fairness of default interest and default fee terms". And it runs all the way down to page E853. And if I can just show you that paragraph at the end, paragraph 28 on page E853 where the authority said:

"Where an agent makes any secret profit from the use of his principal's property, he is accountable to his

principal as trustee for that profit. In the 'Companys case [in Lendy's case] there appears on the evidence provided by the Administrators to be a strong argument that all default interest that it receives from the borrowers, whether under the waterfall or otherwise, is held on trust for the relevant investors. The FCA therefore considers that these issues need to be considered ..."

I'm not going to take your Lordship through it at any level of detail. One point I should make in fairness is this. The FCA's analysis of the documentation from the perspective of the 2015 legislation deals with the relevant provisions as if they are contract terms rather than consumer notices. And that reflects the fact that the analysis was then I think on all sides rather less developed than it is now.

I suggest the correct analysis is as I've suggested it to your Lordship: they fall to be regarded as notices and they consequently have to match the test in the legislation if they are to pass muster.

But to be absolutely clear, this is very much an alternative case. Your Lordship does not even get to this if you decide there was a breach of fiduciary duty and on ordinary principles Lendy did not get informed

consent.

Unless I can assist you further.

HIS HONOUR JUDGE RAWLINGS: No, thank you. So, Ms Toube, a response?

MS TOUBE: My Lord, yes. Starting with that final point. The question of what the FCA thought should or shouldn't be argued doesn't really help us to determine the question that is now raised by my learned friend which is raised on the loan agreement. In other words, that this is a consumer notice that clause 9.3 which says the provisions are held in the loan agreement is a consumer notice. The way in which it is put in my learned friend's skeleton at paragraph 40.5 is that since lenders were never allowed by Lendy to see the loan contract, to which the sentence referred, it cannot possibly satisfy the requirement of good faith.

But that is stating it much too high. First of all we know that lenders, or at least Mr Powell, was on one occasion allowed by Lendy to see the loan contract.

And this really boils down to an even more extreme version of the version we heard from my learned friend in relation to issue 8, which is the assertion that it can somehow be reasonably assumed that Lendy deliberately hid the loan agreements from the Model 2 Investors. We say it was the clearest possible

indication that Lendy knew that if they had shown the loan agreements to the Model 2 Investors there would have been uproar. And then he says, well Mr Powell says, I would never have agreed to this.

Now, Mr Powell in cross-examination, in answer to a point by your Lordship, didn't say that at all in fact. At page 80 of the transcript of Day 1; I'll just give your Lordship that for your note. But you asked him about the position in relation to interest:

"... [in fact you said] ... you weren't concerned on that occasion, and hadn't been concerned to find out what it was that the borrowers were paying to Lendy?

"Answer: No, it didn't seem to me to be relevant ... investors had always received their capital and interest in preference to Lendy getting their fees."

And then you said -- he said:

"... by the point that this case came up, I was in the position that I -- my understanding was that I was still going to get capital and interest ahead of any fees due to Lendy."

And you said:

"OK, so you didn't care what they were getting as long as you were getting yours first?

"Answer: I cared in terms of obviously they needed to make a profit so they didn't go into -- you know,

where we are now. But from the communications they'd provided to us, they were clearly making a significant profit."

So, he didn't say: I absolutely would not have let them earn a default interest at all. He said, I -- in answer to your Lordship's question. He didn't care what they were getting. As long as they were making a profit, which he understood, and as long as he was getting his capital and interest he wasn't really bothered by it, if I can summarise it that way.

So, it's far from clear either that Lendy was deliberately hiding this from the investors because they knew that their reaction would be that this was an outrage, or that the investors themselves thought it would be a complete outrage. So the way in which my learned friend has put the point is much too high.

Then we go back to what this boils down to. It's said that the statement, which is a statement of fact, which is that the question of what borrowers would pay in interest and fees and to whom, assuming that we now know the answer to that question, is governed by the loan contract.

Now that is, as I say, a statement of fact. Of course it doesn't stop it being a consumer notice. But it's difficult to see what term exactly my learned

friend is trying to knock out. Because unless he knocks out clause 6.3 of the loan agreement as a matter of fact the default interest was to be paid to, on this assumption, Lendy, in full or in part. So it is a bit difficult to understand that even if the sentence were to go out, all the other sentences which we saw in the Model 2 Terms which say the loan agreement governs questions of interest, the loan contract governs the agreement, not just here but all over, the loan contract did still govern those questions.

So, it's for that reason we don't really see why we're in the territory of this regulatory provision at all. And even if it were, it does satisfy the provision requiring good faith because it says exactly what the position is.

So that is we think the short answer to that point, which is that this is simply not relevant because in fact the loan agreement did govern the question of interest.

HIS HONOUR JUDGE RAWLINGS: Okay.

MS TOUBE: That's really all I had to say on issue 7.

HIS HONOUR JUDGE RAWLINGS: All right. Fine. Mr Gledhill, I'm assuming there is nothing you particularly wanted to come back on in relation to that?

MR GLEDHILL: No. And I am wondering whether the only other

thing we might usefully do is to wrap up issue 9 right now. Which leaves us then with issue 10, which is not going to take the whole of tomorrow. In fact I think we're only scheduled to take half a day on issue 10.

HIS HONOUR JUDGE RAWLINGS: All right then let's go to issue 9.

Submissions on Issue 9 by MS TOUBE

MS TOUBE: So issue 9, as I understand it -- again Mr Gledhill will let me know if this isn't correct -- is as stated in our skeleton argument. So we deal with this at paragraph 146 onwards of our skeleton. And what we say is that Lendy was entitled to charge standard interest and fees for its own account, and there is no legal or equitable proprietary interest in that, which is agreed.

The default interest is either all payable to Lendy or split between Lendy and the Model 2 Investors. Or if my learned friend is right is paid to the Model 2 Investors.

If we are in the universe of issue 8, and if there is a fiduciary duty and if there is a breach of the fiduciary duty, there would be prima facie an equitable proprietary claim, and there we refer to the FHR case in the Supreme Court. And in order to make this as quick as possible we just refer your Lordship to the headnote

of that. I'll give you the reference to it, at Authorities bundle 2, tab 31, page 849. But the principles which were set out there are those that we set out in 147.

HIS HONOUR JUDGE RAWLINGS: Sorry, what was the page?

MS TOUBE: 849. So it's just the headnote at page 251 of that report. So first of all it will be necessary for the Model 2 Investors to trace.

If they can't trace then they don't have a proprietary claim.

If there is a question of tracing that has to be determined, we can't do that now.

If there is an equitable allowance to which Lendy is entitled that would have to be deducted.

Alternatively, there might be an account of profits claim. That would be a personal remedy. It wouldn't be a proprietary remedy, it would be an unsecured provable claim, and again you would have to give credit for an equitable allowance.

So those principles, as I understand it, are all accepted by my learned friend and it will follow from whatever conclusions your Lordship reaches on issues 5 to 8.

MR GLEDHILL: It is agreed. And it all turns on issue 8. As I have mentioned, 5 is not the point, 8 is the point.

But we are agreed. The bottom line is if there has been a breach of fiduciary duty we have a proprietary claim, we'd have to trace into particular assets. If your Lordship allows an equitable allowance that falls to be deducted. That's all common ground.

HIS HONOUR JUDGE RAWLINGS: Okay. Fine. So tomorrow is issue 10.

MS TOUBE: Yes.

MR GLEDHILL: Yes.

HIS HONOUR JUDGE RAWLINGS: All right. 10.30 tomorrow then.

MR GLEDHILL: Just before we rise, my Lord, I was wondering, since we are not going to be the whole day, whether your Lordship might just sit a little bit later tomorrow morning, perhaps at 11 o'clock?

HIS HONOUR JUDGE RAWLINGS: I can do. Yes, all right. I suppose the only problem is that those people who didn't attend today and who might be expecting to start at 10.30 tomorrow will be a little confused that we're not on.

MR GLEDHILL: It will be no different from if we were in open court I suspect.

HIS HONOUR JUDGE RAWLINGS: No, probably not. All right, well, yes, I think we can start at 11 o'clock.

MR GLEDHILL: I'm grateful. Thank you.

HIS HONOUR JUDGE RAWLINGS: So 11 o'clock tomorrow.

(4.09 pm)

(The hearing adjourned until 11.00 am on Thursday, 1 July 2021)

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