CR-2019-BHM-000443 and CR-2019-BHM-000444

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY & COMPANIES LIST

IN THE MATTER OF LENDY LTD (IN ADMINISTRATION)
AND IN THE MATTER OF SAVING STREAM SECURITY HOLDING LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

(1) Damian Webb, Phillip Rodney Sykes and Mark John Wilson as Joint Administrators of Lendy Ltd (in administration)

(2) Damian Webb, Phillip Rodney Sykes and Mark John Wilson as Joint Administrators of Saving Stream Security Holdings Limited (in administration)

Applicants

-and-

(1) Lisa Taylor (as a representative respondent on behalf of the Model 2 Investors and Model 2 Transferees)

(2) Christine Mary Laverty, Helen Julia Dale and Patrick O'Sullivan as joint conflict administrators of Saving Stream Security Holding Limited (in administration)

Respondents

SKELETON ARGUMENT ON BEHALF OF THE APPLICANTS FOR TRIAL BEFORE HHJ RAWLINGS (SITTING AS A HIGH COURT JUDGE) LISTED TO COMMENCE ON 28 JUNE 2021

A INTRODUCTION

1. This skeleton argument is lodged on behalf of the Applicants for the trial of two directions applications (the "**Applications**"[1]). The Applications were issued by the Applicants on 10 July 2020. In order to assist the Court with the numerous issues on this hearing, this skeleton argument is lengthier than would normally be the case. It is intended that in the light of these full written submissions, oral submissions can be presented in an efficient manner.

2. The Applicants are the joint administrators of Lendy Ltd ("**Lendy**") and Saving Stream Security Holdings Limited ("**SSSHL**") (together, the "**Companies**"). Lendy traded both

[1] There is a single application notice in respect of both Applications **A/9/149-150**

under its own name and under the name "**Saving Stream**". Each of the Companies entered administration on 24 May 2019.

3. The agreed pre-reading list is at **A/18/185**. The defined terms in the agreed pre-reading list are adopted herein.

(1) Background to the Applications

4. Prior to entering administration, Lendy operated a peer-to-peer ("**P2P**") lending platform through a website (the "**Website**"). In simple terms, the Website enabled investors (the "**Investors**") to provide funding for the purpose of making loans to third parties (the "**Borrowers**"). The Website also enabled the Investors to sell their rights under the relevant loans to other Investors (the "**Transferees**") through an online secondary market.

5. The loans were advanced to the Borrowers at high interest rates, significantly exceeding the interest rates on bank deposits and other traditional debt investments. The loans were normally secured over real property in the UK and were often guaranteed by persons associated with the Borrowers (the "**Guarantors**"). SSSHL acted as a security agent and trustee in respect the loans under the Model 2 structure (as defined below).

6. During the course of its operation, Lendy operated two different business models:

   6.1. Under the first business model ("**Model 1**"), which operated between March 2014 and October 2015, the relevant Investors made loans to Lendy (as principal) and Lendy made a back-to-back loan to the relevant Borrower. The back-to-back loan from Lendy to the Borrower is described as a "**Model 1 Loan**". The security for the back-to-back loan was held by Lendy (in its own right and not as trustee).

   6.2. Under the second business model ("**Model 2**"), which operated from October 2015 onwards, the relevant Investors made loans to the relevant Borrower directly, albeit the loan documents were executed by Lendy as agent of the Investors (the "**Model 2 Loans**"). The security was held by SSSHL as trustee for, *inter alios*, the Investors.

7. The purpose of the Applications is to obtain directions on a series of issues in order to enable distributions to be made in the administrations of the Companies. The answers to these issues will affect the recoveries made by the Investors. In essence, the conflict between the Model 1 Investors and the Model 2 Investors arises for the following reason:

   7.1. The Model 1 Investors have an incentive to maximise the value of Lendy's general estate, since this is the only source from which they can be paid.

7.2. The Model 2 Investors and Model 2 Transferees have an incentive to establish a proprietary claim (of the highest possible ranking) against any recoveries made by Lendy and SSSHL.

8. The Applications were issued pursuant to paragraph 63 of Schedule B1 to the Insolvency Act 1986 (the "**1986 Act**"), which provides that "*the administrator of a company may apply to the court for directions in connection with his functions*".

9. Three case management conferences ("**CMCs**") have taken place in respect of the Applications. The first CMC was before HHJ Simon Barker QC (sitting as a High Court Judge) on 23 September 2020. The second and third CMCs were before HHJ Rawlings (sitting as a High Court Judge) on 23 October 2020 and 21 December 2020. The PTR was vacated by consent and was dealt with on the papers.

(2) The parties

10. The Applicants, as Administrators, are neutral on the outcome of the Applications.

10.1. However, it is necessary for someone to represent the interests of the Model 1 Investors, and the Applicants are the obvious persons to do so. It was not considered cost-effective or proportionate to appoint a separate representative respondent on behalf of the Model 1 Investors. The Applicants have made it clear that they will adopt this approach at all three of the CMCs.

10.2. The personal views of the Applicants are not relevant to the Applications, since the Applications involve a contest between two groups of Investors.

10.3. However, in accordance with their duties as officers of the court, the Applicants have only sought to advance arguments on behalf of the Model 1 Investors which they consider to have a real prospect of success.

11. The First Respondent ("**Ms Taylor**") has been appointed as a representative respondent on behalf of the Model 2 Investors and Transferees[2] in order to ensure that the Court hears adversarial argument.

12. The Second Respondents are partners in the firm of Grant Thornton (the "**Conflict Administrators**"). They were appointed alongside the Applicants as joint administrators of SSSHL (but not Lendy) for the purpose of helping to address certain conflicts that might arise between SSSHL and Lendy. The Conflict Administrators have decided not to take an

[2] See paragraph 2 of the order of HHJ Simon Barker QC (sitting as a High Court Judge) dated 23 September 2020 **A/11/154**.

active role in the Applications, because Ms Taylor is already acting as a representative respondent for the Model 2 Investors and Transferees, such that the active involvement of the Conflict Administrators would result in duplication of costs: see the letter from the Conflict Administrators dated 17 September 2020[3].

13. As to other potential parties:

13.1. The sole shareholder of Lendy is Lendy Group Limited ("**LGL**"), which is owned and controlled by Liam Brooke. Mr Brooke was one of the two directors of Lendy and SSSHL. The other director is Tim Gordon. Mr Brooke and Mr Gordon are also the sole shareholders of SSSHL. LGL applied to be joined to the Applications as an additional respondent, but the joinder application was dismissed[4].

13.2. The Applications were also notified to the general body of Lendy's unsecured creditors for the purpose of determining whether they wished to participate in the determination of one issue (Issue 3) that might affect their interests. In the event, no one sought to participate, and the Court has directed Ms Taylor and the Applicants to run the relevant arguments[5].

13.3. The Financial Conduct Authority (the "**FCA**") instructed Leading Counsel to attend the first CMC on 23 September 2020 and considered the possibility of being actively involved in the Applications. However, by a letter dated 23 November 2020[6], the FCA stated that it did not wish to participate in the current hearing of the Applications (essentially because Ms Taylor and the Applicants are able to run all of the relevant arguments) but has reserved its rights to appear at an subsequent hearing should one be required, and this was recently confirmed by an email dated 18 May 2021[7].

[3] **A/5/66-68**
[4] See paragraph 2 of the order of HHJ Rawlings (sitting as a High Court Judge) dated 21 December 2020 **A/13/170**
[5] See the final recital of the order of HHJ Rawlings (sitting as a High Court Judge) dated 23 October 2020 **A/12/165** and paragraph 5 of the order of HHJ Rawlings (sitting as a High Court Judge) dated 21 December 2020 **A/13/170**.
[6] **D/31/77-78**.
[7] **D/48/141**.

(3) The issues

14. The issues raised by the Applications have been refined and amended during the proceedings. The final agreed list of issues as approved by the Court can be found at **A/2/6-10** (the "**Final List of Issues**").

15. The Court will be aware that various issues have been deleted from the Final List of Issues. The deleted issues included (i) certain issues relating to the expenses of the Companies' administrations (which may need to be determined in due course but will depend on the outcome of the present trial); (ii) certain issues which are agreed and where directions are not required; and (iii) one issue which is too fact-sensitive to be determined at this trial and may fall to be determined in due course: see the letter from Shoosmiths to the Court dated 27 May 2021[8].

16. In addition, the parties have agreed that the issues set out in the Final List of Issues will be addressed in the following sequence at trial:

    16.1. Issues 1 to 4;

    16.2. Issue 8;

    16.3. Issues 5 to 7;

    16.4. Issue 9; and

    16.5. Issue 10.

17. The same sequencing is adopted in this skeleton argument. This is designed to ensure that the issues are addressed in a sequence which is most suited to the parties' arguments (having regard to the parties' position papers and correspondence). For example, the answers to Issues 5 to 7 may depend on the answer to Issue 8, which means that it makes sense to deal with Issue 8 first.

(4) Cross-examination

18. The parties have adopted a detailed Statement of Agreed Facts that sets out most of the relevant facts upon which the Court will be requested to proceed.

19. The Applicants will conduct a limited cross-examination of Ms Taylor's witnesses (namely Mr Powell and Mr Melton).

20. Ms Taylor does not intend to cross-examine the Applicants' witness (namely Mr Webb). Accordingly, it is proposed that his witness statements will stand as his evidence in chief.

[8] **D/53/155-156**.

B KEY FEATURES OF THE MODEL 1 STRUCTURE

21. The first group of issues relate to the Model 1 Investors. As relevant background, the key features of the Model 1 structure are set out below.

22. As set out above, Model 1 was used by Lendy for loans originated between March 2014 and October 2015. In October 2015, Model 1 was replaced by Model 2.

23. The contractual documentation for each Model 1 Loan is slightly different, but each set of documentation shares a number of common features. It has been agreed between the parties that the issues in these proceedings will be determined by reference to the contractual documentation in Trial Bundle C. The Model 1 documents in Trial Bundle C comprise:

    23.1. a loan agreement between Lendy and the Borrower (the "**Model 1 Loan Agreement**"[9]);

    a debenture granted by the Borrower in favour of Lendy (the "**Model 1 Debenture**"[10]);

    23.2. a personal guarantee granted to Lendy by a director of the Borrower (the "**Model 1 Guarantee**" [11]); and

    23.3. the terms and conditions between Lendy and the Model 1 Investors (the "**Model 1 Terms**"[12]).

24. For present purposes, the critical contractual provisions are set out in the Model 1 Terms. These are the terms that governed the relationship between Lendy and the Model 1 Investors. (By contrast, the Model 1 Loan Agreement is a contract between Lendy and the Borrowers to which the Model 1 Investors were not parties.)

25. The Model 1 Terms provide as follows:

    25.1. Clause 4.5 states: "*By funding a loan, you are agreeing to enter into a Loan Agreement with Lendy. Once you have Invested in a loan, the funds cannot be removed for the duration of that loan.*"[13]

    25.2. Clause 4.6 states: "*The loan will remain in place until the borrower repays the loan, upon which time the funds plus interest earned will be made available to you for withdrawal or reinvestment.*"[14]

[9] **C/1/1-15**.
[10] **C/2/16-57**
[11] **C/3/58-71**
[12] **C/4/72-84**
[13] **C/4/74**.
[14] **C/4/74**.

26. Accordingly, each Model 1 Investor has made a loan (as lender) to Lendy (as borrower, acting as principal). It follows that each Model 1 Investor has a claim against Lendy. This is common ground between the parties.

27. In turn, Lendy made a back-to-back loan to the relevant Borrower under the relevant Model 1 Loan Agreement. The liabilities owing by the Borrower to Lendy were secured by the Model 1 Debenture. The security was granted to Lendy, and the Model 1 Investors were not parties to the Model 1 Debenture. (SSSHL was not involved in Model 1 and was only introduced as a security trustee for the purposes of Model 2.)

C FIRST GROUP OF ISSUES – ISSUES 1 TO 4

(1) Issues 1 and 2

Issue 1: Do the Model 1 Investors (in their capacity as such) have any claim other than an unsecured provable claim against Lendy?

Issue 2: Do the proceeds of security of a Model 1 Loan form part of Lendy's general estate?

28. It is common ground that:

    28.1. the answer to Issue 1 is "no". The Model 1 Investors only have unsecured provable claims against Lendy.

    28.2. the answer to Issue 2 is "yes". The proceeds of security of a Model 1 Loan form part of Lendy's general estate.

29. Although the answers to Issues 1 and 2 are agreed, the Court is nevertheless asked to give directions on these points. This is because the answers to Issues 1 and 2 will inform the answers to Issue 3: see below.

30. For the reasons set out below, the Court is asked to declare that:

    30.1. the Model 1 Investors only have unsecured provable claims against Lendy; and

    30.2. the proceeds of security of a Model 1 Loan form part of Lendy's general estate.

31. The Applicants have carefully considered whether it would be possible for them to argue that the Model 1 Investors have any other claims, including proprietary claims, against any assets realised by Lendy in connection with the Model 1 Loans. The Applicants have not been able to identify any argument of this type which has a real prospect of success.

32. The Model 1 Terms do not create a trust in favour of the Model 1 Investors and do not create any security interest in favour of the Model 1 Investors. In particular:

32.1. As noted in paragraph 6.1 above, the term "**Model 1 Loan**" refers to a loan made by *Lendy* (as Lender) to the Borrower under a Model 1 Loan Agreement. This is conceptually distinct from the loans made by *the Model 1 Investors* to Lendy under the Model 1 Terms.

32.2. The sample Model 1 Loan in Trial Bundle C is secured by the Model 1 Debenture, which was granted in favour of *Lendy* (as Lender) by the Borrower. The Model 1 Investors are not parties to the Model 1 Debenture and do not have any rights under the Model 1 Debenture. In particular, the proceeds of security received by the Lender (or, which is not relevant to the Applications, a Receiver or a Delegate) must be applied in accordance with the "waterfall" set out in Clause 20.1 of the Debenture. No reference is made in this clause to the sums owing by Lendy to the Model 1 Investors.

33. It is conceptually possible that Lendy could have created a charge over its security interest under the Model 1 Debenture to secure the sums that Lendy owed to the Model 1 Investors. (In technical terms, such a charge would more properly be regarded as having constituted a "sub-mortgage".) However:

33.1. The Model 1 Terms do not purport to create any charge or sub-mortgage in favour of the Model 1 Investors.

33.2. In any event, any charge or sub-mortgage purportedly created by Lendy in favour of the Model 1 Investors would be void for non-registration under section 859H of the Companies Act 2006.

33.3. A charge or sub-mortgage would also have been void under section 53(1)(a) of the Law of Property Act 1925, given that the key secured assets consist of real property and the Model 1 Terms were not signed by Lendy or any agent thereof[15].

34. It is also conceptually possible that Lendy could have declared a trust over its own mortgage of the Borrower's property in favour of the Model 1 Investors. However:

34.1. The Model 1 Terms do not purport to create a trust over Lendy's own mortgage of the Borrower's property in favour of the Model 1 Investors.

[15] Section 53(1)(a) provides that "*no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law*". A legal charge is an interest in land (see section 1(2)(c)) and an equitable charge is also an interest in land (see section 205(1)(x)).

34.2. In any event, any purported trust would have been unenforceable under section 53(1)(b) of the Law of Property Act 1925, given that the key secured assets consist of real property and the Model 1 Terms were not signed by Lendy[16].

34.3. Moreover, any purported "trust" would properly be characterised as a charge or sub-mortgage (since any such so-called "trust" could only be designed to secure the payment of sums owing by Lendy to the Model 1 Investors and would necessarily preserve the Borrower's equity of redemption[17]). For the reasons given above, a charge or sub-mortgage would be void for non-registration under section 859H of the Companies Act 2006.

35. It should be noted that Clause 5.2 of the Model 1 Terms[18] identifies a procedure for selling the secured assets at auction. Following a sale at auction, the net proceeds "*shall be used to settle amounts due*" (Clause 5.2.4) to Lendy and the Model 1 Investors in the following order:

> "*1. principal amount of loan which was funded by, and is repayable to the Investors (allocated in proportion to the loan amounts funded);*
> *2. fees due to Lendy in accordance with Lendy Ltd's Terms and Conditions;*
> *3. interest due to the Investors (allocated in proportion to the loan amounts funded); and*
> *4. the balance (if any) will be returned to the Borrower to their Nominated Account*."

36. The Applicants have considered whether it is possible to construct an appropriate argument based on Clause 5.2 that the Model 1 Investors have a proprietary interest in the secured assets. They have concluded that no such argument can properly be constructed. This is for the following reasons:

36.1. No assets were in fact sold at auction under Clause 5.2 of the Model 1 Terms. As a result, Clause 5.2 is not relevant.[19]

36.2. In any event, Clause 5.2 does not purport to give the Model 1 Investors a proprietary interest in the secured assets. It imposes a personal obligation on Lendy to make payments in a particular sequence.

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[16] Section 53(1)(b) provides that "*a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust*". Lendy's mortgage over the Borrower's property is an interest in land (see the previous footnote). Accordingly, any trust over Lendy's mortgage would need to be signed in writing by Lendy.

[17] These are the *indicia* of a security interest: see the Compaq Computer Ltd v Abercorn Group Ltd [1991] BCC 484 per Mummery J at 495.

[18] **C/4/74**

[19] Nor has Lendy used the "*reserve price*" mechanism under Clause 5.3 of the Model 1 Terms.

36.3. Even if (contrary to the above) Clause 5.2 could be construed as giving the Model 1 Investors a proprietary interest in the proceeds of sale of the secured assets, this proprietary interest would properly fall to be characterised as a charge or sub-mortgage (since it could only be designed to secure the payment of sums owing by Lendy to the Model 1 Investors, and it expressly preserves the Borrower's equity of redemption[20]). For the reasons set out above, such a charge or sub-mortgage would be void for non-registration under section 859H of the Companies Act 2006 and void for non-compliance with the formalities under section 53(1)(a) of the Law of Property Act 1925: see paragraphs 33 to 34 above.

37. Accordingly, the Applicants have not been able to identify any proper basis for arguing that the Model 1 Investors have a proprietary interest in any assets realised by Lendy in connection with the Model 1 Loans.

(b) Issue 3

Issue 3: As regards its contractual liability to Model 1 Investors pursuant to the Model 1 Terms, is Lendy liable to each Model 1 Investor only to the extent that Lendy is repaid by a borrower under, or makes recoveries in respect of, the relevant Model 1 Loan which that Model 1 Investor has funded?

38. Ms Taylor argues that the answer to Issue 3 is "yes" (subject to the exceptions in Clauses 5.2.5 and 5.3). She contends that Model 1 structure involves a "limited recourse" arrangement (whereby Lendy's liability is contractually limited to the amount that it recovers on the relevant Model 1 Loan).

39. The position of the Applicants is that the answer to Issue 3 is "no". More particularly:

39.1. The Model 1 Investors are entitled to lodge a proof of debt in Lendy's administration for the entire amount that they advanced to Lendy.

39.2. The quantum of the proof is not "capped" by reference to the amount recovered by Lendy in respect of the relevant Model 1 Loan.

39.3. This result follows from the fact that even if Ms Taylor is right that the Model 1 structure involves a limited recourse arrangement outside of insolvency, it does not follow that the proofs of debt lodged by the Model 1 Investors in an insolvency process (Lendy's administration) are capped in the same way. In the context of insolvency

[20] See Compaq Computer Ltd v Abercorn Group Ltd [1991] BCC 484 per Mummery J at 495.

proceedings, a creditor under a limited recourse loan is entitled to prove for the full amount advanced.

40. The interaction between limited recourse arrangements and insolvency was dealt with by David Richards J (as he then was) in Re ARM Asset Backed Securities SA [2014] BCC 252:

40.1. A winding-up petition was presented against the issuer of a series of bonds.

40.2. The bonds included a limited recourse provision which capped the issuer's liability at the amount recovered from certain sources.

40.3. Despite the limited recourse structure, David Richards J concluded that the company was insolvent. Of particular relevance to Issue 3, the Judge also stated that the bondholders would be entitled to lodge proofs of debt for the entire face value of their bonds. At [28]-[33], he explained:

"*… although it is clear that there are insufficient funds to service in full the bonds issued by the company, and it is likely that there will be insufficient funds to repay the bonds in full, the terms of the bonds provide for only a limited recourse by bond holders. That is to say that they are entitled to recover sums due to them only to the extent that the company has available to it funds derived from the policies purchased in the United States and possibly other funds raised from the issue of bonds.*

The bonds also provide, consistently with that, that the bond holders cannot take steps to attach assets of the company and cannot themselves apply for a winding-up order of the company or other insolvency related orders.

There raises the question as to whether a company is insolvent. Although it has insufficient funds to meet all its liabilities at their face value, its ultimate liability will be restricted to the funds available to it.

As a matter of ordinary language, I would take the view that if a company has liabilities of a certain amount on bonds or other obligations which exceed the assets available to it to meet those obligations, the company is insolvent, even though the rights of the creditors to recover payment will be, as a matter of legal right as well as a practical reality, restricted to the available assets, and even though, as the bonds in this case provide, the obligations will be extinguished after the distribution of available funds.

It seems to me it can properly be said in relation to this company that it is unable to pay its debts. A useful way of testing this is to consider the amounts for which bond holders would prove in a liquidation of the company. It seems to me clear that they would prove for the face value of their bonds and the interest payable on those bonds.

I therefore conclude that the company can properly be said to be unable to pay its debts, both on a cash-flow basis and on a balance-sheet basis." (emphasis added)

41. The reasoning of David Richards J is correct. If unsecured creditors within a limited recourse lending structure were (as Ms Taylor seeks to contend) unable to prove for the full

amount of their debt, the result would be unfair because the claim of those creditors would be discounted twice over. This can be illustrated by the present case:

41.1. The Model 1 Investors have unsecured claims against Lendy. They do not have any proprietary interest in the security held by Lendy for a Model 1 Loan. It follows that the proceeds realised by Lendy from security held in connection with a Model 1 Loan form part of Lendy's general estate, such that the Model 1 Investors will share with all Lendy's other unsecured creditors in a *pari passu* distribution of those proceeds: see Issues 1 and 2 above.

41.2. In those circumstances, it would be wrong if the Model 1 Investors were only entitled to lodge a proof of debt for a limited amount (i.e. limited to the sum recovered by Lendy in respect of the Model 1 Loan). The Model 1 Investors would then face a "double detriment" in that they would be forced to compete with other unsecured creditors for the recoveries in respect of the relevant Model 1 Loan, and the quantum of their provable claims would also be limited to the value of those recoveries. They would therefore be placed in a worse position than all other unsecured creditors and would be discounted twice in relation to the same debt.

41.3. This is no doubt why David Richards J concluded that, even if a creditor is subject to a limited recourse clause outside insolvency, the creditor is nevertheless entitled to lodge a proof of debt for the entire face value of the claim in the debtor's insolvency proceedings.

42. The fallacy that underlies Ms Taylor's argument is therefore the assumption that a limited recourse structure operates in the same way both outside of insolvency and within insolvency. It may be that, outside the context of insolvency, the Model 1 Investors would not be able to sue Lendy for a shortfall on a Model 1 Loan following the enforcement of security: see below. However, the position is different in insolvency proceedings because they involve a rateable distribution of the debtor's assets (i.e. the creditor is already limited in its recovery by virtue of the limited extent of the pot). The distribution regime would produce unfair results if the claims of some creditors were capped by reference to the value of the assets realised. All creditors must be allowed to compete on an equal footing, and this means that they must be able to lodge claims for the full amount of the debt. More particularly:

42.1. A rateable distribution requires a numerator and a denominator.

42.2. The numerator represents the total value of the estate; the denominator represents the total claims against the estate. In other words, the total value of the estate is divided by the total value of the claims.

42.3. When calculating the denominator, claims should not be capped by reference to the value of assets which count towards the numerator.

42.4. This would be contrary to the purpose of a limited recourse structure. A limited recourse structure is designed to ensure that, outside of an insolvency, the creditor will recover what the debtor recovers from a particular source. In an insolvency, by contrast, the creditor cannot recover what the debtor recovers from a particular source, since the debtor's assets are distributed rateably to other competing creditors. In that context, the rationale for imposing a cap on the proof disappears. By capping the proof, the relevant creditor would end up with a rateable distribution that is far less valuable than the assets to which the creditor would have had recourse outside of insolvency proceedings.

43. It is unnecessary for the Court to determine whether, outside of an insolvency, the Model 1 Investors would have been able to sue Lendy for the shortfall on a Model 1 Loan following the enforcement of security, or whether there was some form of contractual limited recourse structure. Whatever the answer to that question, it does not affect the quantum of the proofs that can be lodged by the Model 1 Investors in Lendy's administration.

44. It is noted, however, that Lendy itself represented to the Investors that they would have been able to sue Lendy for the shortfall on a Model 1 Loan following the enforcement of security. This was included in the explanation of the reasons for the change from the Model 1 structure to the Model 2 structure [**E/179/885**], which stated that under Model 1 "*Lendy Ltd was responsible for covering all repayments and shortfalls as it was both the borrower and the lender*" and that under Model 2 "*Lendy Ltd no longer have any direct responsibility for covering any shortfalls*". This suggests that no limited recourse structure was in fact intended, even outside the context of insolvency.

45. Ms Taylor advances a number of points in her position paper. Taking them in turn:

45.1. Ms Taylor contends that "*the whole point of the Lendy platform was to enable Model 1 Investors to match their funds to specific loans (see generally Webb 2 §110-§126), and it was to those loans, and the relevant security, and not Lendy, that they*

looked for repayment"[21]. However, Ms Taylor accepts that the Model 1 Investors did not have any proprietary interest in the security held by Lendy. As a result, even if the Model 1 Investors viewed the security held by Lendy as the most likely source from which they would be repaid, they did not in fact have exclusive recourse to that security in the event of Lendy's insolvency (in which the proceeds of the security would be available to Lendy's unsecured creditors as a whole). This undermines such a rationale for capping the value of any Model 1 proofs in Lendy's administration.

45.2. Ms Taylor relies on Clause 4.6 of the Model 1 Terms, which provides for an Investor's loan to Lendy to "*remain in place until the borrower repays the loan*"[22]. However, these words cannot bear the weight that Ms Taylor seeks to place on them. Clause 4.6 does not address what would happen where the security produces a shortfall on the Model 1 Loan. Moreover, Clause 4.6 needs to be viewed in context. Its true purpose is to inform Investors that the funds invested will be locked up for the duration of the loan. This can be seen by looking at Clauses 4.5 and 4.6 in context:

> "*5. By funding a loan, you are agreeing to enter into a Loan Agreement with Lendy. Once you have Invested in a loan, the funds cannot be removed for the duration of that loan.*
>
> *6. The loan will remain in place until the borrower repays the loan, upon which time the funds plus interest earned will be made available to you for withdrawal or reinvestment.*"

In any event, even if Clause 4.6 creates a limited recourse structure, it does not impose any cap on Model 1 claims in Lendy's administration (for the reasons explained above).

45.3. Ms Taylor rightly points to certain provisions which support some form of limited recourse structure. These provisions include Clause 5.2.5 ("*In the event that the asset turns out to be stolen or fake, Lendy will reimburse all invested funds to investors*"[23]) and Clause 5.3 ("*If the Asset is not sold at auction, Lendy will settle the Borrower's loan, at the reserve price*"[24]). However, these provisions address the limited recourse nature of the structure, they do not provide any support for the proposition that Model 1 proofs must be capped in Lendy's administration.

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[21] See paragraph 5.1 of Ms Taylor's position paper **A/8/136**.
[22] See paragraph 6 of Ms Taylor's position paper **A/8/136**.
[23] **C/4/75**.
[24] **C/4/75**.

Ms Taylor relies on the fact that Lendy created a fund to provide compensation (at Lendy's sole discretion) for Model 1 Investors who suffered losses on their loans (the "**Lendy Provision Fund**"). However, the Lendy Provision Fund was essentially intended to provide a commercial source from which funds could be released, at the discretion of Lendy, and from which any shortfall could be repaid (without granting a formal security interest to Investors) and is neutral between a limited recourse structure and a full recourse structure. Further:

45.3.1. The Lendy Provision Fund was only created in January 2015. That being so, as Ms Taylor acknowledges[25], the existence of the Lendy Provision Fund is not relevant to construing the Model 1 Terms in relation to persons who had already invested prior to January 2015.

45.3.2. In addition (and more importantly), the Lendy Provision Fund does not provide any support for the proposition that Model 1 proofs must be capped in Lendy's administration. As explained above, the latter issue is a separate issue from the question whether Lendy benefited from a contractual limited recourse structure *outside* of insolvency proceedings.

46. The Court is therefore requested to direct as follows:

"As regards its contractual liability to Model 1 Investors pursuant to the Model 1 Terms, Lendy is *not* liable to each Model 1 Investor only to the extent that Lendy is repaid by a borrower under, or makes recoveries in respect of, the relevant Model 1 Loan which that Model 1 Investor has funded."

(c) Issue 4

Issue 4: If the answer to the question in issue 3 is 'yes', should the Model 1 Investors' contractual claims be valued in an amount equal to the gross proceeds received by Lendy for the relevant Model 1 Loan or the net proceeds of that Model 1 Loan (taking into account the costs of realisation)?

47. If the Administrators are right on Issue 3 (and the answer to that issue is "no"), this issue does not arise.

48. If the Administrators are not right on Issue 3 (and the answer to that issue is "yes"), the following points are noted:

[25] See paragraph 8 of Ms Taylor's position paper. **A/8/136-137**

48.1. Outside of insolvency proceedings, Lendy was entitled to deduct a 5% administration fee from the proceeds of an asset sold at auction: see Clause 5.2.4 of the Model 1 Terms[26]. No assets have been sold at auction pursuant to Clause 5.2, Ms Taylor correctly asserts that Lendy was not entitled to make any other deductions from the proceeds of the security[27].

48.2. Within insolvency proceedings, the Applicants would not be entitled to deduct any costs from the proofs of debt lodged by Model 1 Investors. Under the statutory scheme in administration, creditors' proofs fall to be admitted for the full value of the relevant claim, and the costs of the administration are paid out of the estate in priority to all such provable claims (and not deducted from them separately).

48.3. As a result, it follows that if any direction is required on this issue, it should be that the Model 1 Investors' contractual claims should be valued in an amount equal to the gross proceeds received by Lendy for the relevant Model 1 Loan.

C The Model 2 Structure

(1) Key Features Of The Model 2 Structure

49. The remaining issues in the Applications relate to the Model 2 Investors. Before turning to consider these issues, it is necessary to explain the key features of the Model 2 structure.

50. Model 2 was used by Lendy for loans originated in October 2015 onwards. Model 2 was introduced to replace Model 1.

51. The contractual documentation for each Model 2 Loan is slightly different, but each set of documentation shares a number of common features. It has been agreed between the parties that the issues in these proceedings will be determined by reference to the contractual documentation in Trial Bundle C. The Model 2 documents in Trial Bundle C comprise:

51.1. a loan agreement (the "**Model 2 Loan**"[28]) and an accompanying term sheet specifying the commercial terms of the loan (the "**Term Sheet**"[29]);

51.2. the terms and conditions between Lendy and the Borrower (the "**Borrower Conditions**"[30]);

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[26] **C/4/75**
[27] See paragraph 9 of Ms Taylor's position paper **A/8/137**
[28] There are in fact two Loan Agreements, one for individuals **C/8/123-136** and one for companies **C/9/137-149**. Both are materially identical. For convenience, this skeleton argument refers to the Loan Agreement for companies.
[29] **C/6/109-111**.
[30] **C/7/112-122**.

51.3. a suite of security documents granted by the Borrower in favour of SSSHL as security trustee, including a debenture (the "**Model 2 Debenture**"[31]) and two forms of legal charge[32];

51.4. a personal guarantee granted by a shareholder of the Borrower or some other person connected with the Borrower such as a director or affiliate (the "**Model 2 Guarantee**"[33]); and

51.5. the terms and conditions between Lendy and the Model 2 Investors (the "**Model 2 Terms**"). There were many different versions of the Model 2 Terms, but the differences between them are minor. For the purposes of these proceedings, the parties have agreed[34] to focus on the Model 2 Terms that were in force from 1 February 2016 until 4 March 2018 (the "**Original Model 2 Terms**"[35]) and the Model 2 Terms that were in force from 4 March 2018 onwards (the "**Amended Model 2 Terms**"[36]).

52. For present purposes, the key documents are the Model 2 Terms (both Original and Amended), the Model 2 Loan and the Model 2 Debenture.

(2) Lendy's Role As Agent

53. The major difference between Model 1 and Model 2 is that Lendy acted as *agent* on behalf of the Model 2 Investors (rather than as principal). Model 2 Investors made loans to the relevant Borrower directly and Lendy signed the loan documents as agent of the Investors. The security was held by SSSHL as trustee for, *inter alios*, the Model 2 Investors: see Issue 10 below.

54. Lendy's agency is illustrated by a number of contractual provisions:

54.1. The Model 2 Loan is expressed to be made between the Borrower and Lendy "*as agent for the Lenders*"[37]. Lendy is referred to as "*the Agent*" throughout the Loan Agreement.

54.2. Recital (C) of the Model 2 Loan states: "*The Agent is entering into this agreement as the agent of the Lenders*"[38].

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[31] **C/10/150-190**.
[32] **C/12/205-234** and **C/13/235-263**.
[33] **C/11/191-204**.
[34] See paragraph 3.3.1 of the SAF **A/4/17**
[35] **C/14/264-285**.
[36] **C/15/286-306**.
[37] **C/9/139**.
[38] **C/9/139**.

54.3. Clause 1.2 of the Borrower Conditions provides that "*Saving Stream is authorised by the lenders to enter into the Loan Contract as agent for the lenders*"[39].

54.4. More generally, the provisions of the Model 2 Loan are intended on their face to be binding on the Model 2 Investors. The Model 2 Investors did not execute the Model 2 Loan themselves, but rather it was intended that the Model 2 Investors would be parties to the Model 2 Loan by virtue of Lendy's execution of it on their behalf.

55. Importantly, Lendy was given express contractual authority by the Model 2 Investors to enter into the Loan Agreement on their behalf. This is clear from the Model 2 Terms, which include the following provisions (which are materially the same in the Original and Amended Model 2 Terms):

55.1. Clause 8.1 states: "*when you lend money on the platform you ... appoint Saving Stream to act as agent on your behalf in relation to the loan and instruct Saving Stream to sign the Loan Contract as agent on your behalf*"[40].

55.2. Clause 7.8 states that "*a Loan Contract is between the lender and the borrower. Saving Stream and/or Saving Stream Security Holding has no liability in relation to the Loan Contract*"[41].

56. The "Lenders" under the Model 2 Loan are not Lendy, but are the Model 2 Investors. They are not identified by name, but are instead referred to by description ("*the persons who have agreed with the Agent from time to time to provide all or part of the Loan to the Borrower and whose names and addresses are maintained by the Agent*"). However, this does not prevent the Model 2 Investors from being parties to the Model 2 Loan. There is no legal requirement for a principal to be identified by name (or indeed at all). See Bowstead & Reynolds on Agency 22nd edition) at Article 71:

> "*A disclosed principal, whether identified or unidentified, may sue or be sued on any contract made on his behalf by his agent acting within the scope of his actual authority or whose acts are validly ratified*."[42]

57. Accordingly, the Model 2 Investors and Model 2 Transferees (who stand in the shoes of the Model 2 Investors) are bound by the terms of the Model 2 Loan as parties thereto. This

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[39] **C/7/113**.

[40] This is a quotation from the Original Model 2 Terms **C/14/271**. The same provision in the Amended Model 2 Terms is materially identical **C/15/291**.

[41] This is a quotation from the Original Model 2 Terms **C/14/271**. The same provision in the Amended Model 2 Terms is materially identical **C/15/291**.

[42] As this formulation demonstrates, there is a distinction between an undisclosed principal and an unidentified principal. (See further Bowstead at paragraph 8-105.) In the present case, the Model 2 Investors are disclosed but unidentified.

conclusion reflects the express terms of the Model 2 Loan, which creates a contractual relationship between the Model 2 Investors and the Borrowers. For example, the obligation to lend under Clause 2 of the Model 2 Loan is described as an obligation of the Model 2 Investors (and not of Lendy)[43]:

"*The Lenders[44] agrees [sic] to lend to the Borrower the aggregate amount of the Loan on the terms of the Loan Agreement and in the proportions that they have agreed with the Agent.*"

(3) Lendy's role as principal

58. Lendy's role in relation to the Model 2 Loans was not merely an agent of the Model 2 Investors. Some provisions of the Model 2 Loan treat Lendy as a principal acting on its own behalf. For example:

58.1. The representations and warranties in Clause 9[45] are given "*to the Lenders and the Agent*", as are the undertakings in Clause 10[46]. This suggests that the Borrower owes obligations both to the Model 2 Investors and also to Lendy in its own right.

58.2. Clause 11[47] states that "*the obligations of the Borrower to the Lenders and the Agent under this agreement shall be secured by the Security Documents*". Again, the language of this clause suggests that the Borrower owes obligations to the Model 2 Investors and to Lendy in its own right.

58.3. As to the payment of interest:

58.3.1. Clause 6 of the Model 2 Loan requires the Borrower to pay interest at the Interest Rate[48], which is defined by reference to the Term Sheet.[49]

58.3.2. The Term Sheet distinguishes between the "*Interest Rate payable to Lenders*" and the "*Interest Rate payable to Saving Stream*"[50]. This shows that the Borrower has a bifurcated obligation to pay interest. Part of the interest is payable to the Model 2 Investors, whereas the other part is payable to Lendy for its own account.

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[43] **C/9/141**.
[44] As defined in the model 2 loan agreement at **C/9/139**
[45] **C/9/142-143**.
[46] **C/9/143**.
[47] **C/9/144**.
[48] As defined in the model 2 loan agreement at **C/9/139**
[49] The Loan Agreement states that interest is paid on drawdown (by being deducted from what would otherwise be advanced): see clause 6.2 **C/9/141**.
[50] **C/6/109**.

58.3.3. So far as default interest is concerned, Clause 6.3 of the Model 2 Loan provides as follows[51]:

"*In addition to the interest payable under clause 6.1, if the Borrower fails to make any payment due under this agreement on the due date for payment, interest on the unpaid amount shall accrue daily, from the date of non-payment to the date of actual payment (both before and after judgment), at 3% per month above the aggregate Interest Rate*."

(The above provision does not identify who is entitled to receive default interest. This is the subject of Issue 5 below.)

58.3.4. Fees were also payable to Lendy under Clause 4.2 of the Borrower Conditions[52]:

"*If you accept a loan(s), for each loan Saving Stream will charge you:*

4.2.1 an arrangement fee of an amount notified to you in writing by Saving Stream, on the date of drawdown of the loan as set out in the Contract Details ("Arrangement Fee");

4.2.2 an exit fee of an amount notified to you in writing by Saving Stream, on the date of repayment of the loan as set out in the Contract Details ("Exit Fee")."

59. Accordingly, there is a contractual relationship between the relevant Borrower and Lendy as principal (in addition to the contractual relationship between the Borrower and the Model 2 Investors in relation to which Lendy acted as agent). There is no difficulty as a matter of law for Lendy having acted as agent (in some respects) and as principal (in other respects). It is a matter of construction to determine whether a particular clause imposes an obligation or confers a benefit on the agent, the principal, or both of them. See Bowstead at Article 99:

"*The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a deed, bill of exchange, promissory note or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction of which is a matter of law. The party concerned may act as agent in some respects and as principal (including as trustee) in others*." (emphasis added)

[51] **C/9/141**.
[52] **C/7/116**.

60. The concept of an agent acting in a dual capacity is common in finance contracts. By way of example, in British Energy Power and Trading Ltd v Credit Suisse [2008] EWCA Civ 53, the Court of Appeal recognised that a single bank (Barclays) could act both as agent and as principal in a syndicated loan transaction. The documentation included a Share Option Agreement, which referred to Barclays "*as agent and trustee for the Finance Parties*": per Sir Anthony Clarke MR at [34]-[36].

D SECOND GROUP OF ISSUES

(1) ISSUE 8

Issue 8: Has Lendy breached any of its fiduciary duties regarding its charging fees and/or interest for its own account in connection with the Model 2 Loans? If so:

(a) what is the appropriate form of relief for Model 2 Investors and/or the Model 2 Transferees;

(b) is Lendy entitled to an equitable allowance to cover its costs as agent; and

(c) if the answer to the question in issue 8(b) is 'yes', how should that allowance be calculated in principle?

61. Issue 8 is the central issue raised in relation to Model 2. It relates to pre-administration interest and fees, it being agreed that no issue arises at this hearing in relation to the post-administration Service Charge.

62. Ms Taylor contends that Lendy acted in breach of fiduciary duty (and in particular a duty not to profit from its position - the **No Profit Duty**) by charging interest and fees for its own account in connection with the Model 2 Loans and by failing to disclose them (in breach of the **Disclosure Duty**). On this basis, Ms Taylor therefore contends that the Model 2 Investors and Model 2 Transferees have a proprietary claim to any fees or interest recovered by Lendy for its own account: see Issue 9 below. If Ms Taylor is correct, a significant proportion of assets will be removed from Lendy's general estate (which would otherwise be available to pay dividends to unsecured creditors, including Model 1 Investors).

63. For the reasons set out below, it is submitted that Lendy did not owe such fiduciary duties, or that if it did, it did not act in breach of them. More particularly:

    63.1. Lendy did not have the fiduciary duties relied upon by Ms Taylor in her position paper. In particular, Lendy did not owe the No Profit duty to the Model 2 Investors.

63.2. Even if (contrary to the Applicants' primary case), Lendy did owe the relevant fiduciary duties to the Model 2 Investors, the Model 2 Investors gave their informed consent to the profit made by Lendy.

63.3. Even if (contrary to the Applicants' secondary case), the Model 2 Investors did not give their informed consent to the profit made by Lendy, then Lendy is as a matter of principle entitled to an equitable allowance in respect of the services that it provided to Model 2 Investors and Transferees. The value of that equitable allowance should (if relevant) be determined by the Court at a further hearing.

(A) Fiduciary Duties: Legal principles

64. Ms Taylor contends that "*Lendy was an agent and a fiduciary, and as such, subject to the No Profit Duty*"[53]. The "**No Profit Duty**" allegedly owed by Lendy to the Model 2 Investors is defined by Ms Taylor as "*a duty not to profit from its position*"[54].

65. It is true that (as set out above) Lendy was an agent on behalf of the Model 2 Investors for certain purposes, including the entry into the Model 2 Loan. However, the nature and extent of the fiduciary duties owed by Lendy to the Model 2 Investors depends on a detailed analysis of the role that Lendy agreed to perform for the Model 2 Investors. The No Profit Duty cannot be inferred solely from the fact that Lendy was an agent for certain purposes.

66. In Boardman v Phipps [1967] 2 AC 46 at 127, Lord Upjohn summarised the legal principles as follows:

> "*1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see In Re Coomber).*
>
> *2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him.*
>
> *3. Having defined the scope of those duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.*
>
> *4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty*."

[53] See paragraph 19.1 of Ms Taylor's position paper **A/8/142**
[54] See paragraph 11 of Ms Taylor's position paper **A/8/138**

67. To similar effect, Lord Upjohn stated earlier in the same judgment at 123:

> "*Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case*."

68. The fact-sensitive nature of fiduciary duties has often been noted by the Court. In New Zealand Netherlands Society "oranje" Inc v Kuys [1973] 1 WLR 1126 at 1129-1130, Lord Wilberforce said:

> "*The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: Phipps v. Boardman [1967] 2 A.C. 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship*.
> *... A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at*."

69. In UBS AG v Kommunale Wasserwerke Leipsig GmbH [2017] 2 CLC 584 at [92], Lord Briggs said:

> "*Mr Lord took us to Halton International Inc v Guernroy Ltd [2005] EWHC 1968 (Ch) per Patten J at [138]-[9], and to Tigris International NV v China Southern Airlines Co Ltd [2014] EWCA Civ 1649, per Clarke LJ at [155], in support of his submission that the existence of a fiduciary duty was by no means an essential characteristic of agency. We agree. There are no doubt many forms of non-fiduciary agency, just as there are forms of fiduciary agency in which the agent has no authority to affect the principal's relations with third parties*."

70. In Kelly v Cooper [1993] AC 205 at 213-214, Lord Browne-Wilkinson said:

> "*In the view of the Board the resolution of this case depends upon two fundamental propositions: first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract*.
>
> *... Similar considerations apply to the fiduciary duties of agents. The existence and scope of these duties depends upon the terms on which they are acting*."

71. After citing Lord Wilberforce's judgment in New Zealand Netherlands Society (quoted above), Lord Browne-Wilkinson cited the judgment of Mason J (in the High Court of Australia) in Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 97:

> "*That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction*."

72. On this basis, Lord Browne-Wilkinson concluded that estate agents did not owe many of the usual fiduciary duties, including a duty not to earn a commission from a rival vendor. He stated at 215:

> "*Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency.*
> *Applying those considerations to the present case, their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor*."

73. More recently, in Eze v Conway [2019] EWCA Civ 88 at [38]-[40], Asplin LJ said:

> "*Whether the law of bribery is engaged is dependent upon the nature and extent of the fiduciary duties owed by the recipient of the benefit or promise of a benefit, if any, the nature of the transaction in question and the relevant circumstances. The enquiry is inevitably extremely fact sensitive. This was acknowledged by Lord Upjohn in Boardman v Phipps …*
>
> *It is not helpful, therefore, to consider what might be considered to be the paradigm of any particular type of agent, whether an "introducing agent" or otherwise. It all depends on the nature of the individual's duties and which of those duties is engaged in the precise circumstances under consideration. Although the relationship of principal and agent is a fiduciary one, not every person described as an "agent" is the subject of fiduciary duties and a person described as an agent may owe fiduciary duties*

in relation to some of his activities and not others. See New Zealand Netherlands Society "Oranje" Inc v Kuys & Anr [1973] 1 WLR 1126 (PC) per Lord Wilberforce at 1129H –1130 F.

For example, on some occasions, an agent may merely carry out specific instructions and as a result, in the particular circumstances, may not owe fiduciary duties: see Bowstead and Reynolds on Agency 21st ed at 6-037..."

74. The relevant passage cited by Asplin LJ from Bowstead & Reynolds on Agency (now in its 22nd edition) states as follows, at paragraph 6-037:

"*… the extent of an agent's equitable duties (a phrase that embraces more than the strictly fiduciary duties to avoid conflicts of interest and not to profit) and also common law duties may vary from situation to situation … a person otherwise at arm's length with a claimant with whom the person is proposing to contract may have a limited authority to act for the claimant, for example in filling out the blanks in the document recording the contract. In so doing the person may be required both to adhere to the mandate given and to exercise it in good faith. In many situations the duty may be, by virtue of the circumstances, limited; or restricted or even excluded by contract. "The precise scope of [the obligation] must be moulded according to the nature of the relationship." [Citing Lord Wilberforce in New Zealands Netherlands Society] ...*"

75. Continuing her judgment, at [42] Asplin LJ cited the judgment of Asquith LJ in Reading v The King [1949] 2 KB 233 at 236:

"*In most of these cases [viz. cases in which the servant or agent has realised a secret profit, commission or bribe in the course of his employment] it has been assumed that the plaintiff, in order to succeed, must prove that a 'fiduciary relation' existed between himself and the defendant and that the defendant acted in breach of this* relation. *But the term 'fiduciary relation' in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property … and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise … and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available …*"

76. Asplin LJ noted that Asquith LJ's judgment had been approved by the House of Lords in the same case. (For example, Lord Porter stated at 516 that "*the words 'fiduciary relationship' in this setting are used in a wide and loose sense*".) Finally, Asplin LJ said at [43]:

"*The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential*

conflict between his interest and his duty arose … The requirement that the recipient of the payment or the promise of payment must be someone with a role in the decision-making process in relation to the transaction or someone who is in a position to influence or affect the decision taken by the principal…seems to me to be no more than a means of satisfying the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question and a means of determining the extent of his obligations and fiduciary duties."

(On this basis, Asplin LJ concluded that the No Profit Duty did not apply to an agent whose role was to facilitate a transaction.)

77. To take another example, in Paton v Rosesilver Group Corp [2017] EWCA Civ 158 at [32]-[33], Henderson LJ concluded that a solicitor did not owe fiduciary duties in relation to a sale of a property. This meant that the solicitor did not act in breach of fiduciary duty by acting for both the buyers and sellers. Part of the reason for reaching this conclusion was that the solicitors (Brook Martin) merely performed "*routine conveyancing*" for the appellant (Mr Paton), such that "*any retainer of Brook Martin by Mr Paton in relation to the transaction was of a very limited nature, and gave rise to no real conflict of interest*": see [31] and [33].

(B) Primary case - Lendy did not owe the fiduciary duties relied upon by Ms Taylor

78. In the present case, the scope of Lendy's agency on behalf of the Model 2 Investors was limited. Clause 11 of the Original Model 2 Terms (entitled "*the role of Saving Stream* [namely Lendy]") states as follows[55]:

"*We and Saving Stream Security Holding perform an administrative role in matching borrowers and lenders and in facilitating payments, collection of sums due and onward distribution of funds*."

79. Likewise, Clause 2 of the Original Model 2 Terms[56] includes the following provisions:

"*2.3 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, 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 (together with Saving Stream Security Holding) and to enter into Loan Contracts on behalf of lenders (including Saving Stream Security Holding taking certain actions on behalf of lenders upon a borrower's default or if the borrower becomes, or is likely to become, insolvent as set out in these terms and conditions).*

[55] **C/14/274**.
[56] **C/14/266-268**

2.4 Save as set out in clause 9 of these terms and conditions in connection with any amendments that Saving Stream may make to the Loan Contract in your best interests when acting as agent on your behalf, Saving Stream will not perform any management functions on a lender's behalf; the lender retains complete control and discretion over whether or not to make a loan to a borrower and over all other aspects of its participation in the Saving Stream Website and loans made through it. Nothing Saving Stream does and nothing on the platform is intended to operate or be construed as advice or recommendation by Saving Stream to enter into a particular loan.

2.5 A lender must form its own opinion regarding the creditworthiness of a borrower and undertake its own research, analysis and assessment of each borrower for each loan and, where appropriate, seek its own independent financial and legal advice.

2.6 While Saving Stream believes that the security documents might provide additional comfort as to the likelihood of repayment, Saving Stream accepts no responsibility for the likelihood of a borrower meeting its financial obligations to lenders through the Saving Stream platform in circumstances where such recourse to the assets of the borrower is available.

…

2.11 There are no fees payable to set up a Saving Stream lender account.

…

2.13 Lending money on the platform involves risk to your capital. If you suffer a loss, either by the borrower not repaying the loan or otherwise, you are not entitled to compensation from the Financial Services Compensation Scheme ("FSCS")."

80. The same provisions can be found in the Amended Model 2 Terms[57] which also contained a specific waterfall on enforcement (Clause 13)[58] which made it clear that any "*unpaid fees, costs and expenses of the Agent under the Finance Documents*"[59] were payable as first in the waterfall.

81. The Loan Agreements with the Borrower also reflected this limited role in the Borrower Terms and Conditions. Clause 4 (which addressed the fees charged to the Borrower by Lendy) provided at Clause 4.3 "*The above fees cover our role in providing services in relation to the introduction between you and the lenders*"[60] and further provided for Lendy

[57] See Clause 1.2 **C/15/287**, Clauses 2.3 to 2.13 **C/15/287-289** and Clause 11 **C/15/294** of the Amended Model 2 Terms.
[58] **C/15/296-297**.
[59] **C/15/296**
[60] **C/7/117**.

to act as agent for the Lenders when putting in place security (Clause 6.3[61]) and enforcing payment (Clause 7[62]).

82. Importantly, Lendy did not have any duty to "*procure for the [Model 2 Investors] the best terms available*" in respect of interest (to adopt the language of Asquith LJ in Reading v The King). Lendy did not negotiate the interest rate with the Borrowers on behalf of the Model 2 Investors; the interest rate was already fixed by the time that the Model 2 Investors were able to invest. The Website stipulated an interest rate for each of the Model 2 Loans[63], and the Model 2 Investors were responsible for deciding whether they wished to invest.

83. Lendy did not hold the security under Model 2: instead, the security was held by SSSHL. Lendy was, however, one of the "Beneficiaries"[64] under the Model 2 Debenture[65] and the Model 2 Guarantee (alongside the Model 2 Investors), reflecting the fact that Lendy was owed money in its own right. Lendy was also given authority to enforce the Model 2 Guarantee on behalf of the Model 2 Investors (see Clause 4[66]).

84. As stated in Clause 2.4 and Clauses 9.6 to 9.9 of the Original Model 2 Terms[67] and the Amended Model 2 Terms[68], there were only two relevant respects in which Lendy undertook a duty to act in the best interests of the Model 2 Investors. This duty arose where (i) Lendy decided to amend the Model 2 Loan after it had already been signed or (ii) Lendy negotiated or settled any dispute relating to the Model 2 Loan. (The ability to amend a loan agreement was also reflected in the terms of the Model 2 Loan, Clause 5.4[69].) Save in that limited respect, the terms quoted above make it clear that Lendy did not undertake any duties of a fiduciary nature to the Model 2 Investors.

85. It is therefore correct that Lendy was an agent of the Model 2 Investors, but that agency was only for limited purposes. Lendy's main role was to sign the Loan Agreement on behalf of the Model 2 Investors. This was essentially an administrative function. Indeed, the word "*administrative*" is repeatedly used to describe Lendy's role in the provisions quoted above.

86. It is also notable that Clause 24.8[70] of the Original Model 2 Terms provides as follows:

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[61] **C/7/118**
[62] **C/7/118**
[63] See the screenshots from the Website at **E/201/986-990- and E/202/991-997**.
[64] **C/11/193**
[65] **C/13/236**
[66] **C/11/197**
[67] **C/14/266 (Clause 2.4) and C/14/272-273 (Clauses 9.6 to 9.9)**.
[68] **C/15/287-288 (Clause 2.4) and C/15292-293 (Clauses 9.6 to 9.9)**.
[69] **C/7/117**.
[70] **C/14/284**

"*Nothing in these terms and conditions is intended to, or shall be deemed to, establish any partnership or joint venture between the parties, nor constitute either party the agent of the other party for any purpose*."

(The same provision appears in the Amended Model 2 Terms[71].)

87. This is not a well drafted clause. Lendy *was* an agent of the Model 2 Investors, albeit for the limited purposes identified above. However, having regard to the other provisions of the Original Model 2 Terms and the Amended Model 2 Terms, the purpose of this clause is tolerably clear. The purpose of the clause was to clarify that Lendy was not an agent of the Model 2 Investors for any purposes other than those specifically identified in the Model 2 Terms. As a result, Lendy had not undertaken any wide-ranging fiduciary duties to the Model 2 Investors.

88. Accordingly, it is submitted that Ms Taylor is wrong to contend that Lendy owed the Model 2 Investors a duty not to profit out of its position. Such a duty is inconsistent with the true nature of the relationship between Lendy and the Model 2 Investors and the limited role that Lendy agreed to perform on their behalf.

89. The analysis would have been different if Lendy had undertaken a more extensive role. To take two examples:

89.1. It has been held that a consumer credit broker acting on behalf of a borrower has a duty not to receive a secret commission from the lender: see Hurstanger Ltd v Wilson [2007] 1 WLR 2351. This duty makes sense, since the broker's role is to arrange credit from his client on the best available terms. If the broker is secretly being paid by the lender, then this would place the broker in a position of conflict. As Tuckey LJ said at [33], "*The [clients] were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission*".

89.2. Similarly, if Lendy had agreed to negotiate the best available interest rate on behalf of the Model 2 Investors, then Lendy would have had a duty not to earn a profit by charging interest or fees for its own account (without the informed consent of the Model 2 Investors).

90. However, the role of Lendy in the present case is far removed from these two examples. Lendy agreed an interest rate with the Borrowers (with certain fees and interest payable to

[71] **C/15/306**

Lendy for its own account as principal), Lendy posted the loan on the Website and invited Lenders to participate in the loan if they wished to do so. Lendy did not purport to be responsible for obtaining the best available interest rate for the Model 2 Investors. There was no element of negotiation on behalf of the Model 2 Investors at all; they were only able to review each Model 2 Loan on the Website and "take it or leave it". In those circumstances, the rationale for the No Profit Duty does not arise.

91. If this is correct, it is not necessary to consider whether the Model 2 Investors gave informed consent to Lendy's profits. The question of informed consent only arises if Lendy in fact owed the No Profit Duty. However, in deciding whether Lendy owed the No Profit Duty, it is relevant to consider what the Model 2 Investors knew about Lendy's business model: see, by way of analogy, Kelly v Cooper [1993] AC 205, at 215 per Lord Browne-Wilkinson (quoted in paragraph 70 above) in which the Court determined that the relevant plaintiff was "*well aware*" of the relevant facts, and therefore there was no relevant duty, whether contractual or fiduciary.

92. In particular, it is necessary to consider whether a duty not to make a profit is an appropriate duty to impose on Lendy in all the circumstances of the case. As to this:

92.1. The concept of a No Profit Duty does not sit easily with the reality of Lendy's business model, which was designed to make a profit for Lendy. Lendy was a business, not a charity.

92.2. The Model 2 Investors knew that Lendy did not charge them any fees for using the Website (see Clause 2.11 of the Original Model 2 Terms[72] and the Amended Model 2 Terms[73]). As a result, there was only one way that Lendy could make a profit, namely by charging interest or fees to the Borrowers.

92.3. Both of Ms Taylor's witnesses make it clear that they were in fact aware that Lendy operated in this way. Mr Powell's evidence is that[74]:

"*… at the time I understood that Lendy would be making its profit in respect of Model 2 Loans by charging:*

72.1 fees to borrowers, although I was unclear as to the precise nature of any fee that Lendy was charging, and the specific amount of any fee; and

72.2 borrowers interest above that which it was providing to Model 2 Investors and Model 2 Transferees and taking the delta, however I was unsure about the

[72] **C/14/267**.
[73] **C/15/289**.
[74] See paragraph 72 of Powell 1 **B/4/114**.

precise amount Lendy was taking, and also whether that amount constituted a 'fee' or something else."

92.4. Similarly, Mr Melton's evidence is that[75]:

"*I did not know what fees or charges I was paying to Lendy, and had no idea as to the amount of each of them, or their total. Rather, based on my experience with RateSetter and possibly statements made on the Website (to which, see paragraph 43.1), I assumed that Lendy would charge the borrowers a fee or commission for arranging the loans (Arrangement Fee), or charge interest to borrowers at a higher rate than it paid to the lenders and then keep the difference, or both*."

92.5. The fact that Lendy charged interest and fees to the Borrowers for its own account was also expressly stated in the FAQ section on the Website under the heading "*How do [Lendy] make money?*"[76]:

"*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.*

We feel this is a fair margin as the administration costs that are associated with sourcing new projects for investment, and ensuring all property is secured with a legal charge, are substantial."

92.6. 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[77]. However, the Amended Model 2 Terms were updated to refer expressly to the fact that interest was payable to Lendy (see Clause 9.2: "*Borrowers are liable to repay the loans to lenders and pay any interest on such loans to you and Lendy*"[78]) and expressly noted that Lendy charged fees to the Borrowers (see Clause 9.11: "*Details of the fees which Lendy charges borrowers are set out in the relevant Loan Contract, and these are, typically, an arrangement fee, an exit fee, and a loan monitoring fee*"[79]).

92.7. The FCA was also aware that Lendy charged interest for its own account and did not express any concerns in this regard[80].

[75] See paragraph 42.1 of Melton 1 **B/3/81**.
[76] **E/33/137-138**.
[77] See paragraph 12.34.1(b) of the SAF at **A/4/40**
[78] **C/15/292**.
[79] **C/15/293**.
[80] **E/79/269**.

93. Against that backdrop, there is no justification for imposing the No Profit Duty on Lendy. Such a duty is inconsistent with the fundamental principles of Lendy's business (and also what the Model 2 Investors in fact knew about Lendy's business). Lendy is not the sort of agent that should be treated as having a duty not to make a profit.

94. So far as the Model 2 Transferees are concerned, the foregoing analysis is *a fortiori*. There is no basis for imposing any relevant fiduciary duties on Lendy in relation to the Model 2 Transferees.

(C) Secondary Case - Informed consent

95. If (contrary to the Applicants' primary case) Lendy did owe the No Profit Duty to the Model 2 Investors, it is submitted that (contrary to the case put forward by Ms Taylor[81]) the Model 2 Investors gave informed consent to the profits earned by Lendy.

96. It is accepted that Lendy did not give "chapter and verse" to the Model 2 Investors on the quantum of interest and fees that it charged for its own account on each Model 2 Loan. However, such detailed information is not necessary where the principal is aware that the agent is making a profit. Where the principal is aware that the agent is making a profit, and the principal can discover the quantum of the profit but does not trouble to make inquiries, then the principal will be treated as having given informed consent.

97. In FHR European Ventures LLP v Cedar Capital Partners LLP [2011] EWHC 2308 (Ch), Simon J summarised the principles of informed consent[82].

97.1. He set out the relevant authorities that establish that the agent "*It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell [the principal] all the material facts. He must make a full disclosure*" (at [77]) and that the burden of proof falls on the agent (at [78]).

97.2. However, at [81], Simon J noted that "*Since the sufficiency of disclosure is dependent on the facts of particular cases, previous decisions will be of limited assistance*". Nevertheless it is worth noting that, Simon J identified one proposition that is important to the present case (at [81]):

"*Where the principal knows the agent will receive a commission and could have discovered what the commission was, but did not take the trouble to enquire, a misapprehension as to the amount of the commission will not mean that there has been*

[81] See paragraph 19.2 of Ms Taylor's position paper **A/8/142-143**

[82] This decision was the subject of an appeal to the Supreme Court, but not on this point: see [2015] AC 250.

no informed consent, see for example Great Western Insurance Co of New York v. Cunliffe (1874) LR 9 Ch App 525 at 539 and Baring v. Stanton (1876) 3 Ch D 502 at 505."

98. Simon J also stated at [82]:

"*… where the agent can show a customary usage or that the amount of the commission is standard and ascertainable on enquiry, the failure of the principal to make enquiries as to the amount of the commission is fatal to a contention that there has been insufficient disclosure. They do not assist where there is no customary usage of which the principal is deemed to have notice, or where the amount of the commission is not easily ascertainable from an available source which the principal has failed to take the trouble to discover*."

99. Thus, in Great Western Insurance Co of New York v Cunliffe (1874) LR 9 Ch App 525 at 539-540, Mellish LJ said:

"*… it is quite obvious that [the principal] must have known, and they do not deny that they did know, that Messrs. Pickersgill were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging*."

100. These propositions are cited as good law by the leading textbooks, including Snell's Equity (34th edition) at paragraph 7-015:

"*Where the principal knows that the agent will receive a commission and could have discovered the level of commission by making inquiries, failure to do so (and consequent misapprehension as to the amount of commission) does not negate informed consent. This, however, does not apply where the commission is not a customary usage and is not readily ascertainable from an available source which the principal has failed to take the trouble to discover.*"

101. In light of the facts set out in paragraph 92 above, there can be no dispute that the Model 2 Investors were in fact aware that Lendy was making a profit by charging interest and/or fees to the Borrowers. The Model 2 Investors must also have been aware that this was the only way for Lendy to make a profit (since Lendy did not charge Investors for using the Website, and Lendy was not a charity). Finally, to the extent relevant, the evidence of Mr Melton shows that other P2P platforms adopt a similar charging structure: see, for example,

Mr Melton's reference to his "*experience with RateSetter*"[83], which he states charged interest and fees to borrowers in a similar way.

102. Accordingly, the critical question is whether the Model 2 Investors could have ascertained the amount of Lendy's interest and fees by making enquiries. If the answer to that question is "yes", but the Model 2 Investors did not take the trouble to make such enquiries, then the Model 2 Investors should be treated as having given informed consent.

103. In particular, 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 for its own account.

104. Moreover, Mr Powell and Mr Melton (and indeed any other Model 2 Investor) could have ascertained the amount of interest and fees that Lendy was charging. They could have asked Lendy to produce a copy of the Loan Agreement for the relevant Model 2 Loan together with the Term Sheet. As to this:

104.1. The Original Model 2 Terms made it clear that it was the Loan Contract that governed the relationship with the borrower: "*Each agreement between each lender and borrower comprises our standard loan conditions and term sheet (together the 'Loan Contract')…The Loan Contract is a separate agreement between you and the borrower and is governed by separate terms and conditions. If there is a conflict between these terms and conditions and the Loan Contract, the Loan Contract will prevail.*"[84]

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*" (see Clause 9.1[85]) and that "*interest and charges will be calculated on a daily basis up to the date the loan is repaid … The Loan Contract governs the payment of these amounts*" (see Clause 9.3[86]).

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[87]. However, Lendy was happy to provide a copy of the Loan Agreement to Model

[83] See paragraph 42.1 of Melton 1 **B/3/81**.
[84] **C/14/264**.
[85] **C/14/272**.
[86] **C/14/272**.
[87] See paragraph 70.2 of Powell 1 **B/4/113-114**.

2 Investors on request. This is shown by the evidence of Mr Powell, who explains that he asked for a copy of the Loan Agreement on a particular Model 2 Loan in late September 2018 and was provided with an unredacted copy of the Loan Agreement shortly thereafter[88].

104.4. Similar provisions can be found in the Amended Model 2 Terms: see Clause 9.1 ("*The Loan Contract governs the terms of repayment of principal and payment of interest by the borrower*"[89]); Clause 9.2 ("*Borrowers are liable to repay the loans to lenders and pay any interest on such loans to you and Lendy*"[90]); Clause 9.3 ("*The Loan Contract governs the payment of these amounts and the interest rates applied to the loans due to you and Lendy*"[91]); and Clause 9.11 ("*Details of the fees which Lendy charges borrowers are set out in the relevant Loan Contract, and these are, typically, an arrangement fee, an exit fee, and a loan monitoring fee*"[92]).

104.5. In order to understand the precise quantum of interest and fees that Lendy was charging, it would also have been necessary to review the Term Sheet for the relevant Model 2 Loan (in relation to interest) and the Borrower Conditions (in relation to the exit fee and arrangement fee). However: (i) the Term Sheet is expressly identified in the definition of "**Interest Rate**" in the Loan Agreement; (ii) Clause 4 of the Loan Agreement expressly identifies the existence of fees; and (iii) there is no evidence that Lendy would have been unwilling to supply a copy of the Term Sheet or the Borrower Conditions in addition to the Loan Agreement.

105. Thus, the present case falls within the principle stated by Simon J in FHR v Cedar at [81]. In the words of Simon J, "*where the principal knows the agent will receive a commission and could have discovered what the commission was, but did not take the trouble to enquire, a misapprehension as to the amount of the commission will not mean that there has been no informed consent*".

106. The above remarks apply to the Model 2 Transferees *mutatis mutandis*. Moreover, it was not necessary for the Model 2 Transferees to give any separate informed consent. Provided that the original Model 2 Investors gave informed consent, the Model 2 Transferees (as assignees) stand in the shoes of the original Model 2 Investors (as assignors) and are bound

[88] See paragraph 81 of Powell 1 **B/4/121**.
[89] **C/15/292**.
[90] **C/15/292**.
[91] **C/15/292**.
[92] **C/15/293**.

by the latter's informed consent. This follows from the principle that an assignee cannot be in a better position than the assignor: see Re Brown & Gregory Ltd [1904] 1 Ch 627 at 632.

(D) Tertiary case: Equitable allowance

107. In the alternative, it is submitted that Lendy is entitled to an equitable allowance in respect of the services that it provided to Model 2 Investors and Transferees.

108. It has long been established that the Court has the power to award an equitable allowance to a fiduciary who acts in breach of the No Profit Duty. In O'Sullivan v Management Agency and Music Ltd [1985] QB 428 at 467-468, Fox LJ referred to the various judgments in Boardman v Phipps (at first instance, in the Court of Appeal and in the House of Lords) and stated:

> "*These latter observations (and those of Lord Denning M.R. and the judgment of Wilberforce J. at first instance) accept the existence of a power in the court to make an allowance to the fiduciary. And I think it is clearly necessary that such a power should exist. Substantial injustice may result without it. A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe. Nor do I think that the principle is only applicable in cases where the personal conduct of the fiduciary cannot be criticised. I think that the justice of the individual case must be considered on the facts of that case. Accordingly, where there has been dishonesty or surreptitious dealing or other improper conduct then, as indicated by Lord Denning M.R., it might be appropriate to refuse relief; but that will depend upon the circumstances …*
>
> *Once it is accepted that the court can make an appropriate allowance to a fiduciary for his skill and labour I do not see why, in principle, it should not be able to give him some part of the profit of the venture if it was thought that justice as between the parties demanded that. To give the fiduciary any allowance for his skill and labour involves some reduction of the profits otherwise payable to the beneficiary. And the business reality may be that the profits could never have been earned at all, as between fully independent persons, except on a profit sharing basis*."

(Fox LJ went on to explain that the quantum of an equitable allowance would depend on the conduct of the fiduciaries and all the circumstances of the case[93].)

[93] These principles were approved by the Court of Appeal in Imageview Management Ltd v Jack [2009] 2 All ER 666 at [56]-[59] per Jacob LJ. When Jacob LJ said that the discretion to award an equitable allowance should be exercised sparingly, he was essentially referring to the Court's broad discretion in fixing the quantum of the allowance (as is clear from the quotation from Snell that he approved at [56]).

109. In the present case, and assuming that the Court is required to consider this question at all (contrary to the arguments set out above), Lendy should be awarded an equitable allowance for its services in relation to the Model 2 Loans. Otherwise, Lendy would (in effect) have provided a P2P platform to the Model 2 Investors free of charge. This result would be unfair to the Model 1 Investors (as it would deplete the assets available in Lendy's general estate). In the words of Wilberforce J at first instance in Phipps v Boardman [1964] 1 WLR 993 at 1018, "*it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it*". The law of fiduciary duties (and in particular the remedy of ordering an account) "*should not be allowed to become a vehicle for the unjust enrichment of the [principal]*": see Imageview Management Ltd v Jack [2009] 2 All ER 666 at [58] per Jacob LJ.

110. It would be particularly unjust for Lendy not to receive an equitable allowance in circumstances where both Mr Powell and Mr Melton were aware that Lendy was likely to be earning a profit by charging interest and/or fees for its own account.

111. Lendy's conduct towards the Model 2 Investors was not dishonest, surreptitious, or improper in relation to the fees and interest that Lendy charged. As noted in paragraph 92.5 above, the FAQs displayed on the Website expressly referred to the fact that Lendy charged interest for its own account. Although the relevant FAQ was deleted when the Amended Model 2 Terms came into force, the Amended Model 2 Terms made it clear that Lendy charged interest for its own account (see Clause 9.2[94]: "*Borrowers are liable to repay the loans to lenders and pay any interest on such loans to you and Lendy*" (emphasis added)) and that Lendy also charged fees for its own account (see Clause 9.11[95]: "*Details of the fees which Lendy charges borrowers are set out in the relevant Loan Contract, and these are, typically, an arrangement fee, an exit fee, and a loan monitoring fee*").

112. If the Court is satisfied that Lendy should be awarded an equitable allowance for its services in relation to the Model 2 Loans, then it will be necessary for that allowance to be quantified.

113. The authorities provide little guidance on the principles for quantifying an equitable allowance. The quantum of the allowance is within the discretion of the Court.

    113.1. In some cases, the Court has awarded an allowance equal to the estimated amount that the principal would have agreed to pay the fiduciary in consideration for

[94] **C/15/292**
[95] **C/15/293**

performing the relevant services: see Accidia Foundation v Simon C Dickinson Ltd [2010] EWHC 3058 (Ch) at [95] per Vos J. Another (related) approach is to identify the sum that is "*just and equitable*" having regard to "*the usual kind of figure that is expected in this market*" (ibid).

113.2. The Court can also award "*some part of the profit of the venture*" (see O'Sullivan v Management Agency). There is no fixed methodology for quantifying an equitable allowance; the Court will exercise its discretion in light of all the circumstances.

114. It is submitted that the quantum of any equitable allowance should be determined at a further hearing in due course. If it is necessary to deal with this matter, the parties should be given permission to file evidence dealing with the points set out in the previous paragraph and any other matters that may be relevant to the quantum of the allowance.

(E) No breach of COBS 6.1.9(1)(R)

115. Finally, a miscellaneous point is raised in Ms Taylor's position paper at paragraph 20[96]. She contends that Lendy breached a provision in the Conduct of Business Sourcebook promulgated by the FCA ("**COBS**"), namely rule 6.1.9(1)(R):

> "*A firm must provide a client with information on costs and associated charges including, if applicable:*
>
> *(1) the total price to be paid by the client in connection with the designated investment or the designated investment business, including all related fees, commissions, charges and expenses, and all taxes payable via the firm or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the client can verify it. The commissions charged by the firm must be itemised separately in every case …*" [emphasis added]

116. However, COBS 6.1.9(1)(R) has no application in the present case. As to this:

116.1. There was no "*price to be paid by the client in connection with the designated investment*". No fees were payable by the Model 2 Investors, who were the relevant "*clients*". Interest and fees were payable to Lendy by the *Borrowers* and not by the *Investors*. The payment of such fees is not within COBS 6.1.9(1)(R).

116.2. In Ms Taylor's position paper, it is suggested that the interest and fees payable by the Borrowers should be treated "*in effect*" as a "*price to be paid by the [Model 2*

[96] **A/8/143**

Investors]" on the basis that the Model 2 Investors would be required to compete with Lendy in the event of a shortfall on a security enforcement. However, the mere fact of competition between Lendy and the Model 2 Investors in the event of a shortfall does not show that any price was payable by the Model 2 Investors to Lendy.

117. In any event, a breach of COBS 6.1.9(1)(R) would not give rise to a proprietary remedy (unlike a claim for breach of the No Profit Duty). At best, the Model 2 Investors/Model 2 Transferees would be entitled to lodge a proof of debt for damages for breach of statutory duty under section 138D of the Financial Services and Markets Act 2000.

E THIRD GROUP OF ISSUES – ISSUES 5 TO 7

(1) Issue 5

Issue 5: On a proper construction of clause 6.3 of the Model 2 Loans, is the borrower required to pay the default interest to (i) the relevant Model 2 Investors and/or Model 2 Transferees, (ii) to Lendy (as principal) or (iii) in any other manner?

118. Clause 6.3[97] of the Model 2 Loan provides as follows:

> "*In addition to the interest payable under clause 6.1, if the Borrower fails to make any payment due under this agreement on the due date for payment, interest on the unpaid amount shall accrue daily, from the date of non- payment to the date of actual payment (both before and after judgment), at 3% per month above the aggregate Interest Rate*."

119. The Applicants note that this provision does not expressly identify whether it was Lendy or the Model 2 Investors who would be entitled to receive any default interest paid by the Borrower.

120. Ms Taylor contends that because the clause is silent as to the recipient, all default interest should be paid to the Model 2 Investors and Model 2 Transferees[98].

121. The Applicants' position is that there are two options for the distribution of default interest. The first option is that all default interest was properly payable to Lendy. The second option is that default interest should be divided equally between Lendy and the Model 2 Investors.

122. The basis for treating all default interest as payable to Lendy is as follows:

122.1. There is no suggestion in the Model 2 Terms that any default interest would be payable to the Model 2 Investors.

[97] **C/9/141**
[98] See paragraph 10 of Ms Taylor's position paper **A/8/137-138**

122.2. Instead, there was a separate regime for the payment of "*bonus interest*"[99]. This is explained in Webb 2 at paragraph 118 as follows: "*After the loan repayment date, in place of the monthly interest payments to investors, Lendy offered to pay investors a bonus of up to 3% of the investor's investment, on any loan which was paid in full by the borrower. In order to qualify for bonus interest, Lendy had to receive payment from the borrower in full, including the entire loan sum, interest and fees which were due. In reality, this very rarely happened although there were a couple of loans which paid bonus interest. This potential bonus payment of up to 3% followed the loan part, so if the loan part was sold on the secondary market, the bonus attached to it and would be payable to the purchasing investor who was holding the loan part upon the repayment date (see page 314). The intention was to try to compensate investors holding loan parts past expiry, with the additional bonus payment, upon repayment in full by the borrower*".

122.3. On this basis, it is open to the Court to conclude that all of the default interest was payable to Lendy and that (in contrast) all of the bonus interest was payable to the Model 2 Investors (in circumstances where the loan was paid in full).

123. In the alternative, it is submitted that default interest should be divided equally between Lendy and the Model 2 Investors for the following reasons:

123.1. Clause 6.3[100] states that default interest is payable at 3% above the "*aggregate Interest Rate*".

123.2. In this context, the "*aggregate Interest Rate*" is the aggregate of the "*Interest Rate Payable to Lenders*" and the "*Interest Rate Payable to Saving Stream*" (as identified in the Term Sheet[101]). Thus, if the total non-default interest rate is 6% (with 2% payable to Lendy and 4% payable to the Model 2 Investors), then default interest is payable at a rate of a further 3% (generating a total interest rate of 9% following a default).

123.3. Given that default interest is payable at 3% above the "*aggregate*" of the normal interest rates payable to the Model 2 Investors and Lendy, it is submitted that the most natural and fair construction of Clause 6.3 is that the additional default interest should

[99] See the extract from the Website at **E/187/938** and the Amended Collections and Recoveries Policy at **E/194/965**.
[100] **C/9/141**
[101] **C/6/109**.

be split between Lendy and the Model 2 Investors on a *pro rata* basis (by reference to the normal interest rates payable to each party as set out in the Term Sheet).

124. Accordingly:

124.1. Any default interest paid by the Borrower under Clause 6.3 should be split between Lendy and the Model 2 Investors in the same proportions that non-default interest is split between Lendy and the Model 2 Investors under the Term Sheet for the relevant Model 2 Loan.

124.2. For example, if the total non-default interest rate is 6% (with 2% payable to Lendy and 4% payable to the Model 2 Investors), and if default interest is payable at a rate of a further 3% (generating a total interest rate of 9%), then the total amount of interest payable to Lendy and the Model 2 Investors (respectively) is 3% and 6%.

125. This arrangement makes good commercial sense. It is common ground that Lendy charged the Borrowers interest for its own account (in addition to the interest payable to the Model 2 Investors by the Borrowers). That being so, it makes commercial sense for default interest to be split in the same proportions. This does not provide a windfall to Lendy – it reflects the way in which interest was already divided up between Lendy and the Model 2 Investors.

126. In contrast, it would be odd if the Model 2 Investors were able to keep the entirety of the default interest, given that the default interest is fixed at 3% above an "*aggregate*" interest rate which is defined to include the interest rate payable to Lendy.

127. Ms Taylor argues that, "*if and to the extent there is any ambiguity, clause 6.3 should be construed consistently with [the No Profit Duty], and specifically, not so as to create any entitlement in favour of the fiduciary, Lendy, to which its principals did not consent*"[102]. However, for the reasons explained above, the Applicants submit that Lendy did not in fact owe the No Profit Duty. That being so, the No Profit Duty is not relevant to the construction of Clause 6.3.

(2) Issue 6

Issue 6: Were any of the relevant clauses in the Model 2 Terms not properly incorporated into the contract between Lendy and Model 2 Investors (on the basis that they were onerous or unusual or otherwise?)

[102] See paragraph 11 of Ms Taylor's position paper **A/8/138**

128. This issue does not arise, having regard to the way in which the Applicants put their case. Moreover, if it were necessary to answer this question, the answer would be "no", none of the relevant clauses in the Model 2 Terms were not properly incorporated into the contract between Lendy and Model 2 Investors (on the basis that they were onerous or unusual or otherwise).

(A) Background to Issue 6

129. Ms Taylor (rightly) does not seek to advance any general contention that the Model 2 Terms were not properly incorporated into the contract between Lendy and the Model 2 Investors. This is no doubt because:

129.1. the Model 2 Terms were posted on the Website[103]; and

129.2. both Mr Melton and Mr Powell have given evidence that they read the Model 2 Terms before they invested. Mr Powell read the terms in detail, whereas Mr Melton says that he did not give much thought to their contents and skimmed some parts[104].

130. Ms Taylor's position paper acknowledges that Issue 6 only arises if there is a specific contractual provision in the Model 2 Terms that would provide Lendy with a defence to a claim for breach of the No Profit Duty[105]. If such a provision exists, then Ms Taylor would argue that it was not properly incorporated into the Model 2 Terms. In this regard, Ms Taylor relies[106] upon the well-established common law principle that "*even if A knows that there are standard conditions provided as part of B's [terms of business], a condition which is "particularly onerous or unusual" will not be incorporated into the contract, unless it has been brought fairly and reasonably to A's attenti*on": see Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] CTLC 265 at [29] per Coulson LJ.

131. The principle set out in Goodlife v Hall Fire is not in dispute. However, it is submitted that the principle is irrelevant in the present case. The principle is irrelevant because, as explained below, there is no specific contractual term relied upon by the Applicants which can be described as onerous or unusual.

(B) The Applicants' primary position

[103] See paragraphs 53 to 55 of Powell 1 **B/4/104**.
[104] See paragraph 41 of Melton 1 **B/3/80-81** and paragraph 69 of Powell 1 **B/4/113**.
[105] See paragraphs 12 and 13 of Ms Taylor's position paper **A/8/138**
[106] See paragraph 14.4 of Ms Taylor's position paper **A/8/139-140**

132. The Applicants' primary position is that Lendy did not owe the No Profit Duty: see paragraphs 78 to 94 above. The non-existence of the No Profit Duty is a function of the overall relationship between Lendy and the Model 2 Investors, not a function of any specific contractual term. The Applicants do not rely on any specific provision of the Model 2 Terms to "permit" Lendy to make a profit. If this position is correct, then no question of informed consent arises, and nor does any question relating to the incorporation of terms.

(C) The Applicants' Secondary position: Informed Consent

133. The Applicants' secondary position is that the Model 2 Investors gave informed consent to any breach of the No Profit Duty. Again this is not a function of any specific contractual term. Rather, as set out in paragraphs 95 to 106 above, the Applicants' case relies on the following propositions:

133.1. The Model 2 Investors were aware that Lendy was making a profit by charging interest and/or fees to the Borrowers. This is not understood to be in dispute (and is expressly set out in the evidence of Mr Powell and Mr Melton).

133.2. The Model 2 Investors must also have been aware that this was the only way for Lendy to make a profit (since Lendy did not charge Investors for using the Website, and Lendy was not a charity).

133.3. Mr Powell and Mr Melton (and any other Model 2 Investor) could easily have ascertained the amount of interest and fees that Lendy was charging. (There is no evidence that Mr Powell or Mr Melton took any steps to make inquiries as to the amount of interest and fees that Lendy retained for its own account.)

134. Although the Applicants rely on various contractual provisions in support of their arguments (see paragraph 104 above), these contractual provisions cannot be viewed in isolation; they form part of a broader analysis of the relationship between Lendy and the Model 2 Investors.

135. More particularly, the Applicants do not contend that any of the contractual provisions alone are sufficient to constitute informed consent. Rather, these provisions form part of the wider submission that the Model 2 Investors were aware that Lendy charged interest and fees for its own account (but failed to make inquiries as to the amount of interest and fees that Lendy charged). In particular, the Applicants rely upon the provisions quoted above in support of their submission that:

135.1. the Model 2 Investors were informed (and were aware) that the Model 2 Loan governed the payment of interest by the Borrower; and

135.2. the Model 2 Investors could have asked for a copy of the Model 2 Loan (together with the Term Sheet referred to in the Loan Agreement) in order to identify the interest that Lendy was charging for its own account.

(There is in any event other evidence in support of these points, including the evidence provided by Mr Powell and Mr Melton, and the other documents referred to above.)

136. Against that backdrop, it is not possible for Clauses 9.1[107] and 9.3[108] of the Original Model 2 Terms (or their equivalent in the Amended Model 2 Terms) to be "excised" from the contract under the law relating to the incorporation of terms. Moreover, even if they were so excised, the underlying evidence would remain, as would the contentions made in support of Issue 8.

137. Further, it would not be possible for Clauses 9.1 and 9.3 to be excised, because the result would be that the Original Model 2 Terms would no longer contain a sentence stating that "*the Loan Contract governs the terms of repayment and payment of interest by the borrower*". This is an accurate statement of fact (and will no doubt be common ground).

138. In addition:

138.1. It is not enough for Ms Taylor to advance a general case that Lendy retained an excessive amount of interest and fees for its own account. For the purposes of Issue 6, a specific term needs to be identified that can be characterised as "*particularly onerous or unusual*".

138.2. It is insufficient for Ms Taylor to contend that the overall relationship between Lendy was the Model 2 Investors was particularly onerous or unusual. This proposition appears to lie at the heart of Ms Taylor's position paper, (for example where she contends that it was onerous or unusual for Lendy to compete with the Model 2 Investors in the event of a shortfall on enforcement[109]). However, even if the overall bargain between Lendy and the Model 2 Investors could be described as onerous or unusual, this is not a proposition that engages the law relating to the incorporation of terms.

138.3. The Court does not have any relevant power to set aside a contract merely because the overall relationship between the parties is onerous or unusual. In such a

[107] **C/14/272**
[108] **C/14/272**
[109] See paragraph 14 of Ms Taylor's position paper **A/8/139-140**

scenario, freedom of contract prevails. The law relating to the incorporation of terms is not designed to provide a freestanding remedy in respect of an onerous or unusual relationship: rather, it is essentially designed to identify what the parties could reasonably be taken to have agreed.

(3) Issue 7

Issue 7: Do any of the relevant clauses in the Model 2 Terms constitute 'unfair terms' under Part 2 of the Consumer Rights Act 2015?

139. Again, this issue does not arise, having regard to the way in which the Applicants put their case. The answer is therefore, "No, none of the relevant clauses in the Model 2 Terms constitute 'unfair terms' under Part 2 of the Consumer Rights Act 2015".

140. It is common ground that Lendy was a trader within section 2(2) of the Consumer Rights Act (the "**2015 Act**") and that some or all of the Model 2 Investors were consumers within section 2(3) [110]. It follows that, in relation to any Model 2 Investors who were consumers, if there were a term which causes a "*significant imbalance in the parties' rights and obligations under the contract to the detriment of the [Model 2 Investors]*", that term would be unfair and would not be binding on such Model 2 Investors: see section 62 of the 2015 Act[111].

141. However, having regard to the way in which the Applicants put their case, no relevant contractual term could be said to cause a "*significant imbalance in the parties' rights and obligations under the contract to the detriment of the [Model 2 Investors]*". As explained above:

141.1. The Applicants' primary position is that Lendy did not owe the No Profit Duty. The non-existence of the No Profit Duty is a function of the overall relationship between Lendy and the Model 2 Investors, not a function of any specific contractual term. Similarly, the Applicants do not rely on any specific term to "permit" Lendy to make a profit. There was no need for any such contractual permission, since Lendy did not owe the No Profit Duty in the first place.

141.2. The Applicants' secondary position is that the Model 2 Investors gave informed consent to any breach of the No Profit Duty. Once again, however, this is not a function

[110] See paragraph 16.1 of Ms Taylor's position paper **A/8/141**
[111] See paragraph 16.2 of Ms Taylor's position paper **A/8/141**

of any specific contractual term, and is based on a wider analysis of the information available to the Model 2 Investors: see paragraphs 101 to 104 above.

142. The 2015 Act is concerned with unfair terms. The 2015 Act does not confer a general power on the Court to interfere with a bad bargain; one must identify a specific term that is said to be unfair. Thus, in Schedule 2 to the 2015 Act, a series of examples of unfair terms can be found, most of which involve some form of exclusion clause. Moreover, the 2015 Act only applies to express terms, since it cannot be the case that terms would be implied if they are unfair: see the discussion of HHJ Pelling (sitting as a High Court Judge) in Baybut v Eccle Riggs Country Park Ltd (unreported, 2 November 2006) at [20]-[23] in relation to the predecessor of the 2015 Act; see also Chitty on Contracts (33rd edition) at paragraph 38-240. The fundamental problem for Ms Taylor is that none of the relevant express terms within the Model 2 Terms can be characterised as unfair.

143. Ms Taylor does not seek to argue that any term of the Model 2 Loan is unfair. She focuses her attention on the Model 2 Terms[112]. However, the Model 2 Loan is the contractual document which requires the Borrowers to pay interest and fees to Lendy.

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 from Clause 9 quoted in paragraph 104.4 above). 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 (viz. that the applicable interest rates are governed by the Loan Agreement) cannot properly be characterised as unfair within section 62 of the 2015 Act.

145. Ms Taylor's arguments do not engage the 2015 Act. Her real objection is that Lendy should not have been allowed to charge interest and fees for its own account. The resolution of this issue depends on whether Lendy owed the No Profit Duty and (if so) whether informed consent was given by the Model 2 Investors. It does not depend on the fairness of any specific provisions within the Model 2 Terms.

F FOURTH GROUP OF ISSUES – ISSUE 9

(1) Issue 9

[112] See paragraphs 16.3 and 16.4 of Ms Taylor's position paper **A/8/141**

Issue 9: Based upon the answers to the questions in issues 5 to 8, do the Model 2 Investors and/or the Model 2 Transferees have a legal or equitable proprietary interest in any of the following:

(a) any default interest payable by a borrower to Lendy under a Model 2 Loan;

(b) all standard interest payable by a borrower to Lendy under a Model 2 Loan; and

(c) any of the fees payable by a borrower to Lendy pursuant to a Model 2 Loan?

146. It follows from the submissions set out above that:

146.1. Lendy was entitled to charge standard interest and fees for its own account. The Model 2 Investors and Transferees therefore do not have any legal or equitable proprietary interest in the interest and fees that Lendy was entitled to receive for its own account under the Term Sheet and Borrower Conditions.

146.2. As to the default interest on each Model 2 Loan, that should either be paid to Lendy in its entirety or, in the alternative, be split between Lendy (on the one hand) and the Model 2 Investors and Transferees in respect of that Model 2 Loan (on the other hand) in the same proportions as non-default interest is split between them: see Issue 5 above. Thus, Lendy has a contractual right against the Borrower to receive its share of the default interest, and the Model 2 Investors and Transferees have a contractual right against the Borrower to receive their share of the default interest. These sums will also rank for payment out of the security enforcement waterfall under the Model 2 Debenture: see Issue 10 below.

147. If (contrary to the above) Lendy did owe the No Profit Duty, and if Lendy acted in breach of the No Profit Duty by charging default interest and/or non-default interest and/or fees for its own account, then each set of Model 2 Investors and Transferees (under each Model 2 Loan) would prima facie be capable of asserting an equitable proprietary interest in the proceeds of the interest and/or fees payable to Lendy in respect of that Model 2 Loan: see the decision of the Supreme Court in FHR European Ventures LLP v Cedar Capital Partners LLC [2015] AC 250. However:

147.1. The relevant proceeds must be capable of being traced in accordance with the equitable rules of tracing. If the proceeds cannot be traced, then no proprietary claim would exist. Any contested issues of tracing would need to be resolved at a further hearing.

147.2. If the Court is satisfied that Lendy should be awarded an equitable allowance (see Issue 8), then the value of the equitable allowance would fall to be deducted from the proceeds of any interest or fees in which the Model 2 Investors and Transferees have a proprietary interest.

148. In the alternative to a proprietary claim, the Model 2 Investors and Transferees would be entitled to claim an account of profits from Lendy. This is personal remedy and would rank as an unsecured provable claim. In calculating the account of profits, credit would again need to be given for any equitable allowance awarded to Lendy.

G FIFTH GROUP OF ISSUES – ISSUE 10

Issue 10: Should the Secured Liabilities be discharged pro rata between Lendy on the one hand, and Model 2 Investors and/or Model 2 Transferees on the other hand, or in some other manner?

149. The Applicants' position is that the Secured Liabilities should be discharged *pro rata* (to the extent that there is any shortfall in the proceeds available for the discharge of the Secured Liabilities) so that any shortfall is borne rateably by the persons to whom the Secured Liabilities are owed.

150. In contrast, Ms Taylor contends that the Secured Liabilities owing to the Model 2 Investors and Transferees should be discharged in priority to the Secured Liabilities owing to Lendy. There is no proper basis for reaching this conclusion, which would operate to reduce the assets available to Lendy's general estate to the detriment of Model 1 Investors, and would prefer the Model 2 Investors.

151. Clause 21.1 of the Model 2 Debenture provides as follows[113]:

> "*All monies received by the Security Agent, a Receiver or a Delegate pursuant to this deed, after the security constituted by this deed has become enforceable, shall (subject to the claims of any person having prior rights and by way of variation of the LPA 1925) be applied in the following order of priority:*
>
> *21.1.1 in or towards payment of or provision for all costs, charges and expenses incurred by or on behalf of the Beneficiaries, the Security Agent, (and any Receiver, Delegate, attorney or agent appointed by it) under or in connection with this deed, and of all remuneration due to any Receiver under or in connection with this deed;*
>
> *21.1.2 in or towards payment of or provision for the Secured Liabilities in any order and manner that the Security Agent determines; and*

[113] **C/10/182**.

21.1.3 in payment of the surplus (if any) to the Borrower or other person entitled to it." (emphasis added)

152. The second limb set out above appears at first glance to give a broad discretion to SSSHL to determine the order and manner in which the Secured Liabilities are to be discharged. However, the Applicants' case is that SSSHL can only properly exercise this discretion to apply the proceeds *pro rata* between the Secured Liabilities (in the event of a shortfall). This is because:

152.1. SSSHL's discretion to determine the order and manner in which the Secured Liabilities are to be discharged must be exercised honestly and in good faith, and should not be exercised arbitrarily, capriciously, or irrationally: see Braganza v BP Shipping Ltd [2015] 1 WLR 1661 at [18]-[32]. Only a *pro rata* allocation could satisfy this test.

152.2. SSSHL is now under the control of the Administrators and Conflict Administrators, who are officers of the Court. Both sets of Administrators of SSSHL have a statutory duty to treat creditors fairly (by virtue of the "unfair harm" provision in paragraph 74 of Schedule B1 and the rule in Ex Parte James (1873-4) LR 9 Ch App 609). Again, only a *pro rata* allocation would be fair.

152.3. A *pro rata* allocation is also consistent with Clause 12.7 of the Model 2 Terms[114]:

"*12.7 Where Saving Stream Security Holding holds a debenture, a legal charge and/or other security in respect of a particular loan or the liabilities of a particular borrower, that debenture, legal charge and/or other security will generally operate to secure all monies due from that borrower to lenders on the Saving Stream platform from time to time. If Saving Stream Security Holding is required to enforce any security agreement, and any proceeds of recovery become available (after allowing for all of Saving Stream Security Holding and/or Saving Stream's costs of enforcement), it is possible that the available proceeds will not be sufficient to discharge all obligations owed by the borrower at that time to lenders on the Saving Stream platform. If that is the case, then the lenders shall only be entitled to recover their proportionate share of such recoveries." (*emphasis added) (Original Model 2 Terms)

"*12.7 Where Saving Stream Security Holding holds an all asset security, a legal charge and/or other security in respect of a particular loan or the liabilities of a particular borrower, that debenture, legal charge and/or other security will generally operate to secure all monies due from that borrower to each lender (and any amounts due to Lendy) on the Lendy Platform from time to time. If Saving Stream Security Holding*

[114] See **C/14/276** (Original Model 2 Terms) and **C/15/295-296** (Amended Model 2 Terms)

is required to enforce any security agreement, and any proceeds of recovery become available (after allowing for all of Saving Stream Security Holding and/or Lendy's costs of enforcement), it is possible that the available proceeds will not be sufficient to discharge all obligations owed by the borrower at that time to lenders (and any amounts due to Lendy) on the Lendy platform. <u>If that is the case, then the lenders shall only be entitled to recover their proportionate share of such available proceeds</u>." (emphasis added) (Amended Model 2 Terms)

This provision does not expressly deal with the allocation of recoveries between the Model 2 Investors / Transferees and Lendy. However, the language of the clause (including in particular the reference to a "*proportionate share*") is consistent with a *pro rata* allocation.

153. In correspondence[115], Ms Taylor has argued that the Conflict Administrators should exercise the discretion under Clause 21.1.2 of the Model 2 Debenture. This is said to be on the basis that the Applicants have a conflict of interest (by virtue of the fact that the Applicants are also administrators of Lendy, which is one of the beneficiaries of the security enforcement waterfall). However, this is not correct:

153.1. The purpose of Issue 10 is to obtain a determination as to the way in which the discretion under Clause 21.1.2 of the Model 2 Debenture should be exercised.

153.2. In order to provide such a determination, the Court needs to satisfy itself that the Administrators of SSSHL are before the Court (which they are) and to hear adversarial argument on the point (which it will – see below). This will enable the Court to provide a determination of Issue 10.

153.3. In those circumstances, it is irrelevant whether the discretion under Clause 21.1.2 is exercised by the Applicants or the Conflict Administrators. Whoever exercises the discretion must do so in accordance with whatever determination the Court makes in relation to Issue 10.

153.4. Ms Taylor has in any event now confirmed that she will provide the Court with adversarial argument on Issue 10. Her substantive position appears to be that the Secured Liabilities owing to the Model 2 Investors and Transferees should be discharged in priority to the Secured Liabilities owing to Lendy: see below.

153.5. In those circumstances, the Court will be able to determine Issue 10 after hearing argument from each of the Applicants and Ms Taylor. It is not necessary for the Conflict Administrators to be actively involved in these proceedings, since

[115] See paragraph 6 of the letter from Gunnercooke dated 18 May 2021 **D/49/143**

the relevant arguments will already be advanced by the parties who are before the Court.

154. Ms Taylor will no doubt seek to rely upon the fact that the Head of Compliance at Lendy (Mr Coles) informed the FCA that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy. This was stated in an email from Mr Coles to Mr Cooper (of the FCA) dated 16 March 2018[116]:

> "*All capital payments received are apportioned to ensure that investors receive full repayment before settling any interest and/or costs payable to, or paid out by, Lendy. Therefore, Lendy will always apportion the monies on the following basis:*
>
> *1. Capital payable to investors*
> *2. Interest payable to investors*
> *3. Bonus accrual payable to investors*
> *4. Monies owed to Lendy*
>
> *The only time this process is not followed is when an LPA Receiver or Administrator is appointed whereby the costs of the receivership/ administration (which are not Lendy's costs) will be deducted from any proceeds of sale before monies are attributed as above.*
>
> *Lendy has never prioritised its costs over and above those of investors in the event of a shortfall from an asset sale. The minor update to the payment waterfall seeks to further clarify (and therefore strengthen) investor protection in the case of these or similar sale events. Furthermore, I can confirm that Lendy has absolutely no plans to change the payment waterfall to promote its costs above investors. This a key foundation stone of the business.*
> *On this basis we have not historically detailed the costs incurred by Lendy on the platform since they are not relevant to the recovery to investors*…"

155. However, this email is not an aid to the construction of the Model 2 Debenture and is in any event inconsistent with

155.1. the express terms of Clause 21.1

155.2. the Original Model 2 Terms and the Amended Model 2 Terms: see Clause 12.7 (quoted in paragraph 152.3 above), which did not provide that the Model 2 Investors would be given any priority over Lendy.

156. In addition:

156.1. There is no suggestion that the email from Mr Coles was disseminated to Model 2 Investors. This makes it impossible to see how any argument based on estoppel (or any similar doctrine) could be advanced in reliance on the email from Mr Coles.

[116] **E/109/476**.

156.2. It may be that the email from Mr Coles was an attempt by Lendy to seek to persuade the FCA that the position was other than it was. However, Mr Coles is not before the Court, and there is no need for the Court to reach any conclusion as to his state of mind. The email from Mr Coles is not relevant to the construction of Clause 21.1.2 of the Model 2 Debenture or to the exercise of SSSHL's powers under Clause 21.1.2 of the Model 2 Debenture.

157. Ms Taylor may also seek to rely upon the fact that a series of inconsistent and confusing statements were included in the policy documents uploaded to the Website by Lendy. As to this:

157.1. The first policy document (the "**First Overdue Loans Default Policy**"[117]) was effective from 1 March 2017. It did not suggest that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy.

157.2. The second policy document (the "**Second Overdue Loans Default Policy**"[118]) was effective from 1 August 2017. Again, it did not suggest that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy.

157.3. The third policy document (the "**Recovery and Collections Policy**"[119]) was effective from 13 April 2018. Unlike the previous two policy documents, it stated that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy[120].

157.4. However, shortly afterwards, the original Recovery and Collections Policy was deleted and a new policy document was uploaded in its place (the "**Amended Recovery and Collections Policy**"[121]). This document removed any suggestion that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy. Instead, it stated: "*Payments received… as a result of any enforcement action will be applied as set out in Lendy's [investor] terms and conditions*"[122].

[117] **E/71/229-232**.
[118] **E/88/306-309**.
[119] **E/111/486-491**.
[120] **E/111/489**.
[121] **E/194/963-968**.
[122] **E/194/966**.

157.5. It is not known exactly when the Amended Recovery and Collections Policy was uploaded to the Website, but it appears to have taken place at some point between the end of April and the beginning of October 2018. Mr Powell himself contacted Lendy on 30 April 2018 to point out that the original Recovery and Collections Policy was inconsistent with the Model 2 Terms, which did not contain any suggestion that the Secured Liabilities owing to the Model 2 Investors and Transferees would be discharged in priority to the Secured Liabilities owing to Lendy[123]. It may be that Mr Powell's emails resulted in Lendy deleting the original Recovery and Collections Policy and introducing the Amended Recovery and Collections Policy in its place.

158. Although these policy documents are undoubtedly inconsistent and confusing, they do not provide a proper basis for exercising the discretion under Clause 21.1.2 of the Model 2 Debenture. In light of the inconsistencies, the policy documents should be disregarded for the purposes of exercising the discretion under Clause 21.1.2. The right course of action is to apply a *pro rata* allocation in the manner set out in paragraph 149 above.

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[123] See paragraphs 77 to 79 of Powell 1 **B/4/117-119**.

Schedule of proposed declaratory relief

1. Issue 1: The Model 1 Investors (in their capacity as such) do not have any claims other than unsecured provable claims against Lendy.
2. Issue 2: The proceeds of security of a Model 1 Loan form part of Lendy's general estate.
3. Issue 3: As regards its contractual liability to Model 1 Investors pursuant to the Model 1 Terms, Lendy is *not* liable to each Model 1 Investor only to the extent that Lendy is repaid by a borrower under, or makes recoveries in respect of, the relevant Model 1 Loan which that Model 1 Investor has funded.
4. Issue 4:
   4.1. This issue does not arise.
   4.2. Alternatively the Model 1 Investors' contractual claims should be valued in an amount equal to the gross proceeds received by Lendy for the relevant Model 1 Loan.
5. Issue 8:
   5.1. Lendy was entitled to charge interest and fees for its own account in connection with the Model 2 Loans and did not act in breach of any fiduciary duty by doing so.
   5.2. Lendy did not owe any No Profit or Disclosure duty to the M2 Investors/Transferees.
   5.3. Alternatively, Lendy did not breach any of its fiduciary duties regarding its charging fees and/or interest for its own account in connection with the Model 2 Loans.
   5.4. Alternatively, if Lendy did breach of any of its fiduciary duties, it is entitled to an equitable allowance to cover its costs as agent.

6. Issue 5: The Borrower in respect of each Model 2 Loan is required to pay any default interest to
   6.1. Lendy for its own account, and such sums form part of Lendy's general estate.
   6.2. In the alternative: default interest in respect of each Model 2 Loan should be split between Lendy and the Model 2 Investors on a *pro rata* basis by reference to the non-default interest rates payable to each party as set out in the Term Sheet.
7. Issue 6:
   7.1. The issue as to whether any of the relevant clauses in the Model 2 Terms were not properly incorporated into the contract between Lendy and Model 2 Investors (on the basis that they were onerous or unusual or otherwise) does not arise.
   7.2. Alternatively, the relevant clauses in the Model 2 Terms were properly incorporated into the contract between Lendy and Model 2 Investors.

8. Issue 7:

8.1. The issue as to whether the relevant clauses in the Model 2 Terms constitute ‘unfair terms’ under Part 2 of the Consumer Rights Act 2015 does not arise.

8.2. Alternatively, the relevant clauses in the Model 2 Terms do not constitute ‘unfair terms’ under Part 2 of the Consumer Rights Act 2015.

9. Issue 9: The Model 2 Investors and Model 2 Transferees do not have any legal or equitable proprietary interest in the interest and fees that Lendy was entitled to receive for its own account under the Term Sheet and Borrower Conditions.

10. Issue 10: For the purposes of the application of proceeds under Clause 21.1 of the Model 2 Debenture, the Secured Liabilities should be discharged *pro rata* (to the extent that there is any shortfall in the proceeds available for the discharge of the Secured Liabilities) so that any shortfall is borne rateably by the persons to whom the Secured Liabilities are owed.