

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

BETWEEN

NORTHERN ROCK APPLICANTS

Applicants

- and -

(1) ANDREW CALDWELL

(As the Independent Valuer of Northern Rock plc)

(2) HM TREASURY

Respondents

SKELETON ARGUMENT ON BEHALF OF
HARBINGER CAPITAL PARTNERS

A. INTRODUCTION

1. This skeleton argument is filed on behalf of Harbinger Capital Partners (“**Harbinger**”) pursuant to paragraph 3 (3)(a) of the Case Management Order No 2 (“**the CMC Order**”) of Andrew Bartlett QC (“**the Judge**”) dated 24 February 2011. This provided that:

“Harbinger shall file and serve a skeleton argument addressing the interpretation and application of section 133 (5) of the Financial Services and Markets Act 2000 (as amended by paragraph 158 of the Transfer of Tribunals Functions Order (SI 2010/22)”.

2. These submissions primarily set out Harbinger’s position in relation to this issue (the “**Section 133 (5) Issue**”) and respond to the Valuer’s submission on the Section 133 (5) Issue in his skeleton argument dated 1 April 2011. They also address paragraphs 26 to 44 of that document, which incorrectly assert that the three expert reports (the

“Expert Reports”¹) on which Harbinger relies are irrelevant to these proceedings (which paragraphs, in any event, do not comply with paragraph 3 (2)(b) of the CMC Order).

3. Since the case management conference on 24 February 2011 (the “CMC”) a statement of case has been filed and served by Mr Hulme, the chairman of the Northern Rock Shareholders Action Group (the “NRSAG”). Mr Hulme is acting in a coordinating capacity on behalf of the ordinary shareholders who have submitted reference notices to the Tribunal. Significantly, Mr Hulme supports all the legal and factual submissions advanced by Harbinger².

B. THE INAPPROPRIATE APPROACH OF THE VALUER

4. The Valuer’s position can be summarised as follows:
 - (a) The Tribunal is not permitted to make directions that would direct the Valuer to reach a particular outcome (Skeleton at §21).
 - (b) In particular, the Tribunal cannot direct the Valuer to adopt a given methodology – *a fortiori* if the relevant context has changed (Skeleton at §22).
 - (c) If the valuation were remitted to the Valuer on the basis that the Repayment Interpretation³ was not correct, he would have to reconsider his approach through a new consultation (Skeleton at §42).

¹ These comprise the first expert report of Murdoch McKillop dated 3 April 2009 (the “First Expert Report”); the second expert report of Murdoch McKillop dated 27 January 2010 (the “Second Expert Report”); and the expert report of Paul Thompson dated 28 October 2010 (the “Thompson Report”).

² See his statement of case, paragraph 5.

³ The Repayment Interpretation is the Valuer’s construction of Section 5 (4) of the Banking (Special Provisions) Act 2008 (“the Withdrawn Assumption”) i.e. that the meaning of “[financial assistance] has been withdrawn” is that assets of sufficient value to repay the £25.38 billion due to the Bank of England are realised immediately prior to 22 February 2008.

- (d) In the interim, the expert evidence filed by Harbinger is irrelevant. This is because the respective approaches of Harbinger and the Valuer are fundamentally incapable of comparison. Instead, Harbinger has purported to construct “issues” between the parties. The Valuer reserves his position pending the determination of the Interpretation Issue, and neither agrees nor disagrees with Mr McKillop’s valuations (Skeleton at §41 to 43).
5. The necessary consequence of the Valuer’s analysis is that the Tribunal will only be able to consider the Interpretation Issue⁴ at the substantive hearing: it will not be able to consider any of the methodology issues raised by Harbinger unless and until the Valuer has conducted a “new consultation” (based on any alternative construction of the Withdrawn Assumption that he is directed to adopt) and re-considered his valuation (Skeleton at §42).
 6. The position of the Valuer is both wrong and inappropriate.
 7. Through his restrictive approach the Valuer in effect seeks to have the Interpretation Issue determined as a preliminary issue.
 8. The Tribunal will recall that the Valuer previously sought a direction for a preliminary issue at the CMC. He submitted⁵ (CMC Skeleton at §17) that:

“.....since the Withdrawal Assumption determines the starting point for the Valuation, the effect of such a direction [as to the correct interpretation] would be that

⁴ The Interpretation Issue is the question of the proper construction of the Withdrawn Assumption.

Harbinger has posited two, alternative constructions: “withdrawn” means that Northern Rock is treated as having repaid the financial assistance in kind by a transfer of assets at book value (“**the Repayment-in-Kind Interpretation**”), alternatively that the Bank of England has made a demand for repayment of the financial assistance (“**the Demand Interpretation**”). The First Respondent relies on one construction, the Repayment Interpretation.

⁵ It should be noted that HM Treasury (as now) supported the written/oral submissions of the Valuer in this regard. Mr Cromie, for the Treasury Solicitor, developed this point further in oral submissions.

the Valuer would have to reconsider his methodology in light of the new interpretation of the Withdrawal Assumption. He could not simply apply the methodology used for the existing Valuation to a new situation. It follows that, in such a scenario, any complaints about his (existing) methodology fall away. It would be a clear usurpation of the Valuer's statutory function for the Tribunal to make a direction as to the methodology to be applied even before the Valuer has determined what the effect of the new interpretation would be" (emphasis added⁶).

9. Having considered the Valuer's CMC submissions, the Judge in his ruling (the "**Ruling**") determined that there was no "sufficiently strong reason for hiving off the methodology points" (at [13]) and that "there should be a single hearing to deal with all points" (at [18]). In reaching this conclusion the Judge expressly referred to the Valuer's written submissions set out in the previous paragraph (at [14]):

"Against that Mr Howard advanced the argument set out in paragraphs 16 – 17 of his skeleton, but I am not sufficiently convinced for today's purposes by his characterisation of the jurisdiction of the Tribunal or by his submission that decisions on the methodology points will necessarily not assist the valuer if he is required to re-do his valuation. The jurisdiction in FSMA s 133 (5) is not expressed as a mere remission but remission "with such directions as the Tribunal considers appropriate", which at least arguably may include directions on methodology. It would be unfortunate, as Mr Phillips submitted, if there were a decision by the Tribunal which meant that the valuer re-did his valuation, and then the same methodology points were raised again which have already been raised in relation to the current valuation" (emphasis added).

10. The Judge clearly ruled that all "methodology points" should be dealt with at the substantive hearing (thus precluding the same points from arising on a further reference of a second valuation).
11. In total disregard of the terms of the Ruling, the Valuer now seeks to take the Interpretation Issue as a preliminary issue for a second time. His reasoning at, for example, Skeleton §22 bears a striking resemblance to his submission at CMC Skeleton §17 (which submissions the Judge expressly rejected – see above).

⁶ It should be noted that the Valuer made a similar submission in his Statement of Case, at paragraph 142 (1) (in relation to statutory interest) and at paragraph 156 (in relation to Covered Bonds).

12. Harbinger makes the following submissions:

- (a) The conduct of the Valuer is wholly inappropriate. The Judge has ruled that all the issues should be heard together. The Tribunal should adhere to that direction. If necessary, Harbinger will argue that the Valuer is estopped from raising this issue again and/or it is an abuse of the process of the Tribunal that he seeks to do so. This same issue (i.e. whether all the issues should be heard at the substantive hearing) has already been litigated by the same parties and made the subject of a final decision (*Halsbury's Laws*, Volume 12, 5th edition, 1180). An issue estoppel can arise from an interlocutory decision on a procedural matter (*Desert Sun Loan Corporation v Hill* [1996] 2 All ER 847, 858). The complete re-litigation of an issue is an abuse of process (*Taylor Walton v Laing* [2007] EWCA Civ 1146, [33]). It is an abuse of process to misuse a tribunal's procedure in a way that is manifestly unfair to a party (*Hunter v Chief Constable of West Midlands Police* [1982] AC 529, 536).
- (b) This inappropriateness is epitomised by the Valuer's suggestion that there be "a new consultation" (Skeleton at §42). The Judge made it clear in the Ruling that one reason for rejecting the preliminary issue was the need to avoid any further delay (at [12]) and that shareholders required certainty and a quick resolution of these proceedings (at [15]). Northern Rock was nationalised over three years ago. The Valuer took 15 months from the date of his appointment to produce the Consultation Document and a further 4 to produce the Final Document/assessment notice.⁷ The revised assessment notice was not issued until October 2010.⁸ In view of the scarcity of Tribunal time, it could easily take a further 12 months for a reference of any "new consultation" to come back before the Tribunal. Such a state of affairs (and therefore the Valuer's suggestion is unacceptable.

⁷ The Valuer was appointed on 8 September 2008. The Consultation Document was not published until December 2009. The Final Document and assessment notice were both published at the end of March 2010.

⁸ See Harbinger's letter of 27 September 2010 in relation to this further delay.

- (c) To this end, the Tribunal is reminded that the Valuer was invited by Harbinger in December 2009⁹ to seek a declaration on the Interpretation Issue in the Chancery Division in order to save time and costs. The Valuer twice rejected that invitation in correspondence on the grounds that it was “premature” when he was “still in the process of consultation”¹⁰ However, he went on to conclude in the Consultation Document that the valuation assumptions are “matters which are fixed by law”¹¹ on which he would not in any event be seeking representations from former shareholders (i.e. he already felt bound by his construction of the Withdrawn Assumption).
- (d) If (as appears to be the case) the Valuer was at all times advised that the Repayment Interpretation was the only applicable construction of the Withdrawn Assumption, and that the Repayment Interpretation inevitably necessitated a net deficit position at the end of administration (see e.g. the CMC Skeleton at §19), he should have referred the matter to the Chancery Division in December 2009. Instead, he has conducted an artificial valuation exercise that he always knew (because the Repayment Interpretation was “fixed by law”) was bound to result in a zero valuation. In the process he has wasted the applicants’ time and money.
- (e) In truth, this refusal to seek a declaration in the Chancery Division typifies the Valuer’s approach to this case: one of maximum resistance and obstruction, and wholly inappropriate given his statutory role¹². Other examples of this include:

- (1) His repeated mischaracterisation of Harbinger’s case.¹³

⁹ See Harbinger’s letters of 24 December 2009, 29 January 2010 and 4 May 2010.

¹⁰ See the Valuer’s letters of 11 January 2010 and 29 March 2010.

¹¹ See the Consultation Document, paragraph 1.14.

¹² See Harbinger’s letter to this effect of 21 March 2011.

¹³ See his statement of case, paragraph 32 (2), and the CMC skeleton at §11.

- (2) His refusal to clarify his approach to the payment of interest on debts on the assumption that Northern Rock was balance-sheet solvent at the beginning of the hypothetical administration (i.e. if either the Repayment-in-Kind Interpretation or the Demand Interpretation are found to be the proper construction of the Withdrawn Assumption) despite a direction from the Tribunal to file and serve expert evidence and a specific invitation from Harbinger in correspondence that he do so to clarify his position¹⁴.
 - (3) His ongoing challenges to the relevance of documents that the Judge expressly expects him to disclose¹⁵ and his delay in disclosing them.
 - (4) His recent intimation that he will be seeking a direction to shorten the substantive hearing (even though the Tribunal has expressly ordered that the hearing last five days)¹⁶.
- (f) The approach of the Valuer cannot dictate the approach of the Tribunal at the substantive hearing of the matter. In this regard:
- (1) The Valuer has been aware for many months that Harbinger's alternative constructions of the Withdrawn Assumption (i.e. the Repayment-in-Kind Interpretation and the Demand Interpretation) would require the valuation exercise to be conducted by reference to a substantial net asset position at the start of the hypothetical administration.
 - (2) The Valuer has been aware for many months of the detail of the expert evidence submitted by Harbinger which addresses the

¹⁴ See the Valuer's letters dated 15 March 2011 and 21 March 2011.

¹⁵ See the Valuer's letter of 28 March 2010.

¹⁶ See the Valuer's letter dated 23 March 2011, and paragraph 46 of his skeleton argument.

valuation of the Preference Shares in Northern Rock on the basis of the Repayment-in-Kind Interpretation and the Demand Interpretation (the Valuer has had the First Expert Report for 2 years, the Second Expert Report for 15 months and the Thompson Report for 6 months).

- (3) The Judge directed that the methodology points should be addressed at the hearing. Furthermore, the Judge directed that the Valuer had until 1 April 2011 to notify the other parties whether he intended to rely on expert evidence at the hearing.
- (4) The Valuer has chosen not to prepare any further report or adduce any expert evidence which takes issue with the expert evidence submitted by Harbinger.
- (5) Moreover, the legal advisers to the Valuer have confirmed that they do not wish to cross-examine Mr McKillop or Mr Thompson.
- (6) The tactical decisions by the Valuer and his legal advisers cannot dictate the matters which may be considered by the Tribunal at the hearing.
- (7) Accordingly, the Tribunal will be asked to proceed on the basis of the evidence of Mr McKillop and Mr Thompson as the evidence of the value of the Preference Shares in Northern Rock in circumstances where the Tribunal determines that the Repayment-in-Kind Interpretation or the Demand Interpretation is the correct interpretation of the Withdrawn Assumption.

13. Harbinger maintains as follows: (1) that there should be no preliminary issue and that all the issues should be dealt with at the substantive hearing, as directed at the CMC, (2) that the time estimate of five days is appropriate and should remain.

C. THE INTERPRETATION AND APPLICATION OF SECTION 133 (5)

Section 133 (5) of FSMA 2000

14. Section 133 (5) provides as follows in respect of references to the Tribunal under paragraph 13 of the Schedule to the Northern Rock plc Compensation Scheme Order 2008 (the “**Compensation Scheme Order**”):

“Where the Tribunal is satisfied that the decision as to the amount of compensation shown in the revised assessment notice was not a reasonable decision the Tribunal must remit the matter to the valuer for reconsideration in accordance with such directions (if any) as they consider appropriate”.

15. Harbinger had understood the true issue that divided the parties to be the proper interpretation of the term “reasonable” in the context of the Tribunal’s basis for intervention.
16. It appears however that there is a prior and more basic disagreement between the parties which has emerged from the Valuer’s skeleton. Accordingly, that issue is first briefly addressed.

(i) **A preliminary point: the reasonableness of what?**

17. The Valuer (Skeleton at §13 (4)) appears to suggest that there is a distinction of substance between: (1) an inquiry as to the reasonableness of a valuer’s decision as the amount of compensation and (2) an inquiry as to the reasonableness of the amount of compensation. He apparently argues that the function of the Tribunal is confined to considering the first question and does not embrace the second. This is part of a

theme which suggests that the Tribunal is confined to considering whether the “valuation approach is reasonable” (Skeleton at §19) rather than the actual and ultimate issue of whether the valuation *itself* is reasonable. There is no warrant in the language of section 133 (5) for the submission.

18. Harbinger submits that there is in fact no distinction of substance between inquiries (1) and (2) and the Tribunal’s role is ultimately to consider the reasonableness of the amount which was the subject of the Valuer’s decision.
19. That may of course involve an inquiry into the methodology or approach adopted by the Valuer but the ultimate issue for the Tribunal, consistently with the role Government intended for it, as part of Human Rights Act 1998 (the “HRA”) compliance, and consistently with the actual language used in section 133 (5), is to assess whether the amount determined meets the State’s obligations under Article 1 of the First Protocol (“A1P1”) to the Convention.
20. The HRA submission is developed in more detail below, but even confining oneself to just the language used in section 133 (5) the Valuer’s position as to the proper scope of the Tribunal’s inquiry is untenable:
 - (a) The only legitimate subject-matter of any proceedings before the Tribunal is “the amount of compensation which is contained in a revised assessment notice” and the right of the Treasury and an applicant to refer that to the Tribunal arises only if they are “dissatisfied with the revised assessment notice”: see Part 4, paragraph 13 (b) of the Schedule to the Compensation Scheme Order. There is no mention of mere dissatisfaction with process or methodology; the focus is only on the amount.
 - (b) Unsurprisingly, when one looks at section 133 (5) the same theme appears. So, it is when the Tribunal is satisfied that “the decision as to the amount of

compensation”¹⁷ is not a reasonable decision (not merely the process or methodology) that it can remit the matter. The “trigger” or “threshold condition” (to use the Valuer’s words) for the intervention of the Tribunal is thus a finding by it that the amount was not reasonable. There is nothing in the section confining the Tribunal to considering whether the Valuer’s approach was unreasonable: the inquiry is always focussed on the output not the process, although the process if flawed will affect the output.

- (c) Were there any remaining doubt, the “matter” (the word used in section 133 (5) which is to be remitted to the Valuer for reconsideration is the amount of compensation not something else (such as his valuation method).

21. The Tribunal is invited to rule that its role in the section 133 (5) exercise is to consider whether the ultimate decision of the Valuer as to *amount* was not reasonable. That may include considering whether his valuation approach was incorrect but the inquiry is not confined to that question.

(ii) Standard of review: an irrationality standard of review or a Human Rights Act 1998 compliant standard of review?

22. The nature of the dispute between the parties on the issue of construction may be summarised as follows.

- (a) The Valuer submits that the Tribunal may only remit a matter if his decision was perverse under the well-known public law *Wednesbury* principles.

¹⁷ This point is reinforced by considering the terms of the enabling legislation pursuant to which the Compensation Scheme Order was made. Thus, section 9(1)(e) of the Banking (Special Provisions) Act 2008 (the “Banking Act 2008”) provided for compensation schemes to make provision for “enabling persons to apply for decisions relating to assessment of any compensation or consideration to be reviewed by the Financial Services and Markets Tribunal or a tribunal appointed by the Treasury for the purposes of this order”. Parliament clearly considered it appropriate to provide a remedy before an independent and impartial tribunal on matters relating to *assessment* of amount of compensation and not a remedy confined to merely the *approach* adopted in valuation.

However, the Valuer appears not even to accept that the Tribunal can remit a matter if the amount of compensation fails a rationality test but asserts (Skeleton at §15 and §19) that it is only if the *approach* of the Valuer is perverse that the Tribunal can remit; and

- (b) Harbinger submits that the correct focus is on the reasonableness of the final assessed amount (not just the approach) and that the Tribunal can and indeed must interfere if that amount falls below the level of compensation which meets the standards required under A1P1. As will appear below, that is after all why the whole regime of review has been set up. Specifically, “reasonableness” in the context of the present scheme must mean “meeting Convention standards” and in assessing whether such standards are met the Tribunal can and must investigate all contested issues of fact and law rather than applying a “light-touch” *Wednesbury* standard. The more rigorous role for the Tribunal is demanded by section 6 of the HRA and, in the interpretation of section 133 (5), is required by section 3 of the HRA.

23. The Valuer rightly accepts that the meaning of the word “reasonable” in section 133 (5) of FSMA is to be ascertained by reference to the context and history (Skeleton at §4) but he then goes on to make his submissions in a manner which ignores the most important aspect of the context and history, namely the fact that the compensation regime as a whole was set up to satisfy the obligations of the State under A1P1¹⁸. The high point of his argument is a semantic analysis of the changes made to what he calls the “generally applicable” (Skeleton at §11) version of section 133. However, this wholly ignores the most important element of the context: the fact that the Tribunal was rightly included in the procedure established by the Compensation Scheme Order to meet the state’s A1P1 obligations (see paragraph 24 (c), below).

¹⁸ This article provides as follows: “*Protection of property*: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

24. Before developing Harbinger's case on the meaning of "reasonable" in section 133 (5) it is important to set out some matters which should be uncontroversial:

- (a) Harbinger's interests in the Preference Shares were possessions for the purposes of A1P1 and by reason of the Transfer Order they were deprived of the benefit of these possessions within the meaning of the first paragraph of A1P1¹⁹.
- (b) The taking of property without compensation in an amount reasonably related to its value will normally constitute a violation of A1P1²⁰.
- (c) The purpose of the scheme of compensation provided for by the Banking Act 2008 was to meet the State's obligations to provide compensation. As explained in the Explanatory Notes to the Banking (Special Provisions) Bill, which were prepared by HM Treasury:

"82. The Bill requires the Treasury to make an order under clause 5 or 7 that sets out a scheme for the determination by an independent valuer of the amount of any compensation or consideration payable to the former holders of the securities or assets transferred under clause 3 or 6 or whose rights have been extinguished under clause 4. The order must be made within 3 months of making a transfer order. The Bill sets out in clauses 5(4) and 7(3) the fundamental principle for the assessment of compensation payable to persons whose A1P1 right have been interfered with. Lord Davies takes the view that the mandatory assumption is justified on the grounds that it is reasonable in all the circumstances and in the wider public interest where significant amounts of support from public finances have been provided to a deposit-taker and public resources are also used to pay compensation. Lord Davies believes that in some circumstances it will be justified and proportionate to apply one or more of the discretionary assumptions in clause 9(2) of the Bill. This would not cause the holders of securities in it to bear an excessive or

¹⁹ See in this regard the judgment of Laws LJ at para [36] in SRM and others v Commissions of Her Majesty's Treasury [2009] EWCA Civ 788 (hereafter referred to as "SRM").

²⁰ See Laws LJ at para [48] of SRM citing *Holy Monasteries v Greece* (1995) 20 EHRR 1. See also *Lester, Pannick and Herberg*, *Human Rights Law and Practice* (3rd Edition) at para. 4.19.21, page 661 citing *James v United Kingdom* (1986) 8 EHRR 123. That is why Parliament made it a mandatory requirement that the taking of property was accompanied by a compensation scheme: see section 7(1)(a) of the Banking Act 2008.

disproportionate burden because they would be in that situation but for the provision of public financial support”.

- (d) The determination of the amount of compensation, if any, to be provided to those whose shares were taken amounts to the determination of “civil right or obligation” for the purposes of Article 6 of the Convention and must accordingly meet the procedural standards required by that provision. Harbinger enjoys a private law right in this respect conferred by the Transfer Order (as a person “affected” by the valuation decision). The existence of that right was indeed the basis upon which the Government set up the Tribunal system in this case (see paragraph 84 of the Explanatory Notes, set out in subparagraph (g), below).
- (e) It is well established in the AIP1 jurisprudence that the right to property includes, as an essential aspect, certain procedural guarantees under Article 6 of the Convention. As the Strasbourg Court explained in *Jokela v Finland* no. 28856/95 at § 45:
- “Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see, for example, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55, and *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 21, § 49)”.
- (f) This statement of principle has been endorsed in several more recent Strasbourg cases which were cited by Stanley Burnton LJ in SRM in the Divisional Court at paras [151]-[156] and by Laws LJ in the Court of Appeal at para [82]. Thus, in *Forminster Enterprises Limited v Czech Republic* (Application No 38238/04, 9 October 2008, para 69) the Strasbourg Court held that a person whose property has been taken must have access to adversarial proceedings before an independent body which is competent to review the relevant evidence. To the same effect, that Court held in

Katikaridis v Greece (2001) 32 EHRR 107 that where the fairness of compensation payable depends on factual issues going to the value of the property taken the individual must be able to challenge the facts in issue before an independent tribunal.

- (g) These principles were not lost on the Government. As explained by HM Treasury in the Explanatory Notes to the Banking (Special Provisions) Bill (with emphases added):

“83. Subject to the application of the mandatory and optional assumptions referred to above, clause 9(1) of the Bill permits compensation orders to set out the manner in which compensation or consideration (as the case may be) is to be assessed. This includes provision as to methods of calculation, valuation dates and matters to be taken into and left out of account. The exercise of the powers in clause 9 in individual cases must observe Convention rights.

84. The resolution of disputes about the determination of the amount of compensation payable by the Treasury under clause 5 or 7, or for the amount of consideration or compensation payable by a private sector body to whom a transfer is made, engages Article 6 of the ECHR.

85. Clause 9 of the Bill provides that the Treasury may, by order, appoint an independent valuer to assess the amount of compensation or consideration and make provision for the procedural rules to be followed for assessing any compensation, including provision enabling the independent valuer to make such rules. The valuer appointed by the Treasury will be an independent person, whose decisions are subject to subsequent control by an independent judicial body.

86. Clause 9 also gives the Treasury the power to make provision enabling people to apply for decisions relating to the assessment for any compensation or consideration to be reviewed by the Financial Services and Markets Tribunal or a tribunal appointed by the Treasury. If a party is not satisfied with the decision of the tribunal they will have the option of a further appeal to the higher courts.

87. The appointment of an independent valuer, whose decisions will be reviewable by an independent tribunal and further reviewable by the higher courts, will provide the procedural safeguards required by Article 6”.

25. So the aim of the provisions which provide for a right to refer a valuer's decision to the Tribunal is to meet the obligation recognised by the Government to ensure that domestic law provides for "control by an independent judicial body" which meets Article 6 standards.

26. The issue is what type of judicial control is necessitated by those standards. Harbinger submits that the answer to that question determines the correct interpretation of "unreasonableness" as the basis for Tribunal intervention in section 133 (5) of FSMA, and also the scope of the directions which the Tribunal can give under that section when remitting matters to a valuer.

(iii) Judicial control and the meaning of "reasonable"

27. The starting point is to consider the way in which Parliament decided to fulfil the state's obligations under AIP1, including the procedural obligations described above. The solution was to set up a tripartite system for deciding the issue of compensation. This was made up of (a) the Valuer; (b) FINSMAT (now the Upper Tribunal, to decide whether the decision as to amount "was reasonable"); and (c) the Court of Appeal (with a very limited right of appeal only on a point of law).

28. It cannot be disputed that stage (a), the Valuer's decision, is an administrative decision by a person who is not any form of judicial tribunal. However independent he may be, he is not a court or tribunal in any sense: see the comments of Lord Hoffmann in Runa Begum v Tower Hamlets LBC [2003] 2 AC 430 (HL) at para [27] in this regard.

29. That is why Parliament created two further levels of review: the Tribunal and then a limited further appeal to the Court of Appeal on a point of law.

30. The Valuer's argument however is that the second level, the Tribunal, is constrained to apply a narrow judicial review intervention standard, perversity in the *Wednesbury*

sense. That is the limit of the judicial control he says is available²¹ to a dissatisfied applicant. The logic of the Valuer's argument is that those whose shares have been taken cannot challenge any of the facts upon which the Valuer has proceeded, cannot invite the Tribunal to look afresh at issues, and cannot ask the Tribunal to make its own findings of fact. His argument suggests that the Tribunal approaches the references under the Compensation Scheme Order with substantial "handcuffs". As explained below, if that argument were correct, the Government would have failed in its desired attempt to provide judicial control meeting A1P1 and Article 6 standards.

31. Where a decision is determinative of a person's private law civil rights and obligations (as here, in the case of the assessment of compensation by the Valuer) Article 6 requires the state to provide a right of access to an independent and impartial judicial body with "full jurisdiction" providing the guarantees of Article 6 (1)²². As to the meaning of that term, see *Lester, Pannick and Herberg*, Human Rights Law and Practice (3rd Edition) at para. 4.6.23-4.6.27.

²¹ It is rightly not suggested by the Valuer that a person dissatisfied with a valuer's decision as to amount should seek judicial review if he complains for example about factual errors which it is said cannot be the subject of a *Wednesbury* complaint. The Tribunal is the appropriate port of call for all such challenges. The Valuer appears to accept in his Skeleton at §24(2) that a judicial review in addition to a remedy before the Tribunal would not be appropriate.

²² For the determination of civil rights and obligations by a "tribunal" to satisfy Article 6(1)1, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see, for example *Le Compte, Van Leuven and De Meyere* (1983) 5 EHRR 533 § 51 and *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996). Lord Neuberger explained in his speech at para.45 in *Manchester City Council v Pinnock* [2010] 1 WLR 713 (UKSC) that where Convention rights were in issue traditional judicial review was insufficient to meet Convention standards: "...A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues....".

32. A review on traditional judicial review grounds falls below that standard. However, in certain narrowly defined cases the courts have held that judicial review with limited *Wednesbury* review of the facts will meet Article 6 standards and the case Bryan v United Kingdom (1995) 21 EHRR 342 (relied upon by the Valuer at Skeleton §13 (1)) is an example.

33. The principle which establishes the sufficiency of judicial review in those cases however has no application in the present context. The principle is summarised in *Lester, Pannick and Herberg* at para. 4.6.24 and was described in the following terms by Lord Hoffmann in Runa Begum v Tower Hamlets LBC [2003] 2 AC 430 (HL) at para. [56] following a survey of the Strasbourg jurisprudence:

“The key phrases in the judgments of the Strasbourg court which describe the cases in which a limited review of the facts is sufficient are "specialised areas of the law" (*Bryan's* case, at p 361, para 47) and "classic exercise of administrative discretion" (*Kingsley's* case, at p 302, para 53). What kind of decisions are these phrases referring to? I think that one has to take them together. The notion of a specialised area of the law should not be taken too literally. After all, I suppose carriage of goods by sea could be said to be a specialised area of the law, but no one would suggest that shipping disputes should be decided otherwise than by normal judicial methods. It seems to me that what the court had in mind was those areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators. And when the court in *Kingsley* spoke of the classic exercise of administrative discretion, it was referring to the ultimate decision as to whether Kingsley was a fit and proper person and not to the particular findings of fact which had to be made on the way to arriving at that decision. In the same way, the decision as to whether the accommodation was suitable for Runa Begum was a classic exercise of administrative discretion, even though it involved preliminary findings of fact.”

34. It follows that those cases where an ordinary judicial review standard will suffice are accordingly those which involve discretionary policy decisions where the administrative body is acting in a regulatory and welfare context²³. By contrast, the Valuer is not making decisions on a discretionary policy basis, he is determining private law rights, and he is not accountable to any democratic body. He also has to

²³ See also the factors which Lord Bingham in Runa Begum para.9, page 440 of his speech found to be relevant in justifying provision of a tribunal which could not make fresh findings of fact.

act within legally defined parameters and indeed the subject matter of the decision (valuation of shares) is classically something within the judicial field²⁴. This is not a specialist area like planning control.

35. More recently, in Tsfayo v United Kingdom (2007) HLR 19 at para [46], the Strasbourg Court, in similar terms to those used by Lord Hoffmann, identified those cases which did not require a full jurisdiction review as being those where the factual findings were merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take²⁵.
36. Planning and state benefits cases may be classic examples of such decisions. A decision as to the correct valuation of shares for A1P1 purposes falls at the other end of the spectrum: it involves no policy choices or democratic accountability. The Tribunal is the only check on the decision-maker and that Tribunal must accordingly enjoy should accordingly full jurisdiction if the procedure is to comply with Article 6.
37. As explained by Lord Hoffmann at para [42] in Runa Begum, those cases which concern the adjudication of private law rights (as opposed to regulatory or social welfare schemes) must be entrusted to the judicial branch. The decision as to the amount of compensation to be awarded to applicants is clearly a private law decision. There is no “opt out” for states in that type of case: ordinary judicial review, even with an appeal, is not enough.

²⁴ See, for example, the valuation of shares of a private company in the context of unfair prejudice petitions pursuant to section 994 of the Companies Act 2006.

²⁵ The Court went on to explain that the limited powers of a court on judicial review meant there was a breach of Article 6. At para 48, the Court explained: “The applicant had her claim refused because the HBRB did not find her a credible witness. Whilst the High Court had the power to quash the decision if it considered, *inter alia*, that there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that the HBRB had misunderstood or been ignorant of an established and relevant fact (see paragraphs 25-26 above), it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility”.

38. It follows that in practical terms the level of “judicial control” which the Tribunal must adopt when assessing the reasonableness of the amount is to allow an applicant to make all points of fact and law on the merits in attacking a valuation. The term “reasonable” requires no strained interpretation to achieve that result. It is classically a term informed by context. However, in the present case the Tribunal also has to have regard to the provisions of sections 3 and 6 of the HRA.
39. The Tribunal is itself under an interpretive obligation by operation of section 3 of the HRA to interpret both primary and secondary legislation consistently with Convention rights, so far as possible (Sheldrake v Director of Public Prosecutions [2003] 2 WLR 1629; Ghaidan v Godin-Mendoza [2004] UKHL 30). As explained in *Lester, Pannick and Herberg* at para 2.3.3, page 44 by reference to the English case law, this is an unusual and far-reaching obligation and can even require the court to depart from an unambiguous meaning. It is with this interpretive obligation in mind that one must approach section 133 (5) of FSMA.
40. In addition, the Tribunal is itself as a public authority under an obligation by reason of section 6 of the HRA to act in a manner compatible with Convention rights unless primary legislation requires it to act differently.
41. Drawing these strands together, Harbinger submits that section 133 (5) must be construed to provide those who have suffered a deprivation of possessions within A1P1 with an independent and impartial judicial tribunal with an ability to investigate all relevant issues of fact and law relating to the fairness of compensation in order to determine whether a level of compensation meeting A1P1 standards has been provided.
42. This submission is strongly supported by the observations of Laws LJ in the SRM case at para [84]. There Laws LJ explained that A1P1 required a judicial review court to have “full jurisdiction”. Those comments apply to the Tribunal. It is not suggested by the Valuer that in order to reach a court or tribunal with “full jurisdiction” the

applicants must take judicial review proceedings rather than proceedings before the Tribunal. The Tribunal was the body selected by Parliament to do the job and its remit to decide whether the amount of compensation was “reasonable” provides it with a full flexible jurisdiction to consider all issues of fact and law rather than being confined to a *Wednesbury* standard.

43. Stepping back from the Valuer’s case, it leads to the following undesirable position. A non-judicial individual who is appointed by HM Treasury decides how much, if anything, HM Treasury is to pay by way of compensation. This is the determination of a civil right or obligation but the Tribunal can only undertake a light-touch review of the approach of the Valuer (not even of his decision as to amount) and an applicant can then only appeal on point of law against the Tribunal’s decision. Unless it is the Valuer’s case that an applicant can in parallel bring judicial review proceedings invoking “full jurisdiction”, the Valuer’s arguments if correct lead to an obvious violation of the state’s obligations under the HRA.

44. By contrast, reading “reasonable” in section 133 (5) of FSMA to mean “consistent with AIP1 standards of compensation” and allowing an investigation of all matters of fact and law decided by the Valuer, avoids these problems. The Tribunal can put the semantic arguments relied upon by the Valuer to one side. The Tribunal’s duty is to arrive at a HRA compliant interpretation of its role.

45. Finally, the judicial review case relied upon by the Valuer (Skeleton at §14), Tameside [1976] AC 1014, is of no assistance for at least two reasons:

- (a) The House of Lords was there concerned with a statutory scheme where a discretionary policy decision had to be made by the Secretary of State as to as to the conduct of a local authority. This was classically an area of politics where the court’s role is necessarily limited and where Parliamentary accountability is the primary control; and

- (b) The court was not concerned with assessing the legality of any determination of civil rights and obligations protected by the HRA. The “full jurisdiction” issue did not arise.

46. Even in a public law context, it is not always the case that the term “reasonable” is to be interpreted in a *Wednesbury* sense. As explained by Lightman J in R (Dart Harbour and Navigation Authority v Secretary of State [2003] EWHC 1494) at para. [29] when interpreting the word “unreasonably”:

“The meaning of the word must in all cases turn on its statutory context. The very high threshold of “Wednesbury unreasonable” has been adopted as the public law test of the validity of decisions of bodies entrusted by Parliament with competence to make administrative decisions. Judicial restraint is called for in this context in exercise of the judge-made judicial review jurisdiction and this is reflected in the requirement for proof of irrationality. There are however statutory contexts where this construction is inapposite and, in place of the public law test, what is called for is a straightforward factual test based on all the material before the reviewing body: consider Reg v Hampshire CC ex parte W, Times Law Reports June 9th 1994. The present case is clearly an apposite case for the straightforward reconsideration by the Secretary of State in the light of the full facts of the reasonableness of the Authority's decision. The disappointed applicant for a licence already has a right to challenge the decision of the Authority on Wednesbury grounds in judicial review proceedings. For the added protection and safeguarding of the rights and legitimate expectations of disappointed applicants section 33(3)(b) introduces a new two-tier decision-making process. In this context Parliament cannot sensibly have intended by use of the word “reasonably” to require that the Secretary of State should apply the same strict test as a judge in judicial review proceedings. The provision of the second tier and the identity of the decision-maker at the second tier militate in favour of giving a common-sense (rather than technical) meaning to the term and affording the applicant a hearing where he can require the merits of his application to be examined as well as the merits of the Authority's decision. The Secretary of State is not free to substitute his own view for that of the Authority, but he can and should decide on the basis of the material before him as a matter of common-sense and common justice whether the previous decision was just, fair and reasonable. This is what the Secretary of State set out to do in the Decision Letter. In my judgment accordingly the Decision is not open to challenge on the ground that the Secretary of State applied the wrong test of reasonableness”.

(iv) **Section 133 (4): new evidence**

47. The legislature clearly made a deliberate decision to permit the Tribunal to receive evidence which was not before the Valuer. This strongly supports the position set out above. Parliament was aware that it had to ensure that a valuer's decision was, in the Treasury's words, subject to "judicial control" in a way which met Convention standards.
48. If a *Wednesbury* standard had been intended this provision makes little sense. By contrast, allowing a "full jurisdiction" review of all facts and issues of law would require admission of evidence without constraint. There is a long line of public law cases which establish that fresh evidence cannot provide grounds for judicial review, absent exceptional circumstances: see *Fordham, Judicial Review Handbook* (Fifth Edition) at paras.13.7.4-13.7.6, pp.138-139. and at para 17.2.1, page 162.
49. The case of Turgut [2001] 1 All ER 729 cited by the Valuer (Skeleton at §18) does not assist him, as a fuller quotation of the relevant part of that case would have shown. That was a case concerning the admission of evidence which concerned the safety of an alleged asylum seeker were he returned to his home country. It was in an exceptional category. The fuller quotation from Schiemann LJ's judgment at [346]-[347] is as follows (with the part the Valuer omitted being underlined):
- "The guiding principle is that the Secretary of State has undertaken not to send someone from here to a country where there are substantial grounds for believing that he would be at real risk of facing treatment proscribed by Article 3. If an applicant for permission to move for judicial review claims that the Secretary of State's decision is vitiated by some form of illegality he will file evidence to that effect. The Court will not shut out evidence which is relevant to the issues. Indeed, it may order disclosure of evidence necessary for disposing fairly of the application. The evidence is not strictly limited to evidence which was or should have been before the Secretary of State at the time of the decision".
50. In that case, the new evidence was relevant to test the Secretary of State's position that he would not remove a person to an unsafe country. This was an issue of fact on

which the court rightly admitted the most up to date evidence and allowed the Secretary of State (with new evidence) to explain his decision. Simon Brown LJ was certainly not accepting (which would have been a rather revolutionary step) that in all ordinary judicial review perversity challenges a claimant can freely submit new evidence.

51. In fact, the default position in ordinary judicial review cases is that stated at *Fordham* para. 17.2.2 on the basis of *Dwr Cymru Cyfyngedig v Environment Agency of Wales* [2003] EWHC 336 (Admin). As explained by Harrison J at para [58] in that case, the principles stated by the Court of Appeal on the admission of fresh evidence in judicial proceedings in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 provide an approved and sensible basis on which to proceed, which should only be departed from in exceptional circumstances where it could be justified in order to achieve justice and fairness.

52. So the principle in ordinary judicial review is that new evidence is not admitted absent exceptional circumstances. By contrast, section 133 (4) imposes no such hurdle on the admission of new evidence. Parliament must be taken to be well aware of the limitations on the perversity ground of judicial review and deliberately provided for free admission of additional material knowing that the Tribunal was required to perform an AIP1 and Article 6 compliant role.

53. Parliament also allowed admission of new evidence before the Tribunal because it recognised that the Tribunal was a specialist tribunal (a fact acknowledged by the Valuer at §24(3) of his skeleton). The Tribunal is not an ordinary court but a body intended to deal with all issues of fact and law which are relied on in a reference to it.

(v) **Section 133 (5): directions**

54. If the Tribunal is required to have full jurisdiction as described above, it must have the power in substance to substitute its own decisions on facts and law for those of the

Valuer. That is part and parcel of enjoying full jurisdiction: see Albert and Le Compte v Belgium (1983) 5 EHRR 533 and Chevrol v France, Judgment of 13 February 2003, ECtHR at para.82-84. In order to meet Article 6 standards the tribunal must have power to make its own findings of primary fact and to weigh the evidence: R (Bewry) v Norwich City Council [2001] EWHC Admin 657, per Moses J at para [82].

55. This result can be achieved without doing any violence to the language of section 133 (5). The Tribunal, in an appropriate case, can making findings of fact and issue consequent directions to the Valuer to reconsider and to make a determination in an amount according with those findings. Such a direction could include an express direction in relation to the treatment of statutory interest in the hypothetical administration of Northern Rock.

56. The fact that the statute requires a remission to the decision-maker rather than providing for the Tribunal to make a decision itself is not significant. The interpretive obligation imposed by section 3 of the HRA and the Tribunal's obligation under section 6 of the HRA require such a result.

57. Accordingly, it would be within the Tribunal's power to order a reconsideration in accordance with directions which would require the Valuer to give a specified value to the appropriated shares.

(vi) Section 133 (5): conclusions

58. To summarise Harbinger's position:

- (a) The focus of the Tribunal's attention under section 133 (5) must be the reasonableness of the amount assessed by the Valuer;
- (b) "Reasonableness" in this context means "in compliance with the State's obligations to pay appropriate compensation under A1P1";

- (c) In considering this issue the Tribunal is obliged to consider all issues of fact and law raised by the applicants in their complaint against the assessment;
- (d) The Tribunal must receive and take into account all evidence submitted by the parties, including new evidence which was not before the Valuer;
- (e) The Tribunal must be able to make its own findings of fact and law; and
- (f) The Tribunal must be able to direct the Valuer to take into account these findings of fact and law in making a further assessment, even if this leads to a determined amount as the outcome.

D. EXPERT EVIDENCE

59. The Valuer was ordered at paragraph 3 (2)(b) of the CMC Order to indicate whether he intended to rely on any expert evidence at the hearing and, if so, its intended nature and scope, and when it would be served (including an indication as to whether the Valuer intended to make himself available for cross-examination at the hearing).

60. Although the Valuer has complied with the CMC Order (Skeleton at §45), the majority of his skeleton argument (Skeleton §26 to §44) purports to be a response to the 'Note on Expert Evidence' filed and served by Harbinger on 23 March 2011 pursuant to paragraph 3 (1)(b) of the CMC Order (the "Note"). The Judge did not order such a response, and its contents are unwarranted.

61. The Valuer alleges (Skeleton at §29) that the Note "does not advance matters but proceeds on a false basis as to the issues between the parties". This criticism stems from the Valuer's own misunderstanding of the "issues" in these proceedings. As to this:

- (a) The principal issue with which Harbinger is concerned in these proceedings is the ultimate value of the preference shares in Northern Rock and the amount

of compensation for former preference shareholders (the “**Ultimate Valuation Issue**”).

- (b) The Valuer claims that this [Ultimate Valuation Issue] “cannot be in issue, because it is not for the Tribunal to determine” (Skeleton at §40 (4)). He is wrong to do so. It is an “issue” in the sense that the only legitimate subject-matter of any proceeding before the Tribunal is the “amount of compensation contained in a revised assessment notice”: see Part 4, paragraph 13 (b) of the Compensation Scheme Order. The Tribunal is expressly tasked with considering whether the decision as to the amount of compensation is a reasonable decision. It is also “in issue” (i.e. disputed), insofar as the Valuer values the Preference Shares at zero and Harbinger values them at £322.5 million.
- (c) As explained in the Note²⁶, the Ultimate Valuation Issue necessarily incorporates all of the other “issues”: all other issues inform and therefore are relevant to the question of the ultimate valuation of the shares (and therefore the determination of compensation). Consequently, the whole of the Expert Reports are admissible and relevant to the Ultimate Valuation Issue. The Tribunal will be assisted by comparing the Valuer’s valuation against Harbinger’s alternative valuations in forming a view about whether his decision as to the amount of compensation was reasonable. Moreover, the Expert Reports will inform the content of the directions which the Tribunal may give to the Valuer.
- (d) The Valuer has elected not to respond to or engage with the Expert Reports.²⁷ The CMC Order directed him to file and serve any expert evidence on which

²⁶ See paragraph 5 (g).

²⁷ He has had the First Expert Report for nearly two years, and the Second Expert Report for 15 months. There was a direction for the filing of further expert evidence by 1 April 2011.

he intends to rely by 1 April 2011, and he has elected not to do so. On that basis Harbinger invites the Tribunal to treat them as unchallenged.

Evidence of Mr Thompson

62. The Valuer suggests (Skeleton at §33 to 34) that the Thompson Report is irrelevant to the Interpretation Issue. He does not regard the acts of the Board, the Bank and the Administrator before and during the hypothetical administration as relevant to the interpretation of the Withdrawn Assumption. He has not considered/opined/put forward a positive case on “how the Administrator would have acted” or “the realistic course of action” that might have been taken by the Board and the Bank, and therefore there is “no issue between the parties”.

63. This analysis is again misconceived. The Thompson Report²⁸ is both admissible and relevant to the Interpretation Issue. Harbinger makes the following submissions in relation to this:

- (a) Harbinger does not rely on the Expert Reports²⁹ to construe the Withdrawn Assumption. It recognises the principle that statutes should be construed according to legal principles rather than on the basis of evidence.³⁰
- (b) The ordinary meaning of words in a statute is dictated by their factual context. There are also other balancing factors to consider in statutory interpretation: the broad purpose of the statute, Convention rights, and accepted rules/presumptions of construction.³¹

²⁸ As set out in the Note, it is paragraphs 2.4 to 2.14 and 5.1 to 5.21 that are admissible and relevant to the Interpretation Issue.

²⁹ As the Valuer acknowledges (Skeleton at §37) the First Expert Report is premised on the Primary Legal Analysis and the Second Expert Report on the Secondary Legal Analysis: Harbinger does not rely on the expert evidence for the ordinary meaning of the Withdrawn Assumption.

³⁰ See Hodgkinson & James, *Expert Evidence: Law and Practice*, 2009, 9-043

³¹ See the Valuer’s statement of case, at paragraph 53.

- (c) The Thompson Report illustrates that, in the context of a lender/borrower relationship where the borrower is a major financial institution that is cash-flow insolvent, the Repayment Interpretation: (i) is inconsistent with the ordinary meaning of the phrase “...has been withdrawn (whether by the making of a demand for repayment or otherwise)”; (ii) breaches other rules/presumptions of interpretation. The Thompson Report effectively shows what the Withdrawn Assumption cannot mean i.e. the Repayment Interpretation.
- (d) The conduct of the hypothetical administration is relevant to the Interpretation Issue because it is only through showing the practical consequences of the competing constructions of the Withdrawn Assumption that the Tribunal can then make an informed assessment as to which of them is most consistent with the purpose of the statute³² and the Convention³³.

64. The Valuer also suggests that, since the question of statutory interest due to the Bank does not arise on the Repayment Interpretation, the parts of the Thompson Report³⁴ addressing the Statutory Interest Issue are irrelevant. This misses the point for various reasons:

- (a) The treatment of statutory interest is determinative of value for preference (and ordinary) shareholders. It is therefore essential to the Ultimate Valuation Issue.
- (b) On any view, the proper approach to statutory interest in the event of Northern Rock being balance sheet solvent at the start of administration is “in issue”

³² As to which, see paragraphs 45 to 59 of Harbinger’s Grounds of Appeal (the “Grounds”).

³³ As to which, see paragraphs 93 to 125 of the Grounds (in particular, paragraph 125).

³⁴ As set out in the Note, it is paragraphs 2.12 to 2.14 and 5.22 to 5.30 that are admissible and relevant to the Statutory Interest Issue.

between the parties. In his statement of case³⁵ the Valuer dismissed Harbinger's approach (as set out in both the Thompson Report³⁶ and the Expert Reports³⁷) as "speculative", since it assumed that "all, indeed any, creditors would have agreed to give up the enhanced statutory rate of interest in return for prompter payment".

- (c) In disputing the Harbinger approach, the Valuer relies on the B&B Scheme, in which the independent valuer started with a net surplus at the beginning of administration³⁸ but where, after the rigid application of statutory interest under rule 2.88 of IA86, the creditors were left with a shortfall on interest³⁹. This is a further indicator that the Valuer expressly disagrees with the Harbinger approach to statutory interest (as applied to both the Repayment-in-Kind Interpretation and the Demand Interpretation) and that the treatment of statutory interest is "in issue".
- (d) In the circumstances, the Statutory Interest Issue⁴⁰ is an instance where "it would be unfortunate.....if there were a decision by the Tribunal which meant the valuer re-did his valuation, and then the same methodology points were raised again which have already been raised in relation to the current valuation" (the Ruling, at [14]). It is clearly a live issue between the parties that should be dealt at the substantive hearing.
- (e) Though the Valuer expressly takes issue with Harbinger's approach to statutory interest (as set out in the Thompson Report)⁴¹, he has elected not to

³⁵ See paragraph 142 (2) of his statement of case.

³⁶ See Thompson Report, paragraphs 2.4 to 2.11, and 5.22 to 5.23.

³⁷ See the First Expert Report, paragraphs 6.89 to 6.90 and the Second Expert Report, paragraphs 5.103 to 5.110.

³⁸ See paragraph 5.12 of the B&B Scheme Assessment Notice dated 5 July 2010.

³⁹ Ibid., at paragraph 5.45.

⁴⁰ As defined in the Note.

⁴¹ See paragraph 142 (2) of his statement of case.

file any further evidence to back up his position (despite a direction in the CMC Order to do so by 1 April 2011). Harbinger have prompted him in correspondence (Skeleton at §42). The Tribunal is therefore invited to treat the Harbinger evidence on statutory interest as unchallenged.

Evidence of Mr McKillop

65. The Valuer takes the point (Skeleton at §37) that Harbinger did not produce “any report or other document” based on the Repayment Interpretation which criticised him for the conduct of his valuation. Again, this suggestion is misguided. As the Valuer well knows, such a report would have been a waste of time and resources: the opening deficit under the Repayment Interpretation (as the Valuer has recognised⁴²) necessitates an even greater deficit at the end of administration, so any analysis of methodology is nugatory.

66. The Valuer claims (Skeleton at §39 to 40) that, because of their different opening positions, his and Mr McKillop’s approaches are “fundamentally incapable of comparison”, and that the only real issue between the parties is the Interpretation Issue. Harbinger submits the following:

- (a) This is an inappropriate approach (see Section B, above) which the Tribunal is invited to ignore.
- (b) Harbinger has not “purported to construct” anything (Skeleton at §40). Unlike the Valuer⁴³, it (supported by the other shareholders) has filed expert evidence that will assist the Tribunal with the core issue before it i.e. the valuation of the shares in Northern Rock, and whether the decision as to the amount of compensation was reasonable.

⁴² See e.g. paragraph 19 of his CMC skeleton argument.

⁴³ Who has not filed any expert evidence despite (a) there being matters in issue on the statements of case and (b) a direction to do so.

- (c) In relation to the Statutory Interest Issue⁴⁴, Mr McKillop has not considered how interest would be treated on the Repayment Interpretation because such an exercise would be pointless⁴⁵. The Valuer has submitted that his approach is “inappropriate”⁴⁶. Therefore this is a live issue.
- (d) As for the Derivatives Issue, the Covered Bonds Issue and the Medium Term Notes Issue⁴⁷, Mr McKillop’s criticisms would be equally applicable to the opening deficit position assumed under the Repayment Interpretation. It is clear from the Valuer’s statement of case that they are live issues⁴⁸. Even if they were not, the Tribunal would still want to consider this matter at the substantive hearing to avoid the duplication referred to at [14] of the Ruling.
- (e) As for the Branch and Operating Platform Issue, as the Valuer has acknowledged in his statement of case⁴⁹, Harbinger’s reference did not contain each and every one of the methodological differences between the parties. There is a clear difference in approach between the parties⁵⁰ (and, if not, the Tribunal would still want to consider it to avoid duplication).
- (f) The Ultimate Valuation Issue is the core “issue” in these references. The Valuer has valued the shares at zero. Harbinger (supported by Mr Hulme on behalf of the ordinary shareholders) has valued the Preference Shares at

⁴⁴ As defined in the Note.

⁴⁵ Since, as the Valuer has recognised, the adoption of the Repayment Interpretation necessarily leads to a zero sum for shareholders.

⁴⁶ See paragraph 143 of his statement of case.

⁴⁷ All of which are defined in the Note.

⁴⁸ He describes Harbinger’s position on Covered Bonds as “speculative” (paragraph 153), suggests as much of its position on Derivatives (paragraph 162) and describes its approach to Medium Term Notes as “untenable” (paragraph 168).

⁴⁹ See paragraph 138 of his statement of case.

⁵⁰ Harbinger, unlike the Valuer, ascribes an intangible value to the branch and operating platform: see paragraph 5.111 to 5.114 of the Second Expert Report.

£322.5 million. On Harbinger's primary case (see paragraphs 54 to 57, above) the Tribunal has jurisdiction to (1) substitute its own decision as to the amount of compensation and (2) make directions about the conduct of valuation, including as to statutory interest. On any view, there is clearly "a basis on which to identify [any] disagreement" between the parties (Skeleton at §40).

67. The Valuer points out (Skeleton at §41 to 42) that he has not considered what methodology he would adopt if he were required to reconsider the valuation on the basis of either the Repayment-in-Kind or Demand Interpretations. He has had the First Expert Report for 2 years, the Second Expert Report for 15 months and the Thompson Report for 6 months). He has failed to engage with them. Instead, he relies on his "functions" and "duties" as set out in the Banking Act 2008 and the Compensation Scheme Order in aid of his suggestion that there should be a "new consultation" if the valuation is remitted to him.

68. As set out above, the approach taken by the Valuer is contrary to the Tribunal's order that all matters be heard together and its desire that ordinary shareholders are not prejudiced by further delay. The Tribunal has given a clear indication that its power to remit with directions can help "short-cut" (to use the Valuer's words, Skeleton at §42) the need for a re-valuation which will only then raise the same methodology points again (in view of the Valuer's disagreement with Harbinger's approach to e.g. statutory interest). That is why the Expert Reports are relevant to not only the Interpretation Issue, but all the issues that the Tribunal has ordered should be determined at the substantive hearing. The Valuer has elected not to file expert evidence in support of his opposition on e.g. the Statutory Interest Issue. He must face the inevitable consequences that flow from that decision.

E. CONCLUSIONS

69. For the reasons set out above. The Tribunal is invited:

- (a) To make a finding that the “reasonable” in section 133 (5) of FSMA means “consistent with AIP1 standards of compensation”.
- (b) To exercise a “full jurisdiction” in this matter, allowing for a full investigation of all matters of fact and law decided by the Valuer, and to substitute its own decisions on fact and law for those of the Valuer through the making of appropriate directions pursuant to section 133 (5).
- (c) To treat all of the Expert Reports as admissible and relevant in reaching its conclusions on whether the decision as to the amount of compensation was a reasonable one and what are the appropriate directions for it to make when remitting the valuation to the Valuer for reconsideration.

MARK PHILLIPS QC
MONICA CARSS-FRISK QC
PUSHPINDER SAINI QC
DAVID ALLISON
WILLIAM WILLSON

20 April 2011