

CASES NR/001/2010 ONWARDS
IN THE UPPER TRIBUNAL (TAX & 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

VALUER'S WRITTEN SUBMISSIONS PURSUANT TO PARAGRAPH 3(2) OF
THE CMC ORDER DATED 24 FEBRUARY 2011

INTRODUCTION

1. At paragraph 3(2) of its Case Management Order No. 2 dated 24 February 2011 (**the CMC Order**), the Tribunal ordered the Valuer:
 - (1) To file and serve a Skeleton Argument addressing the interpretation and application of s. 133(5) of the Financial Services and Markets Act 2000 (**FSMA**), as amended by paragraph 158 of the Transfer of Tribunal Functions Order 2010 (SI 2010/22) (**the 2010 Order**).
 - (2) To indicate whether he intends to rely on any expert evidence and, if so, its intended nature and scope, and when it will be served, if later than 1 April 2011. This indication shall include whether Mr Caldwell intends to make himself available for cross-examination at the hearing.
2. This document sets out the Valuer's position on both issues. In doing so, it also responds to the document filed by Harbinger on 23 March 2011, purportedly in compliance with paragraph 3(1) of the CMC Order, concerning the relevance of the expert evidence it intends to rely upon.

SECTION 133(5) FSMA

3. At the Case Management Hearing on 24 February 2011, it emerged that there was a substantial difference between the Valuer and Harbinger concerning the standard of review to be adopted by the Tribunal and the scope of directions that the Tribunal was able to make following such a review. This difference essentially turns upon the interpretation and application of s. 133(5) FSMA.

Legislative context of s. 133(5) FSMA

4. In approaching this question, it is necessary to understand the context and history of the version of s. 133(5) FSMA applicable in the present case.
5. The present proceedings flow from the nationalisation of Northern Rock plc in 2008 pursuant to sections 3 and 4 of the Banking (Special Provisions) Act 2008 (**the 2008 Act**), which empower the Treasury to provide for the transfer of certain securities issued by a UK deposit-taker to (inter alia) a nominee of the Treasury, and for the extinguishment of subscription rights. The transfer of securities in Northern Rock plc and the extinguishment of subscription rights was effected by the Northern Rock plc Transfer Order 2008 (SI 2008/432).
6. Following the making of this Order, the Treasury was required under s. 5(1) & (2) of the 2008 Act to make provision for the compensation of former Northern Rock shareholders. By s. 9(1), such an order may include provision “*(b) for the assessment to be made by an independent valuer appointed by the Treasury*” and “*(e) for enabling persons to apply for decisions relating to the assessment of any compensation... to be reviewed by the Financial Services and Markets Tribunal or a tribunal appointed by the Treasury for the purposes of the order*”.
7. The scheme devised by the Treasury for assessing the amount of compensation due to former shareholders and payment of the same is set out in the Northern Rock Compensation Scheme Order 2008 (SI 2008/718: **the Compensation Scheme Order**). In particular:
 - (1) Part 2 of the Schedule to the Compensation Scheme Order sets out the method by which the amount of any compensation is to be determined.
 - (2) Part 3 of the same Schedule provides for the appointment of an independent valuer, who is to hold and vacate office in accordance with the terms of his appointment and who is to be removable only on the ground of incapacity or serious misbehaviour (see para. 7).

- (3) Part 4 of the Schedule prescribes a procedure for determination (followed by promulgation of an assessment notice) and reconsideration (followed by promulgation of a revised assessment notice) of the amount of compensation. In particular, para. 13 provides that, if the Treasury or any person affected by the determination is dissatisfied with the revised assessment notice, they “*may refer the matter*” to the Tribunal. Originally, this was the Financial Services and Markets Tribunal (**FSM Tribunal**).
- (4) Part 5 then provides for the application in respect of any such reference of Part 9 of and Schedule 13 to FSMA, subject to amendments thereto imposed by the Compensation Scheme Order.

8. At the date of the Compensation Scheme Order in 2008, s. 133 of FSMA (in Part 9), provided as follows:

“(3) On a reference the Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the [Financial Services] Authority at the material time.

(4) On a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it.

(5) On determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

...

(10) The Authority must act in accordance with the determination of, and any direction given by, the Tribunal.”

9. In order to provide for the FSM Tribunal to hear references from the Valuer’s decision, the Compensation Scheme Order introduced modifications to s. 133 FSMA, applicable only to such references. The modified version of s. 133 (as compared with that set out at paragraph 8 above) was as follows:

“(3) On a reference the Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the ~~Authority~~ independent valuer appointed under paragraph 7 of the Schedule to the Northern Rock plc Compensation Scheme Order 2008 at the material time.

~~(4) On a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it. 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.~~

~~(5) On determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.”~~

....

~~(10) The Authority independent valuer appointed under paragraph 7 of the Schedule to the Northern Rock plc Compensation Scheme Order 2008 must act in accordance with the determination of, and any direction given by, the Tribunal.”~~

10. However, in 2010, in connection with the reconstitution of the FSM and other Tribunals into the present Tribunal system, s. 133 FSMA was further amended to provide for the jurisdiction of the FMT Tribunal conferred under it to be transferred to the Upper Tribunal. This was effected by the 2010 Order which amended both (i) the generally applicable version of s. 133 and (ii) the valuer-specific version introduced by the Compensation Scheme Order.
11. The effect of the 2010 Order upon the generally applicable version of s. 133 FSMA was (inter alia) to replace subsections (3)-(5) and (10) thereof with new subsections (4) – (7) as set out below:

“(4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.

(5) The Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it.

(6) On determining the reference or appeal, the Tribunal must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal.”

12. In the case of references to the Tribunal of decisions of the Valuer, the 2010 Order introduced further modifications as set out below (with the comparison being by reference to the version set out in paragraph 11 above):

“(4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.

~~(5) The Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it. 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.~~

~~(6) On determining the reference or appeal, the Tribunal must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.~~

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal.”

Standard of review to be applied under s. 133(5)

13. Five points can be made about the terms of the legislation regarding the standard of review to be applied by the Tribunal.

- (1) First, s. 9(1)(b) of the 2008 Act enables the Secretary of State to make provision for compensation to be determined by an “independent valuer”. Paragraph 7 of the Schedule to the Compensation Scheme Order, which provides that the independent valuer is not removable save for incapacity or serious misbehaviour, guarantees the valuer’s independence. What is referred to the Tribunal is the decision of a fully independent decision-maker, who is also an expert in valuation. That is important because a review limited to error of law or perversity will generally be sufficient to satisfy the procedural requirements of Article 6 ECHR when the decision under review is that of an independent decision-maker exercising specialist expertise: see e.g. *Bryan v United Kingdom*, (1995) 21 EHRR 352, at [45]; *Tsfayo v United Kingdom* (2009) 48 EHRR 18, at [46]-[47].
- (2) Secondly, s. 9(1)(e) of the 2008 Act enables the Secretary of State to make provision for decisions relating to the assessment of any compensation to be “reviewed” by the Tribunal. The purpose of a reference under para. 13 of the Compensation Scheme Order must therefore be to enable a “review” to take place.
- (3) Thirdly, in an ordinary case (outside the context of the 2008 Act and the Compensation Scheme Order), s. 133(5) of FSMA requires the tribunal to “*determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it*” before remitting the matter to the decision-maker with appropriate directions. In this case, however, the Compensation Scheme Order, as amended by the 2010 Order, modifies FSMA so as to omit this provision entirely. The result is that, on a reference under the Compensation Scheme Order, unlike in other cases, there is no duty, nor scope, to determine “*the*

appropriate action for the decision-maker to take". Rather, any reconsideration of the decision is expressly left to the valuer.

- (4) Fourthly, the modified version of s. 133(5) makes clear that the Tribunal's duty to remit the matter to the valuer arises if and only if a threshold condition is met: namely, that "*the Tribunal is satisfied that the decision as to the amount of compensation shown in the revised assessment notice was not a reasonable decision*". This wording makes clear that the trigger for the Tribunal's jurisdiction is a finding that the valuer's decision was *not a reasonable decision*, rather than a finding that the amount of compensation was *not a reasonable amount*.
- (5) Fifthly, it would have been easy for the legislator to say that the Tribunal should remit if satisfied that the decision of the valuer was "wrong". (That is the test applied by the Court of Appeal under CPR r. 52.11(3).) But the legislator did not say that. It obliged the Tribunal to remit only where it was satisfied that the valuer's decision was "*not a reasonable decision*".

14. In *Secretary of State for Education and Science v Tameside MBC* [1976] AC 1014, the House of Lords had to consider a similarly worded provision empowering the Secretary of State to issue directions under s. 68 of the Education Act 1944 if "*satisfied... that any local education authority... have acted or are proposing to act unreasonably*", which is semantically identical to saying that their decision is "*not a reasonable one*". Viscount Dilhorne said this at 1054:

"It did not suffice that in [the Secretary of State's] opinion the conduct of the authority was unreasonable. For him to have power to give directions, the conduct had to be such that no reasonable authority would engage in it."

Lord Diplock said this at 1064:

"My Lords, in public law 'unreasonable' as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Lord Salmon added this at 1070:

“In my opinion, section 68, on its true construction, means that before the Secretary of State can lawfully issue directions under it he must satisfy himself not only that he does not agree with the way in which the authority have acted or are proposing to act nor even that the authority is mistaken or wrong. The question he must ask himself is: ‘Could any reasonable local authority act in the way in which this authority has acted or is proposing to act? ‘If, but only if, he is satisfied on any material capable of satisfying a reasonable man that the answer to the crucial question is ‘No,’ he may lawfully issue directions under section 68. I would adopt what Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700:

‘Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable.’”

Lord Russell of Kilowen said this at 1074-5:

“I have no doubt that the Secretary of State was satisfied that the local authority was wrong... But to my mind it is quite unacceptable... to proceed from ‘wrong’ to ‘unreasonable’... History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, ‘unreasonably’ is a very strong word indeed, the strength of which may easily fail to be recognised...”

15. There are sound reasons why the legislator should have intended the Tribunal to adopt an equivalent test to the standard public law test of reasonableness in this case: valuation involves the exercise of an expert professional judgment; different valuers may adopt different approaches; this is a paradigm situation in which two professional people may reach different conclusions from the same underlying facts without either “*forfeiting their title to be regarded as reasonable*”.
16. The position in this regard may be distinguished from that considered by Sedley J in *R v Hampshire ex parte W* (Times, 9 June 1994), which concerned a local education authority’s obligation, under s. 9(1) Education Act 1981, to assess the educational needs of a child upon the request of a parent unless the request was unreasonable. There is a clear distinction between a test of reasonableness to be applied *to* a public body exercising its statutory discretion, and that to be applied *by* it when considering the acts of individuals before it.¹

¹ It should be noted that *ex p W* was applied by Lightman J in *R(Dart Harbour and Navigation Authority) v Secretary of State* [2003] EWHC 1494 to support a finding that s. 33 of the Dart Harbour and Navigation Act 1975, which empowered the Secretary of State to review a decision to withhold a harbour license on grounds of reasonableness, was to be applied on a “common sense” basis rather than the “technical” *Wednesbury* approach. The correctness of this decision may be questioned, but it can in any case be distinguished: at [29], Lightman J explained that his

17. Nor does the Tribunal's power under s. 133(4) FSMA to consider evidence "*whether or not it was available to the decision-maker at the material time*" affect the above analysis.
18. The question what evidence may be considered by a court or tribunal is distinct from the question what standard of review it should apply. The fact that evidence not before the decision-maker may be admitted does not mean that it is appropriate for the court to substitute its judgment for that of the decision-maker. Thus, in a judicial review claim in the asylum context (for example), the court asks whether it has been "established that no rational Secretary of State could have reached a different conclusion upon the material in the case": see *R v Secretary of State for the Home Department ex p. Turgut*, per Simon Brown LJ at 349. Yet, in answering this question,

"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".

See per Schiemann LJ at 346-7.

19. Moreover it is easy to see why, in the present situation, it may have been thought appropriate to allow the Tribunal to admit new evidence. Valuation is a technical field, and it may well be that without additional evidence, the Tribunal finds itself unable to determine whether a particular complaint regarding the valuation approach is reasonable or not (for example, a complainant may wish to give examples of how assets have been realised in order to demonstrate that the valuer's approach was not reasonable.) It is therefore sensible for the remit of the Tribunal to extend to admitting new evidence.

Scope to make directions under s. 133(5)

20. If, and only if, the Tribunal is satisfied that the Valuer's decision was not a reasonable decision, s. 133(5) requires it to "*remit the matter to the valuer for reconsideration in accordance with such directions (if any) as they consider appropriate.*" This choice of words is significant. As noted above, the original and generally applicable version of s. 133(5) requires the Tribunal to "*determine what (if any) is the appropriate action for the decision-maker to*

decision was based on the particular statutory context of the provision in question. In the present case, as set out at paragraph 13 above, that context supports an orthodox approach. Moreover, it is clear that – whatever test Lightman J was expounding – he did not consider it equivalent to a full merits-based rehearing, as this would be incompatible with his view that "*The Secretary of State is not free to substitute his own view for that of the Authority*".

take”, i.e. to substitute its own decision. But the legislators did not consider this to be appropriate in the case of references under the Compensation Scheme Order. Instead, they expressly limited the Tribunal’s power to one of remission for a fresh decision by the Valuer, together with a power to make directions.

21. It follows that the one thing it cannot be permissible for the Tribunal to do under s. 133(5) as here applicable is to substitute its own decision for that of the Valuer. In particular, it would not be permissible for the Tribunal to use its power to make directions to direct the Valuer to reach a particular outcome, as this would destroy the very discretion on the part of the independent valuer that the amendment to s. 133(5) sought to preserve.
22. This is as true of the Valuer’s methodology as it is of his conclusions. Where the Tribunal is satisfied that the methodology adopted by the Valuer was unreasonable in a given context it should of course remit the matter with a direction not to use that methodology again in that context. But what it cannot do is direct the Valuer to adopt a given methodology – *a fortiori* if the relevant context (as set by the Valuation Assumptions) has changed.²
23. Such an approach to the scope of directions to be made under s. 133(5) is hardly surprising. It is, in effect, the same as would apply in judicial review, and therefore ties in perfectly with judicial review standard of review to be applied.
24. It might be asked, in that case, why s. 133(5) is needed at all. After all, even without any express provision, the Valuer’s decision would still be subject to judicial review. But that is in truth no objection at all:
 - (1) First, s. 133(5) does not give the Tribunal all the powers of the High Court under a judicial review. Rather, it gives the Tribunal oversight of one specific aspect of the compensation scheme, namely the final decision of the Valuer as shown in the Revised Assessment Notice. Any other challenges to the valuation process – for example, a complaint that the Valuer was not properly appointed, or that he has failed to reach any decision at all – are outwith the Tribunal’s jurisdiction.
 - (2) Secondly, given the technical nature of the valuation exercise (and therefore of likely challenges to the Valuer’s final decision), there is a

² By contrast, where the unreasonableness alleged concerns a pure issue of law – e.g. the interpretation of the Withdrawal Assumption – it is of course within the Tribunal’s competence to determine and to direct how the Valuer should approach the issue.

clear advantage in delegating responsibility for its oversight to a specialist Tribunal than leaving it to the Administrative Court.

- (3) Thirdly, the additional flexibility of the Tribunal's procedure, and the comparative lack of formality, makes it a more appropriate venue to deal with a large number of references from individual shareholders, many of whom are not legally represented.
25. There are therefore good reasons why Parliament (and the Treasury, as the secondary legislator) should have considered that the Tribunal, rather than the High Court, should be the appropriate forum to hear challenges to the Valuation. There was no good reason, however, for the legislature to change the standard of oversight. It would be bizarre if, having required the initial decision to be taken (and upon request reconsidered) by an independent valuer, the legislature then required the Tribunal to reach its own decision as to the amount of compensation. That is particularly so given that the right of reference to the Tribunal is automatic, making it all but inevitable that the Valuer's decision would be reviewed.

EXPERT EVIDENCE

26. Paragraph 3(1) of the CMC Order required Harbinger, by 23 March 2011, to *"file and serve a document identifying, in relation to the two expert reports of Mr McKillop and the expert report of Mr Thompson, which parts of the said reports they rely on, in relation to which issues and on what basis."*
27. The reason for requiring Harbinger to produce such a document was the Valuer's complaint, at the CMC, that the relevance of McKillop and Thompson was unclear. In particular, the Valuer pointed out that (i) their evidence could not be relevant on the statutory interpretation issue concerning the Withdrawal Assumption, and (ii) Mr McKillop did not appear to address at all the valuation performed by the Valuer and so could not be of assistance in determining whether the Valuer's decision was reasonable or not.
28. In purported compliance with the CMC Order, on 23 March 2011 Harbinger filed a "Note on Expert Evidence". This purported to (i) describe the issues between the Valuer and Harbinger and (ii) identify the passages of McKillop and Thompson relevant to those issues.

29. In fact, as set out below, this Note does not advance matters, but proceeds on a false basis as to the issues between the parties.

Evidence of Mr Thompson

30. Dealing first with Mr Thompson at para 2(c) of the Note, Harbinger explains that his evidence “sets out Mr Thompson’s expert opinion on (a) how a commercial lender would have approached the hypothetical demand for the repayment of financial assistance provided for by the Withdrawn Assumption and (b) whether the fire-sale of assets posited by the Repayment Interpretation is a factual scenario that would have occurred in reality”.
31. Thus Mr Thompson’s evidence is nothing to do with the valuation process: it is directed at the Interpretation Issue. But as the Valuer made clear at the CMC, it is impossible to see how evidence can be relevant to an issue of statutory interpretation.
32. At para 5(a) of Harbinger’s Note, it describes the issue of statutory interpretation between the parties as:

“5(a) The correct interpretation of the Withdrawn Assumption (“the Interpretation Issue”). In particular:

- (i) The consequences of that interpretation for the opening balance sheet of Northern Rock at the beginning of the hypothetical administration.
- (ii) In relation to an informed assessment of the competing constructions of the Demand Interpretation and the Repayment Interpretation, the realistic course of action that (i) the directors of Northern Rock (“the Board”) would have taken in response to a demand for repayment of the financial assistance from the Bank of England (“the Bank”), (ii) the Bank would have taken after the making of a demand, and (iii) the Administrator would have taken in the hypothetical administration.”

Mr Thompson’s evidence is directed at the second limb of this “issue”.

33. In fact, however, there is no such issue between the parties at all:
- (1) As the Valuer made clear in his statement of case and at the CMC, he does not regard the hypothetical acts of the Board, the Bank, the Administrator or anyone else as being of any relevance to the interpretation of the Withdrawal Assumption, nor has he put forward any positive case in

respect of them.³ Rather his approach is that the statute is to be construed on the basis of the words chosen by Parliament in their legislative context and in the light of Convention Rights and European Union law.⁴

(2) Equally, the Valuer has always denied the relevance to the Interpretation Issue of how the Administrator would have acted in the hypothetical administration (i.e. *after* the application of the Withdrawal Assumption). Again, the Valuer has put forward no case on this, and in particular has put forward no case as to how the Administrator might have acted differently according to which interpretation was adopted.

34. The Valuer has not considered or opined upon and there is therefore no issue between the parties as to “*the realistic course of action*” that might have been taken by such persons in the (wholly unreal) hypothetical scenario posited by Harbinger. The only issue is whether this is a relevant consideration at all. That, of course, is not something with which Mr Thompson’s evidence, or anyone else’s, can assist.
35. As an aside, Harbinger also claims that Mr Thompson’s evidence is relevant to the “Statutory Interest Issue” (discussed further below). This apparently is on the basis that Mr Thompson does not consider that the Bank would have demanded statutory interest on amounts owed to it during the administration. But on the Repayment Interpretation used by the Valuer, the Bank has been fully repaid at the outset of the administration and so statutory interest on amounts due to the Bank does not arise. As with Mr McKillop’s evidence (see below), he is thus not addressing, let alone criticising, the methodology adopted by the Valuer, and thus has nothing to say on the question of the reasonableness of that methodology.

Evidence of Mr McKillop

36. Mr McKillop’s evidence suffers from similar problems. Beginning with the scope of his evidence:

(1) At paragraph 2(a) of the Note, Harbinger identifies that Mr McKillop’s 1st Report “*sets out Mr McKillop’s model of the hypothetical administration of Northern Rock based on the Repayment-in-Kind Interpretation.*”

³ Valuer’s Statement of Case at [112-124]. It should be noted that this lack of relevance is only in relation to the interpretation issue. Once that is settled, then the hypothetical acts of Northern Rock’s administrator and creditors may well be relevant to the valuation figure reached.

⁴ Valuer’s Statement of Case, [53 *et seq.*].

(2) At paragraph 2(b) of the Note, Harbinger identifies that Mr McKillop's 2nd Report "*sets out Mr McKillop's model of the hypothetical administration of Northern Rock based on the Demand Interpretation.*"

37. In other words, what Mr McKillop has done is to produce two further valuations, each based upon an interpretation of the Withdrawal Assumption which differs from that adopted by the Valuer. What he has not done is produce any report or other document based on the interpretation adopted by the Valuer and which criticises how the Valuer has conducted his valuation.

38. In particular, it is not possible to derive from the fact that Mr McKillop, in the scenario he has considered, has used a different methodology from the Valuer, that he disagrees with the Valuer on any question which the Valuer has addressed:

(1) Both the Valuer and Mr McKillop are in agreement that, in order to conduct the Valuation, it is necessary to consider (i) the financial position of Northern Rock as at the Valuation Date and (ii) how a hypothetical administration starting from that position would evolve.

(2) The relevance of the Withdrawal Assumption is that its interpretation determines the assets hypothetically available to Northern Rock on the Valuation Date i.e. starting position for the hypothetical administration.

(3) In particular, the Repayment Interpretation leads to Northern Rock suffering a net asset deficiency of £2.44 billion on the Valuation Date. By comparison, the Repayment-in-Kind and Demand Interpretations lead to a net asset surplus of circa £1.6 billion on the Valuation Date.

39. Clearly, a company entering into administration with a massive asset deficiency will fall to be treated differently from one with a comfortable surplus. Thus the fact that Mr McKillop, in a surplus situation, has taken a different approach from the Valuer, in a deficit situation, cannot imply any criticism of the Valuer. Indeed, nowhere does Mr McKillop state that the Valuer's methodology is incorrect or inappropriate given the assumptions upon which it is based. He cannot do so, because the two approaches, being based on different legal premises, are fundamentally incapable of comparison.

40. Despite this, Harbinger has purported to construct "issues" between the parties as set out at paragraph 5(b)-(g) of the Note. In fact, with the exception of the

Interpretation Issue, none of these can properly be described as issues for the simple reason that there is no basis on which to identify any disagreement between the parties on them. Thus:

- (1) The “Statutory Interest Issue” is said to relate to the “treatment of interest on debts by the Administrator in the hypothetical administration”. But Mr McKillop has not considered how interest would be treated in the position of deficit that results on the Repayment Interpretation, nor has he made any criticism of the Valuer’s approach on this point.
- (2) Equally, the “Derivatives Issue”, “Covered Bonds Issue” and “Medium Term Notes Issue” are all based on positions taken by Mr McKillop on the Repayment-in-Kind and Demand Interpretations, and which contain no criticism (express or implied) of the Valuer’s approach based upon the Repayment Interpretation.
- (3) As for the Branch and Operating Platform Issue, this was not mentioned in Harbinger’s Reference nor in its Reply. Thus even on Harbinger’s case, it is not in issue.
- (4) Finally, the Ultimate Valuation Issue – i.e. the valuation to be given to the shares held by Harbinger – cannot be an issue, because it is not for the Tribunal to determine. Only the Valuer can determine the valuation, whether as a result of his original decision or through a fresh decision following a remission to him by the Tribunal.

41. Further, it cannot be emphasised too much that:

- (1) The Valuer has not considered what methodology he would adopt if required to reperform the Valuation on the basis of the Repayment-in-Kind or Demand Interpretations. He therefore neither agrees nor disagrees with Mr McKillop’s valuations, but reserves his position pending the determination of the Interpretation Issue.
- (2) Accordingly, there is no “decision” of the Valuer in relation to the Repayment-in-Kind or Demand Interpretations that is susceptible to review by the Tribunal.

42. In correspondence, Harbinger has pressed the Valuer to express a view as to whether he agrees with Mr McKillop in advance of any determination by the

Tribunal of the correct interpretation of the statute. It would be inappropriate for the Valuer to do any such thing. The Valuer's functions are set out in the 2008 Act and the Compensation Scheme Order. These set out how he is to perform his duties including the nature of the consultation exercise required. If the Valuation were remitted to him on the basis that the Repayment Interpretation was not correct, he would have to reconsider his approach including through a new consultation. It is not open to him to short-cut those requirements and commit now to the approach he would take on a different interpretation.

43. It follows that Mr McKillop's evidence is fundamentally irrelevant to the issues actually before the Tribunal. It is irrelevant to the Interpretation Issue for the simple reason that evidence cannot be relevant to statutory interpretation. It is irrelevant to the issue of whether the Valuer's decision is otherwise reasonable because it does not address the Valuation made.
44. On this latter point, it is important to appreciate that the Valuer does not contend that expert evidence is in principle incapable of being relevant to the reasonableness of his decision. On the contrary, he accepts that properly directed expert evidence could well be relevant in considering whether the methodology adopted for the Valuation was reasonable or not. The problem with Mr McKillop's evidence is that it fails to address the right question. It is not a criticism of the Valuation as made. It is simply a suggestion as to how the Valuation might have been performed had the Withdrawal Assumption been interpreted differently. With respect to Mr McKillop, that is irrelevant.

Valuer's approach to expert evidence

45. In light of the above, the Valuer does not see any need to cross-examine Mr McKillop or Mr Thompson, nor does it see any need to put in expert evidence of his own or make himself available for cross-examination.
46. On the basis that there will be no oral evidence at the final hearing, it may be appropriate to revisit the time estimate made at the CMC with a view to seeing whether a shorter hearing may be appropriate.

CONCLUSION

47. For the reasons set out above, when considering this reference:
 - (1) The Tribunal should ask itself whether it is satisfied that the decision reached by the Valuer was "*not a reasonable decision*" in the sense that it

was one which no rational valuer could have reached on the material in the case. In applying that test:

- (a) The Tribunal can and should have regard to the guidance of the House of Lords in *Tameside* (as set out above).
 - (b) The Tribunal should ignore any criticisms based upon a comparison between the Valuer's approach, based on the Repayment Interpretation, and those of Mr McKillop and/or Mr Thompson based upon the Repayment- in-Kind or Demand Interpretations.
- (2) If, and only if, it is satisfied that the Valuer's decision was not reasonable, the Tribunal should then remit the matter to the Valuer. In doing so, it should give such directions as are necessary to prevent any recurrence of the same error(s) that vitiated the first decision. However:
- (a) It should not give directions whose effect would be to fetter the discretion of the Valuer, when performing the new valuation, to select between different reasonable valuation approaches.
 - (b) In particular the Tribunal should avoid the temptation to direct the Valuer to adopt any given approach (whether as proposed by Mr McKillop, Mr Thompson or otherwise) unless it is satisfied that no valuer acting reasonably could ever adopt a different approach.

MARK HOWARD QC
MARTIN CHAMBERLAIN
JONATHAN DAWID
1 April 2011