SHARP and Others v BLANK and Others

EXECUTIVE SUMMARY

1. This, despite its length, is an executive summary of my judgment. **The judgment itself is the sole authoritative text and prevails.**
2. This was a claim by 5800 claimants against the chairman and four out of the 13 directors of Lloyds Bank at the time, for damages of some £385 million arising out of decisions they made in relation to the takeover by Lloyds of HBOS ("the Acquisition"). 14% of the claimants are retail investors and 86% are institutional investors. Together they hold less than 5% of the shares in issue at the relevant time.
3. On 19 November 2008 the Acquisition was approved at an EGM. The votes of 52% of the total shareholder population were cast. Of the votes cast 96% were in favour of the unanimous board recommendation to proceed with the Acquisition.
4. The Claimants' case was that the board should not have recommended the Acquisition because it implemented a dangerous and value destroying strategy which involved unacceptably risky decisions. In the alternative the Claimants said that the board should have provided additional information about HBOS funding arrangements and the quality of its asset base and that if they had done so then the 4% vote against the Acquisition would have been swelled to such an extent that more than 46% of the voting shareholders would have changed sides and the board's unanimous recommendation would have been defeated.
5. Since 1995 Lloyds had a plan to expand by making an acquisition. But it found that overseas targets did not produce the requisite synergies and domestic targets presented competition issues. It had made various approaches (including to HBOS) over the years.
6. A tightening of the financial markets in 2008 led to some consolidation in the financial sector. Preliminary talks between Lloyds and HBOS reopened in July 2008. In a social context the Chairman of Lloyds (Sir Victor Blank) mentioned to the Prime Minister (Gordon Brown) that competition issues presented an obstacle. Gordon Brown noted the point. Lloyds had appointed an executive charged with exploring the development of the business through acquisitions. He looked at the merger with HBOS but saw competition issues as one of two major problems: the other being Lloyds' need to rebuild its capital base.
7. High level meetings were still taking place when (between 7 September and 15 September 2008 events in America took a dramatic turn). 15 September 2008 Lehman Bros filed for bankruptcy. The wholesale money markets on which HBOS depended all but closed: and the HBOS share price fell sharply. At a social function on the evening of 15 September 2008 Gordon Brown told Sir Victor Blank that the government would assist if Lloyds wanted to acquire HBOS, but if so, Lloyds must act quickly. The "assistance" was understood by Lloyds to be assistance with competition issues. The Bank of England and the FSA indicated that they too would support a takeover. Lloyds had its own reasons for wanting to act quickly: it wanted to protect HBOS brand names.
8. Lloyds staff used publicly available information and material gleaned from its own interactions with HBOS to assess HBOS as a target. A positive picture emerged. It was put to a board meeting on the 17 September 2008: but the executives did not seek to "sell a proposition" to the board, which was also briefed on the negative aspects of the transaction.

The board authorised Mr Daniels to proceed with negotiations. At a second board meeting on 17 September 2008 Mr Daniels reported the outcome the negotiation. There was a robust and thorough discussion. What emerged was the announcement on the 18 September 2008 of an all share offer of 0.83 of a Lloyds share for each HBOS share. In the relative share prices at the offer date this represented a 60% premium over the current HBOS share price but about a 30% discount to the book value of HBOS. The announcement told Lloyds shareholders of a forthcoming circular and advised them to act only upon the basis of that.

9. The proposed deal was seen in some quarters of the market as presenting a unique strategic opportunity, though with the caveat that the market would need convincing about the existence of a buffer against future losses. But the announcement signalled to the market that HBOS had no long-term standalone future. For its part the Government wanted to stabilise the market. It did not pressure Lloyds into making the offer: but once the offer was made it was prepared to lend every assistance to Lloyds in the way of removing competition obstacles and giving comfort on funding.

10. In the period of uncertainty before and shortly after the announcement depositors began to withdraw funds from HBOS, which added stress to HBOS's funding arrangements. HBOS turned to Lloyds for assistance in its funding difficulties. With the support of the FSA Lloyds was willing to provide this on arms' length commercial terms even though this added strain to Lloyds own funding arrangements by (as a senior Lloyds executive put it) "transferring the monkey from their shoulders to ours". Lloyds granted HBOS a £2.4bn facility on conventional repo terms. This was eventually incorporated into a £10bn facility on unconventional terms ("the Lloyds Repo"). The arrangement was unconventional because the collateral was a portfolio of "raw loans" which the Bank of England would not yet accept under its mainstream facility and the security mechanism was not a conventional re-purchase arrangement but by means of a trust. In isolation it was not a bankable proposition: it had to be seen the context of the Acquisition, in the light of Government support, and as part of a systemic rescue package. The Lloyds Repo was only dealt with at the highest executive levels within Lloyds. The UK Listing Authority expressly confirmed that it regarded the Lloyds Repo as "ordinary course" business for the purposes of the Listing Rules and so required neither shareholder approval nor disclosure to the market. The FSA specifically authorised the Lloyds Repo at its highest level and went on record as having done so.

11. Whilst the additional facility was being negotiated HBOS informed Sir Victor Blank on Saturday 27 September 2008 that its funding position was such that it might not open its doors on Monday 29 September. Sir Victor Blank warned Gordon Brown. A board meeting was held on Sunday the 28 September 2008 to consider the funding and liquidity position of HBOS, the pressure on the share price of all banks, the implications of these matters for the announced terms of the acquisition, the general impact of the financial crisis, and whether a capital raise might be necessary.

12. In fact, HBOS and did open its doors on the 29 September 2008 and the following day, funding itself in the market. But on 1 October 2000 the Bank of England moved to support HBOS by the grant of what became known as "emergency liquidity assistance" (or "ELA"). ELA could only be granted to illiquid but solvent institutions. The grant was authorised by the Chancellor of the Exchequer but otherwise done secretly. It was kept from the Court of the Bank of England and from the Chairman of the Treasury Select Committee. It became known to the Lloyds board: this is admitted.

13. Meanwhile Lloyds progressed the Acquisition by assembling a team of 26 experienced specialists to undertake due diligence on the HBOS loan book and financial assets using conventional techniques, subject to limitations imposed by client and commercial

confidentiality. The object of the exercise was to adjust current value to produce sensible predicted valuations for the purpose of using those values as a basis for planning other actions (including predicting capital requirements necessary to maintain regulatory compliance).

14. One method involves the construction of scenarios and the assessment of the probability of the occurrence of any given scenario. The scenarios were created by the Lloyds Chief Economist, Mr Foley. For planning purposes he created a "base case", a "credit crunch (or "1 in 15") case and a "deep recession" (or "1 in 25") case. These scenarios were then applied to the HBOS' assets by Mr Roughton-Smith. Adjustments would lie in the range of £16.25bn to £25.5bn on a £693 billion balance sheet. The probability of the occurrence of each scenario was assessed by Mr Foley. In early October he thought that the "base case" had a 35% probability, the "credit crunch" 35% probability and a "deep recession" a 15% probability.

15. Another method is to calculate the net capital adjustment required at acquisition using credit default swap spreads. A different Lloyds team in Group Corporate Treasury undertook this work.

16. On 7 and 8 October 2008 the Chancellor made a statement that the Bank would take all actions necessary to ensure that the banking system had access to sufficient liquidity and was proposing to widen its facilities and to announce plans for a permanent support system. This was a radical departure from the Bank's traditional role overseeing monetary policy, operating open market mechanisms and standing facilities and acting as a "lender of last resort". The Bank announced that banks would need to be re-capitalised, that proposals for individual banks would be made and that the matter would be discussed on 11-12 October 2008 with a view to announcements being made when the market opened on 13 October 2008.

17. Lloyds executives together with its investment bank advisers put together an "indicative proposal" as to how recapitalisation could take place in the context of the Acquisition. It was not seen by the board. The Claimants argue that inherent in the proposal was an acknowledgement that HBOS was valueless and that even £20 billion worth of additional capital might not be enough to cover all anticipated losses. If that is right, then a share exchange which gave a notional value to HBOS of £6bn and the eventual acceptance of £17 bn of additional capital would not make sense. I have rejected the submission. I have concluded that the traces in the documents of the "indicative proposal" contained negotiating positions. The Government rejected the proposals.

18. For the Recapitalisation Weekend the FSA had constructed a scenario of a severe but plausible recession modelled over five years. It had then looked at each individual bank and had applied those stress assumptions to see what additional capital was needed to make that bank "bullet-proof" in the modelled recession. What emerged at the Recapitalisation Weekend was an alternative to be chosen by the board. Lloyds could proceed with the Acquisition in which case it would have to raise £5.5bn additional capital and HBOS would have to raise £11.5 bn additional capital (a total of £17bn). Alternatively, Lloyds could abandon the acquisition which case it would have to raise an additional £7bn as a standalone bank (and HBOS would have to raise £12bn). The precise origin of these figures is unknown, and from such material as survives cannot be reverse engineered. They came as a shock to the Lloyds board, particularly the £7 billion figure.

19. The Claimants argued that the £7bn figure was negotiable (and if negotiated would have been reduced) so that the choice which the Lloyds board thought it faced was a false one. I reject that argument. Over the Recapitalisation Weekend it was not possible to reduce the £7bn. Once it had been announced, over the following weeks there was no real prospect of reducing

the figure by negotiation. Whilst the merger remained alive the government would simply have stood by its figures in order to make abandoning the merger unattractive. If the merger had collapsed or been rejected by shareholders, then the Government would have looked again at the £7bn but might well have required more and been willing to contribute less in such turbulent times. This was the tenor of a letter which the FSA wrote to Lloyds on 28 October 2008.

20. Lloyds had been prepared to walk away from the Acquisition. Faced with the choice presented at the Recapitalisation Weekend, at a board meeting at 7pm on Sunday 12 October 2008 after serious discussion the board chose to proceed with the Acquisition, but on revised terms such that HBOS shareholders only receive 0.59 of a Lloyds share for each HBOS share. These revised terms had been hammered out in hard bargaining between Lloyds and HBOS. They meant that Lloyds was only paying 30% of the book value of HBOS, which left significant headroom for any write-downs. Both of Lloyds investment bank advisers said that it would not be possible to access future government funding without accepting the requirement to raise £7bn and that it would not be possible to raise that amount of capital in the market. They thought proceeding with the Acquisition on the revised terms was less dilutive for shareholders and would eventually be accretive. The board considered that advice alongside what had been disclosed by the due diligence work (noting its limitations). The Board was not bedazzled the possibility of transformational change and it was not determined to proceed headlong into the Acquisition.

21. In the early hours of 13 October 2008 there was a minor tweak to the exchange ratio which meant that the revised terms eventually announced to the market offered .605 the Lloyds share for each HBOS share. At the request of the Bank of England the terms were amended so as to restrict the circumstances in which Lloyds could withdraw from the transaction. Once Lloyds had made the revised announcement it is clear that the Government, the Bank of England and the regulators were prepared to give all necessary support to Lloyds to bring the Acquisition to a conclusion: but this did not extend to giving Lloyds a free ride. Lloyds was expected to share some of the risk in return for competition advantages. These were to be secured by the government "calling in" the competition decision and deciding it on "national interest" grounds.

22. There then emerged an additional factor. The EU indicated following the Recapitalisation Weekend that on state aid grounds restructuring plans might be required. But the government sent the message to Lloyds that no significant divestment plan would be required.

23. Due diligence work continued, Lloyds was not able to obtain some data that it would ideally like to have seen. The position improved on the 26 October 2008. Mr Roughton-Smith was able to refine his "1 in 15" estimate and work seriously on his "1 in 25" estimate. Work on estimating the net negative capital adjustment also continued conducted by another Lloyds team. Lloyds' auditors (PwC) were retained to prepare and advise upon a working capital statement – a statement that an enterprise had sufficient working capital to cover its operations over the next 12 months. Banking businesses generally present a unique challenge in the preparation of such statements because of the "borrow short, lend long" mismatch. Lloyds' solicitors and the investment bankers began work on the circular to be sent to shareholders. The draft circular was the subject of review and comment by UKLA.

24. The board next met on 24 October 2008. It was provided with the detail of the benefits of the transaction, of which it took a conservative view. It was also told of the challenges to the proposed Acquisition, disquiet at the amount of capital required to be raised by Lloyds and of efforts to reduce it, and of the adjustments required to the HBOS book value. My view is that

Mr Daniels did not misrepresent to the board the degree of attraction of the Acquisition. I do not consider that the board fell for “a sales pitch”.

25. The next key board meeting was on 29 October. At this meeting the Board had to decide whether it could recommend the transaction to the Lloyds shareholders. By this time Mr Roughton-Smith had revised his impairment figures for HBOS. On the assumption of a “1 in 15 recession” his figure was £16.9bn -£22.3bn pre-tax. This compared with his earlier range of £15-£21 bn. For a “1 in 25” recession his figure was £20.65-£28.8 bn. This was a new figure. These figures became available at about 9:30 pm on the evening before the board meeting, after the board papers were circulated. Mr Tookey assumed responsibility for presenting them to the board.

26. PwC continued to work on their draft working capital report until 1:57 am on the day of the board meeting. Their model had included as an input Mr Roughton-Smith earlier figures but did not include as an input figures produced late on the previous evening. The report drew attention to the fact if the markets returned to their chronic pre-Recapitalisation Weekend state the Enlarged Group would need to look for “backup funding” from the government. As to this the Government would not commit itself in writing but had indicated that PwC should take comfort from the public statements that the Government would support the banking system. Lloyds Group Corporate Treasury had also prepared a report (reviewed by PwC) saying that the Enlarged Group had sufficient working capital. Both this and the PwC report incorporated material provided by HBOS (reviewed by its auditors KPMG) and adjusted by Lloyds in the light of its own work. PwC model showed that in ordinary circumstances the key capital ratio would be above 6% (the threshold set by the FSA) and in a downside stress scenario would remain above 5% (providing a 1% buffer over the FSA threshold).

27. As to the probabilities, Mr Foley remained of the view that a mild recession or better was a 70% probability and a “1 in 25” recession had a 15% probability. This was in line with (and in some respects more cautious than) the prevailing view.

28. It is probable over the next couple of days Mr Roughton-Smith’s latest figures was seen by PwC and although not incorporated into the modelling would have been used to crosscheck the modelled results. This crosscheck did not produce any amendment to the conclusions of the report before the board.

29. KMG had also prepared a working capital statement relating to HBOS. They said that if the recapitalisation was completed then HBOS would have enough capital to withstand a severe downturn, though it was possible that the immediate future might be worse than was being assumed.

30. The Lloyds board considered all this material. Mr Tookey presented Mr Roughton-Smith figures upon which there was a discussion. The board weighed the impairment figures against the suggested net negative capital adjustment and against the material produced by HBOS. They balanced the strategic advantage against the downside risk, taking into account the extent of the risk and the probability of its occurrence. The detail of the argument is not recorded: but individual board members are able to recall the outline of their thinking. This was to look not only at the risks presented by the impairment figures, but also the probabilities: and to see what “headroom” was available in the proposed net negative capital adjustment to accommodate Mr Roughton-Smith’s figures. They unanimously decided to proceed.

31. The board approved the issue of a circular that had been prepared by Linklaters and by the investment banks (UBS, Merrill Lynch, Citigroup and Lazards) approved the UKLA. It was 289 pages in length. It set out the recommendation and the risks inherent in the transaction.

Sir Victor Blank's letter (i) identified the Acquisition as a unique opportunity (ii) invited the shareholders to compare the position of Lloyds under the Acquisition with the position Lloyds would be in if the Acquisition did not proceed (rather than the position Lloyds had been in before the Recapitalization Weekend) (iii) noted that if the Acquisition did not proceed then Lloyds was required to raise an additional £7 billion as to which there could be no certainty of raising it in the public markets and no certainty as to the terms upon which the Government would participate (iv) affirmed the board's belief after the Recapitalisation Weekend the Enlarged Group would have sufficient capital.

32. Circular were scrutinised by analysts. There was a broadly equal spread of those who were critical, those who were neutral, and those who were supportive. The most important (because it was relied upon by many institutions to determine how their votes should be cast) was RiskMetrics. It concluded that there was a reasonable strategic rationale for the Acquisition (which it described as" more of a rescue" than a normal acquisition. It considered that the implicit premium being paid was higher than in recent transactions, but thought that valuation was a secondary consideration to the strategic opportunities/challenges involved; and it recommended a vote "for" the Acquisition (though not in enthusiastic terms).

33. Soon after the publication of the Circular there were press stories about the provision by Lloyds of a £10 billion facility to HBOS. Lloyds did not confirm the story: and it had no significant impact either on Lloyds' or HBOS' share prices.

34. EGM was held on 19 November 2008. At it the board's recommendation was accepted by 96% of those voting, although there was a hostile reception for the proposal from smaller shareholders attending the meeting. They alleged (contrary to the facts) that the deal had been cooked up at a cocktail party with the collusion of Gordon Brown, and that the requirement of £7 billion additional capital was a figure that must have been plucked from the air. The protests did not carry the day.

35. The first head of complaint is that Acquisition could not have been recommended by a competent board. The Claimants allege that in relation to the original and the revised announcement each of the defendant directors owed to each of the individual claimants a duty of care in respect of the opinions expressed. I hold that they did not owe such a duty. The individual directors did not assume personal responsibility to each Lloyds shareholder for the opinion expressed. Such a duty is not in accordance with principle: and the terms of each announcement made clear that reliance should not be placed upon it. That was not an attempt to disclaim liability for negligence that would otherwise have arisen: it was a statement of the basis upon which the announcement was being made.

36. The Claimants have alleged (and the defendants have conceded) that the directors did assume personal responsibility to individual shareholders in the Circular. They were under a duty to take reasonable care that statements made were true and that there were reasonable grounds for the opinions expressed. I hold that the claimants have failed to prove that there was a breach of this duty. The expert evidence simply does not support the proposition that the defendant directors had acted unreasonably in making the recommendation.

37. The Claimants say, putting the expert evidence on one side, that the Acquisition could not rationally be advanced. They say that a share exchange could not be recommended because HBOS was valueless (that it faced wholesale nationalisation or liquidation on a "breakup" basis). I reject that case. The claimants have not tendered in evidence any valuation of HBOS. Even the claimant's expert evidence acknowledges (i) that HBOS may have had some value *to Lloyds* (ii) that partial (not wholesale) nationalisation was a realistic possibility which would have left the HBOS shareholders with some residual value. The investment bankers'

valuations Lloyds obtained at the time of the Acquisition indicated a positive value (though none was of itself reliable enough to fix a particular value). They have not proved that the only fair and balanced view that could have been reached by reasonably competent directors was that HBOS had no value.

38. The Claimants alleged that the transaction should not have been recommended because it was based on inadequate due diligence. I reject that case. Mr Roughton-Smith's reports to the board did not say that the access he had been given to the HBOS books was not adequate to ground any opinion. On the contrary, he indicated that further work would be unlikely to narrow the range of his assessment because of the inherent uncertainty in the exercise. It is true that he had not in general conducted a granular asset-level analysis: but there was no evidence that such was the usual practice or could be achieved whilst respecting commercial and customer confidentiality.

39. The Claimants alleged that the Acquisition could not rationally have been recommended because of the challenges it presented to funding. I reject that case. Lloyds obtained from the Government clear assurances of the availability of funding levels from various sources sufficient to cover the PwC working capital analysis and a further" nod and wink" as to the availability of additional funds outside those sources. I do not consider that every director of reasonable competence would necessarily have formed the view that funding was at such risk that the Acquisition could not be undertaken.

40. The Claimants argued that the threat posed by a restructuring was such that the EPS estimates could not be relied upon. I reject that case. The anticipated synergies were well grounded in some 28,000 hours of work, were conservatively assessed, and took account of the disadvantages created by the merger. This established the benefits. The message received from the government suggested that significant divestment was not a real risk. This established the security of the benefits. I do not consider that every reasonably competent director would have completely discounted the EPS advantages.

41. The Claimants argued that to the extent that the recommendation arose out of a comparison with the alternative of a standalone Lloyds the latter alternative was presented too pessimistically. I have rejected that case. A reasonably competent director could properly treat requirement of the FSA as a genuine requirement and could properly take the view (in the light of advice from investment bankers, correspondence from the FSA and the announced views of the Chancellor) that it was not certain how that requirement could be met.

42. The Claimants allege that Mr Roughton-Smith's impairment figures produced on the 20 October 2008 manifestly indicated a capital shortfall so that a further dilutive capital raise was likely. I reject that case. His figures lay in a range; not every competent director would use the extremity of the range as the guiding figure. Neither his "1 in 15 " nor his "1in 25" scenario was a certainty. The probability of occurrence was for Mr Foley to advise upon. The Roughton-Smith figures were one input. The work of PwC and of the Lloyds Group Corporate Treasury as working capital requirements were others. The view of the Government that the additional capital to be injected as a result of the Recapitalisation Weekend proposals would leave the Enlarged Group adequately capitalised for the modelled downturn was yet another. None of the Lloyds specialist executive team suggested that the PwC/Group Corporate Treasury analysis was incompatible with Mr Roughton-Smith's figures or that his figures could not be accommodated. The evidence does not establish that a reasonably competent director would of necessity have thought that a capital shortfall requiring a dilutive capital raise was a real risk in the forecast period.

43. The Claimants allege that each director was responsible to each shareholder for what was said at press conferences and investor presentations about the Acquisition. I reject that case. The Announcement and the Revised Announcement made clear the basis upon which any investment or governance decision should be taken, and I do not think that any shareholder could reasonably rely on statements made at press conferences. The Circular indicated what could be relied upon and in view of that and because the presentation on 3 November made clear that reliance should not be placed upon it, I do not consider that each director assumed personal responsibility to each shareholder for what was said.

44. As to the Circular itself, it was an invitation to shareholders to vote in favour of the Enlarged Group and they needed sufficient information to enable them to make an informed decision about that proposal. The Claimants say that the Circular ought to have advised that the Acquisition was not in the best interests of the shareholders, should have disclosed that HBOS used ELA and the Lloyds Repo, should have disclosed Mr Roughton-Smith's impairment figures, should have said that the requirement of £7 billion additional capital was unjustified, and should have said that the additional capital required to be raised by Lloyds as part of the Enlarged Group was really required by HBOS (not by Lloyds).

45. I have already dealt with why the transaction could be recommended and why the capital requirements for a standalone Lloyds could properly be communicated. I reject the argument that this should have been included in the Circular. The Circular properly referred to a net negative capital adjustment figure of £10 billion being needed, being based on verified material produced by HBOS. It provided a fair indicator of the anticipated write-downs on the Acquisition.

46. But I consider that the Circular should have disclosed the existence of the ELA facility, not in terms such as would excite damaging speculation but in terms which indicated its existence. The Circular contained an account of HBOS' liquidity management systems which it said had enabled HBOS to manage through periods of stress. But it had only been able to manage by going outside the market and mainstream central bank facilities and by resorting to a special bilateral facility. It is true that this facility would not continue to be used by the Enlarged Group: but that would be because part of the additional capital raised under the Recapitalisation Weekend arrangements was going to be applied to repaying this facility and so would not be available to meet any additional challenges. The shortfall in collateral which afforded access to SLS and other mainstream facilities represented a funding risk that the Enlarged Group would have to bear. I do not think that the board "concealed" this information from shareholders. But they never squarely faced the issue and took no advice upon it, simply assuming that they could properly treat it as an indistinguishable functional part of mainstream central bank funding.

47. Likewise, I consider that the board ought to have disclosed the Lloyds Repo. The board assumed that because at the time of its grant it had been treated by the authorities as "ordinary course" business that provided an answer to all subsequent questions. But whether it should be disclosed in the Circular as material to an informed decision was a separate question. The Court must answer that question on an objective basis. The size of the facility, the fact that it was extended in tight markets, the fact that it was linked to the Acquisition and was part of a systemic rescue package showed that this was a special contract which ought to have been disclosed.

48. The Claimants say that if the board knew that ELA and the Lloyds Repo had to be disclosed then the transaction would have been terminated in preference to the disclosure being made. I reject that case. The authorities would not have prevented disclosure being made though they would certainly have influenced the terms on which the disclosure was made. If told that

disclosure had to be given, then the Lloyds board would have done so. Termination did not provide an answer in any event, as the Lloyds board would have had to explain why the announced takeover was not proceeding: and that would have involved disclosure of the material which (on this hypothesis) they did not want to disclose.

49. The Claimants argued if disclosure had been made, then the transaction would have collapsed because the HBOS share price would have collapsed. I reject the case. There is no doubt that the authorities greatly feared that if the ELA facility was to become known then that would stimulate an outflow of funds and further pressurise HBOS funding. The fact that the risk is foreseen does not mean that it will happen: and I do not consider on the balance of probabilities that it would have done in this case. The debt market would have reacted negatively at least initially. But because the Government would probably have continued to support HBOS (to avoid the systemic shock of the abandonment of a key part of its stabilisation plan) the share price of HBOS would not have collapsed as HBOS continued to be funded. The experts on each side thought that a 15% decline in the share price was the limit of any reaction to disclosure. Shareholders in HBOS would have had no incentive to undermine the merger by selling their shares (since for them the Acquisition presented a better outcome than the alternatives).

50. What happened with Northern Rock or in the other examples cited does not provide an accurate predictor of what would have happened to HBOS if ELA and the Lloyds Repo had been disclosed. The key differences are (i) the HBOS difficulties were known and the support would not have come as a surprise (ii) disclosures would have been controlled (and would not have originated in a leak) (iii) was a clear end-state for HBOS in the immediate future (iv) the role of the central bank as a provider of liquidity willing to do whatever was necessary was radically different from the central bank role at the time of Northern Rock. A better indicator is what happened when the Lloyds Repo was leaked.

51. There is no satisfactory evidence that the press would (in the light of the disclosure) have written the Acquisition off as "folly" so as to cancel out the unanimous board recommendation.

52. The Claimants argued that if the Acquisition had not been terminated or collapsed then it would have been rejected at the EGM if the disclosures had been made. I do not accept that this is so. For the directors' recommendation to be rejected some 1.4 billion votes would have had to have changed sides simply because of the disclosure of some temporary funding arrangements. The evidence of the Claimants (from 13 shareholders) does not establish that that probably would have happened or that they have lost a realistic chance of it happening. On the contrary the evidence established that shareholders generally vote in accordance with the recommendation of the board, and that institutional investors generally follow the guidance of RiskMetrics.

53. In my view the Lloyds shareholders focussed (and would in the event of disclosure still have focussed) on the strategic objectives, as the Chairman's Letter recommended. Warned of multiple risks to the transaction 96% of the shareholders voted to support the recommendation. It is improbable (indeed, there is no real prospect) that the outcome would have been different.

54. In the result I must dismiss the claims. The Defendants were not negligent. For a fair and candid presentation, they should have made further disclosure. But if the disclosure had been made the result would have been the same.