CASE NO: CR-2019-BHM-000443 & CR-2019-BHM-000444

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERY COURTS
IN BIRMINGHAM, INSOLVENCY & COMPANIES LIST

IN THE MATTER OF LENDY LTD (IN ADMINISTRATION)

AND IN THE MATTER OF SAVING STREAM SECURITY HOLDING LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

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

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

Applicants

and

(1) Lisa Taylor

(2) Christine Mary Laverty, Helen Julia Dale and Trevor Patrick O'Sullivan as Joint Conflict Administrators of Saving Stream Security Holding Limited (in Administration)

Respondents

WITNESS STATEMENT OF DAMIAN WEBB

I, DAMIAN WEBB of RSM Restructuring Advisory LLP, 25 Farringdon Street, London, EC4A 4AB, WILL SAY as follows:

Introduction

1. I am a Licensed Insolvency Practitioner and Partner of RSM Restructuring Advisory LLP ("**RSM RA**") of the above address. RSM RA is one of the UK companies comprising the network of RSM accounting and consulting firms which trade under the name "RSM" (together the "**RSM Group**").

2. On 24 May 2019 Phillip Rodney Sykes and Mark John Wilson both also of RSM RA, and I were appointed as joint administrators ("**Joint Administrators**") of Lendy Ltd (CRN: 08244913)

("**Lendy**") and Saving Stream Security Holding Limited (CRN: 09736866) ("**SSSHL**") pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986 ("**Act**") by the director of Lendy and SSSHL.

3. I make this witness statement on behalf of the Applicants in support of the application for directions pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986.

4. Save where otherwise stated, I make this witness statement from facts within my own knowledge and/or derived from the documents and investigations referred to below. My knowledge is largely derived from reviewing the books and records of Lendy and SSSHL and from speaking with various persons in my capacity as a Joint Administrator. I confirm that this witness statement has been prepared over the telephone and via email, in circumstances where I and my legal advisors have been in lockdown as a result of the Covid-19 pandemic. Where facts and matters are not within my direct knowledge, I believe them to be true and the source of my knowledge is identified. Where I refer to an understanding of the legal position, such understanding is derived from advice provided by Shoosmiths LLP ("**Shoosmiths**"). Any references to such advice are included only with a view to assisting the Court to understand the context in which my evidence is given, and no waiver of privilege is thereby intended.

Exhibit

5. There is produced and shown to me at the exhibit marked "DW2". A reference to a **page number** in bold within this witness statement is a reference to a page number in exhibit DW2.

6. References to Lendy's terms and conditions for lenders (**"Terms"**) within exhibit DW2 relate to the 4th Terms, being those dated 11 July 2018 unless stated otherwise. References to the Terms (including earlier and alternative versions) are as defined at paragraph 201 below. References to 'lenders' in the documents contained within exhibit DW2 (including the Terms) and as quoted on occasion below are synonymous with references to investors in this statement.

Issues

7. I set out in this witness statement the trading history of Lendy and SSSHL, an explanation of how Lendy's peer to peer lending platform worked, the administration progress to date, an explanation of the structure of the loan and security documentation and in particular the application of secured asset realisations, and a summary of the communications with interested parties. The purpose of this witness statement is to provide a full and comprehensive description of the facts and matters within the knowledge of the Joint Administrators which can be used in the proceedings.

8. Before turning to the facts, I consider that it would assist the Court to set out the directions which the Joint Administrators are seeking so that the witness statement can be viewed in context. The defined terms in the directions sought are set out in Annex 1 of the List of Issues and explained in detail in the body of the witness statement below. The issues on which directions are sought are as follows;

    a. In relation to the Model 1 Loans:

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

        ii. Do the proceeds of security form part of Lendy's general estate? ("**Issue 2**")

    b. In relation to the Model 2 Loans:

        i. Do the Model 2 Transferees (in their capacity as such) have any unsecured provable claim against Lendy? ("**Issue 3**")

        ii. In what manner should the proceeds of security in respect of the Model 2 Loans be distributed? ("**Issue 4**") In particular:

            1. Is Clause 21.1 of the Model 2 Debenture valid and enforceable? ("**Issue 4a**")

            2. What are the "Secured Liabilities" mentioned in Clause 21.1.2 of the Model 2 Debenture? ("**Issue 4b**")

            3. Do the liabilities owing to Lendy (for its own account) in respect of the Model 2 Loans constitute "Secured Liabilities", and are those liabilities valid and enforceable? ("**Issue 4c**")

            4. Should the "Secured Liabilities" mentioned in Clause 21.1.2 of the Model 2 Debenture be discharged *pro rata* or in some other manner? ("**Issue 4d**")

9. As explained below, this application has become necessary as a result of a disagreement between the stakeholders of Lendy and SSSHL as to the manner in which asset realisations should be distributed. The Joint Administrators have taken advice on these matters from Leading Counsel and have sought to resolve the issues without the need for an application to the Court. Regrettably, however, the relevant stakeholders have been unable to reach agreement. Further, the Joint

Administrators have been informed by the Financial Conduct Authority ("**FCA**") that it considers a directions application to be necessary.

10. The Joint Administrators have sought to produce a List of Issues which is (i) useful, (ii) will enable the disputed realisations to be distributed, and (iii) will avoid an unnecessarily long or costly hearing. That said, it is possible that certain stakeholders may seek to introduce additional issues into the List of Issues. The rights of the Joint Administrators are fully reserved in this regard. I am advised that any request to expand the scope of the application will be considered at the first case management conference in these proceedings.

Trading History

Incorporation & Lendy Marine

11. On 9 October 2012, Lendy was incorporated with Tim Alastair Gordon ("**Tim**") as the sole director and shareholder for the purpose of providing a niche asset finance service which specialised in providing finance to purchase luxury boats. In some instances, charges were secured over the boats. This was a venture commenced by Tim and Liam Brooke ("**Liam**"), who was appointed as co-director on 12 January 2013. I understand that Tim and Liam had known each other socially, but Lendy was their first business venture together.

12. Tim had a commercial background in technology and specifically marine engineering and Liam had a background in corporate finance and sales. The business initially traded as "Lendy Marine".

13. On 23 August 2013, Lendy granted a charge to Midos GC Limited (CRN: 07834160) (Charge Code: 082449130001) securing loan facilities provided by Midos to Lendy. The charge was registered at Companies House on 7 September 2013.

FCA Interim Licence & Model 1

14. By November 2013, Lendy had loaned all its start-up capital and therefore the directors decided to launch an electronic peer to peer lending platform under the name "Saving Stream" in order to continue lending activities. The platform is hosted on the domain www.lendy.co.uk. As far as I am aware, this was the first peer to peer lending platform which either Tim or Liam had been involved in. Given Tim's experience with technology, it was Tim who developed the IT to host the peer to peer lending platform. The platform connected people who wished to borrow money with investors who wanted to lend money.

15. Lendy was one of the first peer to peer lenders in the market. Initially the only form of marketing carried out by Lendy was advertisement on their website and attendance at peer to peer national

award ceremonies. As the business grew Lendy also marketed in industry magazines and journals, as well as to existing investors, including incentives to refer a friend.

16. In February 2014, Lendy obtained FCA interim permission (IPRN: 654326) to enter into regulated consumer credit agreements, to exercise the rights of a lender under consumer credit agreements and to operate a peer to peer lending platform. At this time, the authorisation of peer to peer lending platforms was being brought under the umbrella of the FCA. Interim permission was automatically given to any company in the field who was already operating a peer to peer lending platform. Whilst the FCA did not assume responsibilities until a firm was fully regulated, if a firm does not adhere to FCA regulations during the interim licence period, the FCA can remove their interim permissions and cancel their application for authorisation.

17. On 26 March 2014, Lendy's registered office changed from Royal Naval & Royal Albert Yacht Club, 17 Pembroke Road Portsmouth Hants PO1 2NT to Baring Chambers, 13 Denmark Road, Cowes, Isle of Wight, PO31 7SY.

18. In March 2014, Lendy issued its first secured property bridging loan, pursuant to "Model 1" documentation. These bridging loans were primarily made to businesses for the acquisition of property and modest refurbishments and/or as part of a borrower's global refinance. I set out the structure of the Model 1 documentation below, but in brief, Model 1 involved a structure whereby investors lent money to Lendy (as principal), and Lendy (as principal) in turn lent money to borrowers. Model 1 loans are the subject of Issue 1 and Issue 2. After conversion to a property lending platform, Lendy's business accelerated.

19. Attached at **page 1** is a report showing the first 10 Model 1 loans. The loans were over a period of 7 months. Total investments in each loan ranged from £168k to £45k and the number of investors in each loan ranged from 190 investors to 1661 investors.

20. In the early days of the platform, Lendy built its business on the basis of 4 or 5 core brokers who had a good relationship with Liam who would introduce potential borrowers to Lendy.

21. On 13 May 2014, the charge in favour of Midos GC Limited was satisfied in full.

22. In mid 2014, during the time that the platform went live, Lendy created a secondary market which allowed investors the ability to buy and sell their loan parts. Lendy facilitated the sales but these were investor to investor sales. I explain in further detail below, how the secondary market operated.

Lendy Provision Reserve

23. On 20 January 2015, Lendy Provision Reserve Limited (CRN: 09397136) ("**LPR**") was incorporated. The LPR was advertised on the platform. At **page 2** is a screen shot of the overview explanation of the provision fund which was put on the platform. The explanatory note said that the "*Provision Fund (PF) is made up of contributions from the loan in our portfolio. The Provision Fund is designed to assist in compensating investors in the event that the sale of the security property does not result in full repayment of the loan."* The intention was for LPR to always hold a sum of money, equivalent to 2% of the total value of the loan book at any time, to be a discretionary fund to compensate investors. The platform confirmed that the fund was discretionary and did not guarantee against loss to investors.

24. The FCA was not favourably disposed towards the concept of the LPR as they felt it was misleading to investors. On 1 June 2017 the FCA wrote to Lendy and confirmed, amongst many other things, their view that the promotion of the provision fund did not meet the 'clear, fair and not misleading' requirements in rule 4.2.1R of the FCA Conduct of Business Sourcebook as "*investors cannot accurately gauge the likely protection it might afford and the suggestion is that there is 2% of the total live loan amount, which may not be correct"* and *"the risk of not being paid out by the Provision Fund is concealed*" (see **page 11**). A copy of the letter, together with Lendy's response, is at **pages 3-29**.

25. Whilst there was approximately 2% of the value of the loan book in the LPR bank account at all times, this money was not ring fenced or held on trust for a particular purpose. When the LPR account fell below the requisite 2%, Lendy's operational account was used to "top up" the LPR account. The detail as to the amount of the LPR account was never disclosed to investors.

26. There were a number of instances when Lendy did utilise the monies held in LPR to pay investors for underperforming loans. A history of the usage of the LPR, which was published on the platform, can be found at **page 2**. There are 6 loans where the LPR was used, in the period 28 February 2017 to 9 January 2019. Two of which were development loans (references DFL025 & DFL035) and 4 were bridging loans (references PBL123, PBL067, PBL066, PBL020). The total amount utilised by the LPR was circa £1.6m and varied between £12k to £600k per loan.

27. On 7 September 2018, a charge was registered against LPR to secure a £1m working capital facility provided by Metro Bank.

28. LPR also entered into administration on 24 May 2019 by virtue of a director appointment (see **pages 30-31**). Upon administration, the balance on the LPR bank account was £1,531,995. Metro Bank

held a fixed charge over the balance in the sum of £1,006,241 which has been distributed to the bank (see **page 47**).

Grant Thornton Advice

29. In early 2015, Grant Thornton UK LLP were instructed to provide tax and regulatory advisory services. Their services included leading a workshop covering key tax and client money considerations with regard to the potential restructuring of Lendy. Grant Thornton then produced a report outlining the key issues and agreed action points.

30. A copy of the draft report dated 5 March 2015 is attached at **pages 64-85**. The report recognises that Lendy was contemplating moving from a "Model 1" position where borrowers had a direct legal relationship with Lendy to a "Model 2" basis where future investors would have a direct relationship with borrowers. Grant Thornton recommended that Lendy sought legal advice to clarify whether the current contractual agreement reflected those of a peer to peer model and whether the documentation needed to be amended.

31. The scope of Grant Thornton's instructions appears to have been very narrow and did not extend to reviewing the loan and security documentation or advising Lendy on its role as a peer to peer lender.

Model 2

32. Lendy considered that the structure of the business needed to move from a Model 1 basis to a more sophisticated model which removed the risk and liability in the event of Lendy suffering financial difficulties. Lendy instructed Clarke Willmott LLP, who I understand had previously drafted the Model 1 documentation, to advise and draft a revised suite of loan and security documentation. Liam had a close relationship with Greg Hughes, a partner of Clarke Willmott LLP, who introduced Lendy to the relevant solicitors at Clarke Willmott LLP. Clarke Willmott LLP drafted a suite of precedent Model 2 loan and security documentation. Pursuant to Model 2, investors deposited money on the Lendy platform, Lendy as agent for the investors lent money to borrowers and borrowers provided security for their borrowing to SSSHL as security trustee. A full explanation of the Model 2 documentation is set out below. Issues 3 and 4 relate to Model 2 loans.

33. Lendy explained the change from Model 1 to Model 2 to investors, by putting a general update on the platform (see **pages 86-87**). The reason for the change in models was explained as follows

> *"When you invested in a loan, we kept detailed records of this, but an administrator may consider it a pari passu risk (http://www.investopedia.com/terms/p/pari-passu.asp) in*

the event of Lendy Ltd's (highly unlikely) bankruptcy. One bad loan, could in theory, undermine the rest.

When we become a Pure P2P platform, you lend to the borrower via Lendy Ltd and a "nominee company" called Saving Stream Security Holding Ltd, holds the security on your behalf. The purpose of the nominee company is to manage the investment on behalf of all the Lenders so that the borrower only has to deal with a single entity rather than 1000's of individuals which will constantly change as the loan parts are traded.

This mitigates bankruptcy risk and the contagion of one bad loan will not affect the others. Saving Stream will act as the agent and will manage - the origination of the loan, underwriting decisions, raising the capital on behalf of the lenders, perfecting the security, collecting repayments, distributing repayments to Lenders, paying monthly interest, managing the Lender database and various other activities on the Lenders behalf"

34. On 17 August 2015, SSSHL was incorporated as the security trustee vehicle for the benefit of Model 2 investors. Tim and Liam were appointed as directors. They were joint shareholders, each holding 1 ordinary share in SSSHL.

35. The first Model 2 loan was a bridging loan, PBL064 (Property: Tenanted office block, Somerset, Acorn House Borrower: Agricultural Properties Limited). The purpose of this loan was to refinance existing loans which had been secured on the property and to allow time to arrange a commercial mortgage. The loan went live on the platform on 20 October 2015 and then completed with the Borrower on 27 October 2015.

36. Once Model 2 was initiated, all loans moving forward were on the Model 2 basis. Model 1 loans were not changed to Model 2, although there were situations where further loans or extensions to Model 1 borrower loans were on the basis of Model 2.

37. At **page 88** is a report showing the final 10 Model 2 loans, between February 2018 and September 2018. The value of each loan ranged from £105k to £985k and the number of investors (both original and secondary market investors) ranged from 498 to 3132.

38. Whilst SSSHL was the security trustee, Lendy was still the administrative entity who carried out all the administrative work in liaising with borrowers, putting the loan and security documentation in

place, updating the platform, recovering loans and enforcing security. Lendy were appointed as agent on behalf of SSSHL. The investors' Terms provide that investors "*irrevocably and unconditionally, authorise Lendy to instruct [SSSHL] in relation to the Finance Documents, including without limitation the security documents and their enforcement."* See clause 8.1.3 (**page 673**). This provision is in each version of the Terms relating to Model 2.

Late 2015

39. Throughout 2015, Lendy and the platform had grown from strength to strength and as at December 2015, the loan book had reached circa £70m. Investments in the platform were running at approximately £10m a month.

40. On 17 August 2015, Lendy's registered office changed from Baring Chambers, 13 Denmark Road, Cowes, Isle of Wight, PO31 7SY to Gatcombe House, Copnor Road, Portsmouth, PO3 5EJ. On 29 October 2015, Lendy purchased Branksmere House, Queens Crescent, Southsea Hampshire, PO5 3HT, and its registered office was changed to this address.

41. On 11 November 2015, Liam became a shareholder and as at 11 November 2015, Tim and Liam each held 50000 ordinary shares in Lendy.

Employment of Staff

42. The accelerated growth of the business led Tim and Liam to invest in the business, including the employment of a significant number of staff. In addition, Lendy moved from offering secured bridging loans (referenced with a PBL prefix) to development loans (referenced with a DFL prefix).

43. The key members of staff which were recruited are as follows:

    a. David Garbett was employed in February 2016 as a Business Development Manager ("**BDM**"). His role was to liaise with brokers to secure new loan opportunities with borrowers. Part of David's role was also to try to expand the number of brokers which Lendy worked with and therefore widen the range of borrowers. David left the business on 31 October 2017

    b. Sam Cousins joined the business on 9 March 2016 also as a BDM, and had a similar role to David. Sam had worked with brokers in a previous job role and as such joined Lendy with an existing network of brokers. Sam worked for Lendy until April 2018. Compared to other BDM's in the market place, Lendy's BDM's were paid a basic salary and their commission was very high. They were therefore strongly encouraged to sell.

c. Harry Hodell was employed on 29 March 2016 as a BDM. His role was initially to entice more investors into the business but later changed to working on the borrowers side with David and Sam. Harry left the business in March 2018.

d. Alan Darling joined the business in May 2016 as the Head of Development. His role was to grow and head up the development loan side of the business. Prior to Alan joining, the business had only provided bridging loans, however the bridging market was becoming very competitive. Some of these bridging loans were actually on development sites but without all of the industry standard development controls being put in place when the bridging loan was drawn. This made some of these loans more challenging. Lendy continued to provide bridging loans alongside development loans, however as time went on the bridging loans which were accepted by Lendy were few and often more complex.

   Lendy completed on its first development loan on 17 June 2016. This was a development loan, reference DFL001, to Empire Homes (South West) Limited in the sum of £3,840,000 for a period of 12 months, for the purpose of repaying existing indebtedness (a bridging loan with Lendy) and developing a property at Bricknells Bungalow, Old Rydon Lane, Exeter, EX2 7JW into holiday lets.

   Alan remains employed by Lendy post administration and heads up the remaining Lendy team which consists of Alan, Zaydur Rahman (Business Support) and Shane Lewin (Head of Customer Service and Head of Compliance (Acting)).

e. Mehar Patel was engaged as the Head of Legal in June 2016. Mehar operated the property transaction side of the business. Once an agreement had been reached in principle, Mehar liaised with external solicitors who put in place the loan and security documentation. Mehar was the point of contact for Lendy and SSSHL. Mehar was granted power of attorney by Lendy and SSSHL on 5 July 2016 to sign and execute all agreements and documents on its behalf in connection with finance, security and management transactions (see **pages 89-90**).

   Following Mehar joining the business, Lendy always insisted that borrowers instructed their own solicitors firm with a minimum of 3 partners (for money laundering purposes). In addition, Liam would ask Mehar to deal with any other legal issues which arose, for example complaints by borrowers or investors.

   Mehar left the business in December 2018 and was replaced by Matt Longworth, Gary Anderton and most recently Stuart Nuttall as internal legal advisors. They were all (apart from Mehar) engaged by Lendy on a consultancy basis.

f. Andrew Wawrzyniak was employed as Head of Finance in January 2018 to manage and deal with client monies and accounts (including the CF10a FCA role). He also provided information to accountants for the preparation of annual accounts and prepared management accounts.

g. Mark Whitburn started in December 2016 as Head of Credit. He was responsible for the credit application process. He reviewed all credit applications, valuation reports, and Quantity Surveyor's draw down requests. Mark left the business in November 2018.

h. Paul Coles joined in October 2017 as Head of Compliance with FCA CF10 (compliance oversight) & CF11 (MLRO) roles and duties. Reporting to the board, Paul was responsible for the board's and the operations contribution and communication to the FCA. Paul left on the day Lendy was placed into administration.

i. Kieran O'Connor was hired in June 2018 as the chief Financial officer ("**CFO**"). He left the business in November 2018, when he was given a 3 month notice of termination of employment ending 10 February 2019. Kieran is currently pursuing an employment claim for unfair dismissal against Lendy and Liam personally. Paul Coles reported into Kieran.

j. Adam Bolger was hired to replace Kieran O'Connor as CFO on 14 January 2019. Adam initially started as interim financial director, Adam was already known to Liam and Lendy as he had been the Lendy/group's external accountant/ advisor for a number of years.

44. During and after the large recruitment process in 2016, Liam's role was very much an overseeing and final decision making role. Every day there would be a credit and recoveries meeting with Alan, Mark, Mehar and James Crascall (Portfolio and Recovery Manager). During these meetings, potential new loans were considered and Liam would authorise new loans. They would discuss strategy as to how to bring in new loans and investors. The meetings would be used to run through the credit process and any recovery action which needed to be taken. Attached at **pages 91-94** is a copy of the credit policy which was used by Lendy to assess whether a borrower would have the ability to pay sums due under a proposed agreement. Liam would also have the final decision on recovery steps.

45. Tim's role in the business was primarily two-fold, firstly to develop and monitor the platform including setting loan draw downs etc on the platform. Secondly, to oversee the financial aspects of the business including the day to day banking.

Application for a full FCA licence

46. On 12 August 2016, the FCA wrote to Lendy to express concern that peer to peer agreements were being presented as savings vehicles. A copy of the letter is at **pages 95-105**. The FCA considered that it was *"misleading to describe* crowdfunding *as involving 'saving' or savings'".* The FCA therefore confirmed their view that the use of the trading name "Saving Stream" was misleading.

Lendy initially disagreed with the FCA and set out their reasons in a letter dated 2 September 2016 (see **pages 106-110**).

47. However, following the FCA's concerns in relation to the use of the name "Saving Stream" and Lendy's consideration of the pros and cons of a challenge by the FCA on this issue, as documented in the internal document dated 1 December 2016 at **pages 111-112**, the business was rebranded to "Lendy" in March 2017.

48. Lendy applied for a full FCA licence in March 2016, a copy of which is at **pages 113-138**. As part of this process, Lendy recognised that there had been no formal written process or procedures in place and therefore Lendy engaged Scott Robert Limited ("**Scott Robert**"), compliance consultants, to prepare a suite of compliance policies. Scott Robert prepared a number of policies; the main ones being a credit policy and a policy relating the Client Assets Sourcebook ("**CASS**") promulgated by the FCA. However, these were very much "off the shelf" policies for FCA regulated companies and were not tailored to Lendy. Scott Robert also completed a compliance audit and review report which can be found at **pages 139-174**.

49. As part of the application process, the FCA met with Liam, Alan and Mehar in or around June or July 2016 to ascertain how the Lendy platform worked and what systems were in place. Alan and Mehar showed the FCA the suite of documents which had been prepared, including financial promotions, data protection, credit policy, CASS policy etc. as well as the template Model 2 documentation. The FCA took the files of 4-5 loans to review and did not raise any issues with the loan files.

50. The FCA were surprised and disconcerted that Lendy did not have a compliance officer. On 13 September 2016, the FCA met with Lendy again to look at client money arrangements. In a follow up letter dated 13 October 2016. the FCA stated that "*the issues identified at the Firm indicate to us that you may not be meeting the CASS rules and we are concerned that you have not adequately considered the CASS rules and their application to your business."* The FCA went on to suggest that Lendy should *"consider the knowledge and experience needed to meet CASS rules and this may include appointing a third party to ensure that you are compliant".* A copy of the letter is at **pages 175-178**. In response, Robert Easterbrook was hired in October 2016 as Lendy's compliance officer reporting directly into Liam (see **pages 179-180**). Robert remained with the business for 6 months.

51. In June 2017, Shane Lewin joined the business as a non-controlled function Compliance Officer. Initially reporting into Mehar Patel until Paul Coles joined the business in October 2017 as Head of Compliance. In this role, Paul undertook all of Lendy's communication and reporting to the FCA including, the ongoing FCA authorisation application, updating on the recoveries process, the

monitoring of the business and any special FCA requirements. In February 2018, Shane took on the role of Head of Customer Service, assisting Paul on an ad hoc basis.

52. In February 2018 Lendy instructed Duff & Phelps Ltd to undertake a review of 82 lending files which made up Lendy's "live" loan book, in response to weaknesses identified by the FCA. Duff & Phelps suggested a number of recommendations for Lendy to review their processes (see **pages 181 – 209**).

53. In early 2017, the level of non-performing loans steadily increased and investors could easily identify the underperforming loans via the platform and publicly available information. This resulted in a significant decrease in the level of investment.

Accounts and Corporation changes

54. Lendy had filed small company accounts, until it filed its first full set of accounts to 31 December 2016 (see **pages 210-233**). These accounts show that there were current debtors of £161,415,170 of which £151,499,956 related to loans and total creditors of £171,805,028 of which £158,635,794 related to sums owed to investors. These accounts and the remainder of Lendy's accounts appear to be incorrectly stated as they state that all loans, Model 1 and Model 2 loans are on balance sheet. However, as explained below, Model 2 loans are not on balance sheet as Lendy only acted as agent for the investors.

55. On 3 January 2017, Liam and Tim each transferred their shares in SSSHL to Lendy Group Limited (CRN: 10474112) ("**LGL**") who became the sole shareholder of SSSHL and remains so to date. LGL was incorporated on 11 November 2016 with Liam and Tim being 50% joint shareholders. From 26 July 2018, LGL was solely owned by Liam. LGL was a shell company which did not trade.

56. On 1 March 2017, Tim and Liam transferred their shares in Lendy to LGL. I understand that any corporate structure changes were decisions made between Liam and Adam Bolger.

57. In June 2017, the loan book peaked at £228m and monthly investments from investors averaged £14m per month.

58. On 5 December 2017, the registrar of companies filed a notice to strike Lendy off the register for failing to file accounts on time. This strike off action was discontinued on 6 December 2017.

59. On 27 June 2018, SSSHL changed its registered office to Branksmere House, Queens Crescent, Southsea, PO5 3HT.

60. Tim became estranged from the business and ultimately resigned as a director of SSSHL and Lendy on 26 July 2018 due to a heart attack and poor health.

FCA Approval

61. On 11 July 2018, the FCA granted Lendy formal authorisation as an approved peer to peer lending platform. An email from Paul Coles internally to Lendy staff, dated 10 July 2018 confirms the new Firm Registered Number, a copy of which is at **page 234**.

62. The FCA continued to question and monitor the actions of Lendy and were in regular contact with Shane Lewin, Paul Coles and Liam. Once the FCA had approved Lendy as a regulated peer to peer lending platform, the FCA had a greater remit to monitor and change how Lendy traded. The FCA were scrutinising Lendy more intensely. The regulation of the peer to peer market was a new area for the FCA and therefore it was apparent that the FCA were trying to understand the market themselves. I note (based on Lendy's books and records) that Lendy regularly responded to the FCA's requests for information and documentation either by email or conference calls.

63. The FCA had sight of the non-performing elements of the loan book, engaging regularly with Paul Coles and where necessary other members of the Lendy team.

64. The FCA were keen to be updated regularly on everything that was happening at Lendy, including new loans and the recovery processes. Paul Coles regularly spoke to the FCA regarding the recoveries process, with James Crascall joining him on some of the calls for a period of time and the FCA appeared to be extremely well informed of everything that was going on at Lendy and its day to day business.

65. There were some aspects of loans where the FCA disagreed with the actions Lendy had taken. This was in circumstances where Lendy did not provide full information to investors on the platform in relation to the borrowers. Examples of such concerns and the actions which the FCA required Lendy to undertake, including an "*analysis of the current portfolio*" and the provision of "*details on how it anticipates remediating the range of cases that may be identified where there has been inaccurate or insufficient information provided to lenders at any time,*" can be found at **pages 235-243**.

66. As a result, a disclosure to investors policy was put in place (see **pages 244-245**). Lendy had to consider if there was a "material" factor which needed to be disclosed to investors. Material factors included for example a bankruptcy, death of a borrower, failure of the borrower to comply with a material condition of the loan. The material factor was then allocated as either a Band 1, Band 2 or a Band 3 disclosure. A Band 3 disclosure was the lowest level and meant that internal updates and

monitoring had to take place. A Band 2 disclosure resulted in Lendy informing investors of the material factor very clearly on the platform. If a Band 1 material factor arose, Lendy had to "freeze" the loan so that no loan parts could be bought or sold on the secondary market.

67. This remediation plan applied to approximately 7 or 8 loans over Lendy's trading. For example, on a number of loans, collectively known as "the Convent", the borrower was declared bankrupt during the term of the loan. The FCA considered that it was misleading for Lendy not to have disclosed this information to investors. Particularly in the context of the secondary market where investors could choose to buy and sell loans after completion of the loan, when the borrower's circumstances may have changed following completion. Therefore, the FCA compelled Lendy to repay all investors who had invested in the Convent loans on the secondary market after the date of the borrower's bankruptcy.

Lendy Wealth

68. In or around July 2018 Lendy developed the Lendy Wealth (black box) investment product. Investors could invest money on the platform, but they did not have any decision as to what to invest in. Lendy in its absolute discretion chose which loans to invest the Lendy Wealth investors' money in. Even after Lendy had invested their money, investors would not be informed which loans they invested in. This was an attempt by Lendy to encourage further investment into Lendy at a time the business was struggling.

69. When any investor registered for the Lendy platform, they had to identify whether they were "sophisticated investors" i.e. certified high net worth investors, "certified sophisticated investors" or "self-certified sophisticated investors". If an investor did not identify themselves as one of these sophisticated levels of investors, they were not entitled to the Lendy Wealth product as they were regulated consumers. Only those investors who had indicated that they were sophisticated investors were targeted for Lendy Wealth. Lendy Wealth was a separate platform and website to the ordinary Lendy platform. However, if you were already a sophisticated investor on the Lendy platform, a Lendy Wealth tab appeared on the investor's Lendy platform account.

70. There were two strands to Lendy Wealth, firstly Lendy Wealth 365 (see **page 246**), where investors would have to commit for their money to be tied up for 12 months and/or the investors had to give 12 months notice for their money to be withdrawn. The target interest rate paid to investors of Lendy Wealth 365 was up to 10% per annum gross. There was a minimum account balance of £10,000 and a minimum deposit of £5,000.

71. The second strand was Lendy Wealth 60 (see **page 246**) where the target interest rate was 6% per annum gross and investors had to commit funds for a minimum of 60 days and had the ability to

give notice to withdraw their funds on 60 days' notice. Again, the minimum account balance was £10,000 and a minimum deposit of £5,000.

72. In the event that an investor gave notice to withdraw funds, the theory was that the investment scheme would be so oversubscribed that new investors would invest and replace old Lendy Wealth investors even if a borrower had not repaid their loan on time. However, this did not always work in reality. There was a warning on the Lendy Wealth website (see **page 246**) for both Lendy Wealth365 and Lendy Wealth60 stating:

"Past performance does not guarantee future performance. Access times relate to withdrawals in normal market conditions but cannot be guaranteed. This is an investment in peer-to-peer loans - it is not a bank account. Investment in peer-to-peer loans is not protected by the Financial Services Compensation Scheme (FSCS). Capital is at risk."

73. Based upon current information, I understand that there were circa 140 Lendy Wealth investors in total, who invested total monies in the region of £4m. The first distribution to Lendy Wealth investors was effected by the Joint Administrators on 10 January 2020.

Saving Stream Bond

74. Another investment product was developed called the Saving Stream Bond (the "**Bond**"). This was issued by Saving Stream Bond Limited (CRN: 10261814), a separate company which was wholly owned by Lendy. It was incorporated in July 2016 but did not start trading until around September 2016. In a similar fashion to Lendy Wealth, if investors invested in the Bond, they invested "blind" and agreed for Lendy to choose which loans to invest in. The Bond had a separate website to the standard Lendy platform.

75. This Bond was run by Katherine Manderfield of Lendy. Brokers were financially incentivised with higher introductory fees, to introduce investors to invest through the Bond rather than through the normal platform. The Bond was another method to raise additional investment and fulfil loans which had not raised sufficient investment through the ordinary channel of the Lendy platform.

76. Saving Stream Bond Limited was dissolved on 10 December 2019 following a compulsory strike off note. Saving Stream Bond Limited did not have its own bank account; instead, Lendy had a separate bank account into which Bond investors paid their money. From that account the broker's fees were deducted and the balance was invested on the Lendy platform.

77. Based on information and documentation obtained by the Joint Administrators, there are 12 investors who invested through the Bond, with a total of circa £155K invested across 15 loans

(DFL001/ DFL002/ DFL005/ DFL010/ DFL019/ DFL029/ PBL064/ PBL069/ PBL070/ PBL071/ PBL081/ PBL106/ PBL155/ PBL167 and PBL199).

78. According to the accounting records, the Bond owes Lendy the sum of circa £191k in relation to unpaid legal fees, advertising and marketing, consulting and IT expenses (see **page 247**).

Liam Funding & charge

79. On 7 September 2018, a charge was registered against Lendy in favour of Liam (Charge Code: 082449130002). This charge was to secure monies which Liam had paid to Lendy to keep the business afloat and to pay pressing creditors. On 13 December 2018, the charge in favour of Liam was noted at Companies House as satisfied in full.

Final Loans

80. The last bridging loan issued by Lendy on the platform was PBL201 (Borrower: TMG Cardiff Ltd Property: Suffolk House, Trade Street, Cardiff, CF10 5DT) on 18 September 2018. This was a loan for a maximum facility of £1,200,000. Investments into PBL201 were extremely slow and therefore the loan was drawn in three tranches. The first tranche in the sum of £224,313.85 was drawn on 24 September 2018, the second tranche of £56,079 was drawn on 31 October 2018 and the third and final tranche was in the sum of £32,813.47. The purpose of this loan was to assist with planning costs for an enhanced planning application and the borrower therefore required the deal to be completed urgently. To that end, Lendy granted a further mezzanine facility and released funds of circa £336k to the borrower on 18 September 2018.

81. The final development loan was DFL037 (Borrower: Bourneford Ltd (Clive Wiesbaur) Property: Land at Penmere Manor Hotel, Mongleath Road, Falmouth), which was issued on 31 July 2018. This was a loan for a maximum gross facility of £617,873 and for a term of 15 months. The land loan facility filled up quickly and was drawn down by the borrower on 10 August 2018. The build loan was drawn in tranches nearly monthly, starting in September 2018 with the final tranche drawn in May 2019. A total of 9 tranches were drawn. Investment into the build loan also filled relatively quickly, although much of the investments into this loan were from the Lendy Wealth product.

82. After the above final bridging and development loans, Lendy made a conscious decision not to enter into any new loans with borrowers. Instead, Lendy focussed on raising funds on the platform for development tranches on existing loans.

83. There were further tranches of development loans which were issued on the platform after July 2018. The closer that Lendy neared to administration, the more difficult it became for Lendy to raise sufficient investment from direct investors to fill the loans, and a lot of the loans were funded by Lendy Wealth.

FCA restrictions

84. In late 2018, financial issues at Lendy led to a number of senior members of staff leaving the business. Lendy's new business was slowing down and Lendy was struggling to find investors to fund the existing loans and fill outstanding development tranches. For instance, Harry and Sam, both BDMs, left because Lendy had stopped offering new loans. As the BDM roles were primarily commission based, there was not enough work or financial incentive for them to stay with Lendy. Mark, Head of Credit also left as again, there were no new loans and the number of underperforming loans was increasing.

85. On 12 November 2018, the FCA agreed a VREQ (Voluntary Requirements) with Lendy, pursuant to section 55L(5)(a) of the Financial Services and Markets Act 2000, imposing a voluntary restriction on payments with increased reporting requirements to the FCA. Attached at **pages 248-249** is a copy of the VREQ application, scheduling the terms of the restrictions. The VREQ required all payments in the ordinary course of business over £5,000 (whether as a single transaction or as a combination of related transactions), and any payments not in the ordinary course of business, to be authorised by the FCA before payment was made.

86. Payments in the ordinary course of business included wages, NIC contributions, amounts owed to HMRC, professional services fees and the return of client money to platform investors. Non-ordinary business payments included payments to Lendy's directors, or any person connected to a director, bonuses, capital distribution or dividends, gifts or loans by Lendy and payments made as part of a financial restructure or reorganisation.

87. Lendy had allegedly been complying with the VREQ for a period of 4-5 months. Lendy were meant to send authorisation requests by email to the FCA before processing payments. The FCA however did not respond to any requests via email, but may have responded to payment requests verbally over the telephone to Paul Coles. The process was meant to include email requests being sent by Andrew Wawrzyniak (CF10a) to Paul Coles (CF10) for review and onward submission to the FCA. I understand that there were a number of internal regulatory conversations between Paul, Andrew and Liam, although I do not know the detail of these conversations.

88. The FCA had concerns about the extent of Lendy's compliance with the VREQ and carried out a short-notice audit at Lendy's offices on 9 and 10 April 2019. At **pages 250-260** is a copy of the FCA's enforcement submission document to the Regulatory Decisions Committee summarising Lendy's history with the FCA and recommendation of further action. The FCA discovered that Lendy had made approximately 50 ordinary course of business payments of over £5,000 totalling almost £1,000,000, in the period 8 November 2018 to 29 March 2019, which were not authorised or even

notified to the FCA. In addition, the following payments had been made, without the FCA's consent, in contravention of the VREQ:

a. Large payments to senior managers on 21 December 2018 (who joined Lendy in October 2018 and left in January 2019):

   i. Gary Anderson (General Counsel) - £16,684,78;

   ii. Racefields (where David Gammond COO has significant control) - £22,500; and

   iii. Prosper Capital LLP (where Paul Thompson CFO has significant control) - £16,268.40.

b. Cowes Week Sponsorship payment - £90,000 on 14 January 2019. Cowes Week is an annual sailing regatta on the Isle of Wight. Cowes Week Limited did not have any sponsorship for 2017 and invited Lendy to sponsor the event for the following 3 years. Liam decided to sponsor the event with the intention of attracting further investment and potential borrowers. There was no monitoring of the outcome of the marketing exercise and therefore it is difficult to ascertain what work (if any), flowed from the sponsorship.

c. Personal Expenditure of Liam – circa £30,000

89. During the above-mentioned audit, the FCA also noted that the LPR had an overdraft with Metro Bank of £1,000,000 and therefore the provision fund had in effect been borrowed against to provide "off-balance sheet" funding for Lendy. The FCA stated that this was contrary to Lendy's previous statement that "*the firm cannot use the monies for any other means except the provision fund*."

90. On 15 January 2019, the FCA put Lendy on a supervision watchlist requiring weekly reports, focused on addressing key operational concerns identified by the FCA.

91. Given Lendy's breaches of the VREQ, the FCA's concerns that Lendy did not have the appropriate human resources and the risk to investors, on 16 April 2019, the FCA imposed an indefinite OIREQ (Own Initial Requirements) for Lendy (see **pages 261-270**). The OIREQ provide that Lendy:

   a. "Must not in any way dispose of, deal with or diminish the value of any of its assets; and

   b. Must not in any way release client money

   Without in either case the prior written consent of the [FCA]."

92. As a result, every payment Lendy made had to be approved by the FCA. This was very prohibitive for Lendy as they could not carry out normal day to day business swiftly. The fact that Lendy had

an OIREQ was reported in the media and became public knowledge. As a result, many investors became nervous and started demanding to be paid.

93. On 22 May 2019, the FCA contacted Lendy and SSSHL to notify them that they intended to wind up Lendy and SSSHL on just and equitable grounds. A hearing was listed for 28 May 2019.

Appointment of Administrators

94. Baker Tilly Creditor Services LLP, an entity within the RSM Group had been appointed as the "standby services provider", in accordance with FCA requirements, to take over the run off of the loan book in the event of an insolvency of Lendy. Lendy therefore had a prior relationship with the RSM Group and the RSM Group had some knowledge of the platform and the business operated by Lendy and SSSHL.

95. Lendy's general Counsel, Stuart Nuttall, emailed the FCA on 23 May 2019 at 10:10 (see **pages 275-276**) stating:

"It is the strong view of both the Company and the Proposed Administrators that an Administration of the Company would better protect the position of the Company's creditors, including the retail lenders. If the Company were allowed to proceed into liquidation, it is our strong view that significant harm and detriment would be caused to the position of the Company's creditors and retail lenders."

96. If Lendy entered into liquidation, the IT and financial systems which hold all the platform data would have immediately closed and all the critical data would have been lost. In addition, whilst the RSM Group were in a position to assist in running the platform, for the most effective wind down of the loan book, the Joint Administrators needed to retain Lendy staff who have valuable knowledge of the platform and the history of Lendy.

97. On 23 May 2019, at 15:30 (see **page 271**), the FCA replied to Stuart and Shoosmiths as follows:

"Further to conversations with you both, I can now confirm that the FCA is supportive of the proposed appointment of administrators as an alternative to our proposed appointments of provisional liquidators and that we wish to work with the firm to facilitate the appointments.

As discussed, we believe that, rather than making a court application, a more efficient way to make the appointments would be for the FCA to withdraw the petition and for Lendy then to make the appointments under paragraph 22 of schedule B1 to the Insolvency Act 1986.

On the basis that you are able to provide signed appointment documentation and an undertaking that, on withdrawal of the petition, administrators will be appointed, we will make an application to the court to withdraw the petition. As discussed, we currently hope that such an application could be heard tomorrow.

As discussed, you will require the FCA's written consent to make the appointments in respect of Lendy Ltd. On the basis that you are agreeable to the above procedure, we will be able to provide it by tomorrow morning."

98. On 24 May 2019, the FCA obtained a Court order (see **pages 279-280**) withdrawing the winding up petition, dismissing the FCA's application to appoint provisional liquidators and vacating the hearing of the winding up petition. The FCA sent a copy of this order to Shoosmiths and Lendy at 12:37 on 24 May 2019 (see **pages 281-297**).

99. The directors of Lendy, SSSHL and LPR proceeded to appoint the Joint Administrators as administrators on 24 May 2019 at 1:02pm (see **pages 298-299**), 1:07pm (see **pages 300-301**) and 1:10pm (see **pages 30-31**) respectively.

Conclusion

100. It will be apparent from the description set out above that Lendy was subject to serious mismanagement for a long period of time. The operations of Lendy were chaotic at the best of times, and investors' funds were not properly protected or managed. Indeed, it is surprising that Lendy managed to survive for as long as it did. As I explain below, the legal and contractual documentation relating to Lendy's activities is also extremely confusing.

How the platform worked

Borrower Process

101. The majority of borrowers on the Lendy platform were often unable to access funding from banks and therefore sought alternative financing such as peer to peer lending.

102. The majority of interaction between Lendy and borrowers was through an introducing broker. See **pages 302-305** for an example of a Lendy Broker Agreement. At **pages 306-307** is a copy of Lendy's internal Loan Onboarding Task Checklist, which starts with the broker's information pack. The broker would contact Lendy and have a very brief discussion as to the borrower's requirements, including the requested value and term. Lendy would then issue an Offer In Principle ("**OIP**"). If the terms were attractive to a borrower, they would sign the OIP and start the process of responding to Lendy's information and documentation request.

103. Prior to the recruitment drive in 2016, brokers would source their own valuation report from a valuer of their choosing. The broker would produce this valuation report for Lendy, and it was then within Lendy's discretion as to whether they would lend to that borrower and issue an OIP. Given that the market was buoyant pre 2016, it was within the broker's gift to approach a different lender if Lendy did not want to lend based on the valuation report provided.

104. When Mark Whitburn joined the business in December 2016, he thoroughly assessed every valuation report which was provided to Lendy. This also progressed to Lendy and/or SSSHL engaging valuers directly to prepare valuation reports for potential developments, rather than via a broker.

105. If Lendy agreed to proceed with a loan on the basis of the information and documentation provided by the borrower, together with the valuation report, Mehar would instruct solicitors to draft the loan and security documentation and carry out further due diligence checks. Mehar often instructed DAC Beachcroft LLP to deal with the loans from a property perspective. Whilst Clarke Wilmott LLP produced the draft suite of Model 2 documentation, each loan documentation will have been tailored to fit the factual matrix, by DAC Beachcroft LLP and/or other solicitors. The vast majority of loans to borrowers, in the early years of Lendy, were charged a 1.5% interest rate, a 4% arrangement fee (of which half was paid directly to the introducing broker) and an exit fee of 2%. The loans were typically for an initial term of 12 months with Lendy lending up to a maximum of 70% loan to value.

106. With the influx of specialist team members, Lendy's checks and procedures for approval of borrower loan requests became more stringent and as a result Lendy accepted fewer such requests.

107. Once Lendy were relatively certain that the loan would complete, details of the loan would be put on Lendy's platform for potential investors to review including the valuation report. The details would include the property details, the type of borrower, the exit route and the term. The borrower's name would never be directly disclosed to investors on the platform; however, the borrower could often be ascertained from the valuation report, or following a modest online search based on the description of the property and the type of borrower.

108. The time period which the loan was on the platform before completing could vary. The shortest time period was a few days, and the longest was circa 6 months. The time period depended upon the speed with which the loan monies could be raised from investors and the time it took borrowers to agree the loan and security documentation.

109. Once enough money was raised on the platform, Lendy could complete the loan with the borrower. In some circumstances, if insufficient monies had been raised on the platform to pay the borrower the loan sum, Lendy would make up the shortfall from its own funds, in order to complete the borrower loan. This became more frequent in the period before administration.

Investor Process

110. Investors of the Lendy platform would have been attracted to the high interest rates which were far in excess of the interest rates which could be earned on conventional investments.

111. A proposed investor could open an account on the Lendy platform with a minimum of £1 which was required for AML purposes. At **pages 308-313** are screen shots of the Lendy platform highlighting

the various aspects of the platform website. Once an investor had opened an account, investors could then deposit money on the platform in readiness for investing in any loans. Whilst investors' money was deposited, but not invested, it would not earn any interest. There are 950 investors who opened an account on the platform, but never invested.

112. Investors could then review the potential loans on the platform. As stated above, this would include an overview of the proposed loan, including the corresponding valuation report. Investors could register their interest and could ask for further details about the loan. However, Lendy's responses to those requests were limited and added little more than what was available on the platform.

113. When Lendy thought that they were close to completing the loan with the borrowers, Lendy would put a "Go Live" notice on the platform. This would be a generic one-page notice which was sent to every subscriber to the platform, informing them that the loan was due to "Go Live" in the next day or so. Investors could pre-load and allocate their money to a particular loan which they were interested in. Investors could withdraw this money prior to the "live" date. The FCA did not raise any concerns in relation to this "pre-loading".

114. Once the loan was "live" on the platform, investors could then make an investment in that particular loan. Once the investment was made, investors could not withdraw their investment. Lendy would then pay interest to any investors who had invested in the loan, from the "Go Live" date, despite the fact that the borrower's loan had not completed. Investors were paid circa 1% per month, in accordance with the investor Terms. The investor rate of interest corresponded to the total investor rate charged to borrowers. Interest was always paid to investors at month end. Lendy paid the circa 1% interest from its main client account.

115. In a letter dated 1 June 2017, the FCA raised concerns about the investors being paid interest pre completion of the loan, particularly in circumstances where there was a large gap between the "Go Live" date and the borrower's loan completing (see **pages 8-9** of the FCA letter and **pages 18-20** of Lendy's reply). On some loans, for example DFL017 (Borrower: Hannamay Investments Limited – Property: Homer Row) and DFL033 (Borrower: Mederco (Edinburgh) Limited), completion did not occur for 3 to 6 months after the "Go Live" date.

116. In a few cases, Lendy agreed with borrowers that the interest payable by the borrower would be back dated and payable from the "Go Live" date, as opposed to commencing upon completion of the borrower's loan, however this was not standard procedure for the majority of cases. The agreement to back date the interest payable by the borrower would not normally be formally documented, but appears to have taken the form of a side agreement with the borrower.

117. The monthly interest which was paid to investors had initially been paid until the loan was actually repaid by the borrower (not just to the expiry date). Again, the FCA was not happy with this as Lendy was essentially giving investors credit facilities. Following the FCA's comments in their letter

of 1 June 2017 (see **page 8**), Lendy then limited interest payments to the term of the loan. If the loan was not paid on the repayment date, the monthly interest was not paid to investors.

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

119. Another method by which investors could invest was opting to agree to invest a set amount of money in each loan on the platform known as "pre-funding". The rationale was to give as many people the chance to invest as possible, as demand for investment was outstripping supply of loans. An explanatory note to investors (see **pages 315-316**) stated that "*we want the smaller investors to be guaranteed a* position *in every loan, and the deeper pocketed investors will also participate at the same amount as everyone else. If there is spare capacity, the larger investors will pick this up subject to their pre-set investment levels."* There is a diagram on the final page of the explanatory note at **page 316** which demonstrates how Lendy intended the pre-funding to allocate loan parts in accordance with the size of the investor.

120. If investors chose to pre-fund, when a loan went live, the investor had 48 hours to put sufficient funds onto the platform in order to invest their pre-set sum in the loan going "live". If the investor has pre-funded and there was sufficient money in their platform account, their money would be deducted and allocated to the loan as soon as it went "live". If the loan value was less than the pre-fund pot, all the smaller investors would invest their full pre-set sum and larger investors may only be able to investor a smaller proportion of their pre-set sum. The allocation of the pre-funding was generated electronically. Lendy acknowledge in the explanatory note at **pages 315-316** that larger investors may not be able to invest as much as they wished however "*they should be happy that they have participated in an equitable distribution model which should assist with the growth and opportunities available."*

121. A number of investors opened multiple accounts on the platform and made multiple investments on a particular loan. Save for loans being over supplied in relation to pre-funding, there were no caps on how much an investor could invest. Lendy did not monitor or filter investors' investments so investors were free to invest as much and as many times as they wished.

122. Investors would be able to see the availability of a particular loan i.e. the amount and value of loan parts for sale. When Lendy was attracting investment for a particular loan, investors / potential investors would not be able to see if there were insufficient monies to fulfil a loan requirement. However, if Lendy were struggling to fill a loan with investments, they would send a "mail chimp" to all platform participants asking for more investments. Therefore, potential investors could probably deduce that Lendy were struggling to fulfil the loan. In some situations, when Lendy was trying to complete on a borrower's loan, and there were insufficient investments, Lendy would wait for a day when other borrowers were due to repay their loan and then set new loans "live" on that day, in the hope that investors would choose to invest the monies they had been repaid in to the new loan(s).

123. Once the platform had attracted sufficient investment, a borrower's loan could then complete and the platform would be updated to reflect this. Whilst it varied between loans, in the earlier trading period, this took 7-10 days on average depending on the loan size. Towards the end of Lendy's trading, this time period increased significantly. There were 11 loans which went "live" on the platform but never completed (see the attached report at **page 317**). If a loan did not complete, the investor's investment was returned to their account. The loan and security documentation was never uploaded to the platform, however the platform would say what type of security had been granted i.e. whether a legal charge, debenture and/or personal guarantee had been provided.

124. A small number of investors (less than 50 in total) on a limited number of loans (including DFL017 (Borrower: Hannamay Investments Limited – Property: Homer Row), DFL022 (Borrower: Mederco Block A Limited) and DFL003 (Borrower: Mederco (Huddersfield) Limited), asked to see copies of the borrower documentation. Lendy provided a heavily redacted copy of the facility agreement only to those investors whom had requested the documentation. The loan documentation was not subsequently uploaded to the platform. Neither the term sheet nor the security documentation were sent to the investors or uploaded to the platform.

125. After completion of the borrower's loan and security documentation, Lendy provided fortnightly or monthly updates on the Lendy platform. The updates provided details on the development progress and any enforcement / recovery process.

126. In relation to development loans, each time Lendy needed to raise funds for a new development tranche, the process of putting a "Go Live" notice and providing the investors with the chance to invest, up to the value of the new tranche, worked on the same basis as the above. The new tranche would then be merged with the original loan and any preceding tranches.

<u>Enforcement Process</u>

127. Prior to the expiry of a borrower's loan, Lendy sent the borrower a number of notifications reminding them of the repayment date. The first notification would be sent 6 months prior to expiry, followed

by a 3 month, 2 month and 1 month reminder. A formal demand for repayment would be sent 2 weeks before the loan expired.

128. During 2016 and early 2017, when Lendy was performing well and the peer to peer market was buoyant, Lendy welcomed borrowers exceeding the loan term. At that time, it was easy for borrowers to refinance, the property market was strong and therefore there was a good chance of Lendy recovering default interest. However, in late 2017 and 2018, it became much more difficult for borrowers to refinance and complete developments, therefore Lendy pushed borrowers to repay their loans on time, to avoid having prolonged recovery action and suffering a significant shortfall in repayment.

129. If a borrower intended to sell the secured property or refinance their borrowing, Lendy would discuss this with them and ask for further information, including the details of the refinance or sale, the proposed lender / purchaser, time scales, quantum, solicitor contact details etc. As the number of borrowers reaching the repayment date and defaulting on loans increased, the recovery process improved and became more streamlined.

130. At the daily credit meeting with Liam and other key members of staff, borrowers' repayment strategies were discussed. Liam was often hopeful that if borrowers were afforded further time, they would be able to sell or refinance to repay the borrowing and avoid formal action which would incur costs and further time. Once Lendy considered that a borrower was not going to repay by either a sale or a refinance, Lendy would make the decision to take enforcement action and take control of the secured assets.

131. James Crascall managed the enforcement process on behalf of Lendy. James started in July 2017. He was recruited to the role of Portfolio and Recovery Manager to address the FCA's concerns in the area of defaulted loans as a dedicated specialist in collections and arrears (see **page 11** of the FCA letter dated 1 June 2017 and **page 24** of Lendy's reply). The most appropriate enforcement action was discussed in the daily credit meetings and it would be decided on a case by case basis whether it was appropriate to appoint an administrator over the borrower company or to appoint a fixed charge receiver over the secured property. Lendy engaged a number of insolvency practitioner firms to be appointed as administrators or receivers, including RSM RA, Quantuma LLP and CVR Global LLP.

Secondary Market

132. Lendy initially created the secondary market as a method to attract more investors and provide liquidity to existing investors who would then not be tied into a loan for the whole term as they would have the option to sell their participations in the loan, ie. their "loan parts". The secondary market was for the sale of Model 1 and Model 2 loan parts. Issue 3 specifically relates to transferees in the secondary market and their status as a creditor (or not) in the administration of Lendy.

133. Loan parts could only be sold at their par value, a premium could not be applied by a selling investor. Initially Lendy did not charge a fee to investors either selling or purchasing loan parts on the secondary market. From 2016 onwards, Lendy advertised that they would retain the circa 1% interest fee which would normally be paid to investors, when investors placed their loan parts on the secondary market for sale. This principle was set out in the investor's Terms (see clause 10.3 **at page 675**). In practice, the "fee" was only charged in the last 3-4 months of Lendy's trading.

134. In order to sell a loan part on the secondary market, investors logged onto the online platform, and would see a sale button next to each of their loan parts. If an investor clicked the sell button, their loan part would be added to the bottom of a list of loan parts for sale, for that respective loan. A purchasing investor had to purchase loan parts in the order in which the loan parts were listed for sale, starting with the oldest and therefore an investor could not choose who to sell their loan part to. If a purchasing investor wished to purchase a loan part, and the next loan part for sale was greater or smaller than the amount they wished to purchase, the purchasing investor would have to purchase part of a loan part or purchase several loan parts.

135. Once a selling investor had listed their loan part for sale, they could withdraw their loan part at any time prior to sale. However, if part of a selling investor's loan part was sold, the selling investor could not withdraw the balance of their loan part. The selling investor would not receive payment for their loan part until the entirety of their loan part had been sold.

136. A purchasing investor would log onto the platform and select the drop down option of "available". The available tab listed all the loan parts which were available for sale, including original loans and loan parts for sale on the secondary market. The sales would be listed by loan number and the listing would confirm if it was a bridging loan, development loan or a development tranche. In the available tab, an investor could see if the loan had been drawn down and completed by the borrower. In addition, the purchasing investor would have access to information on the platform for the loan which they were interested in purchasing, for example the date the loan went "live" (if applicable) details of the property, updates on property development, updates on the loan repayments and any extensions etc. A proposed investor would therefore be able to tell whether the loan part being purchased was an original loan, or on the secondary market.

137. There were many sales of loan parts on the secondary market before some borrowers had even completed on their loans (i.e. before they had signed the documentation and drawn down any funds), especially where there was a significant delay between the "Go Live" date and completion. However, as explained above, interest was ostensibly being earned by investors as soon as loans went "live" and as soon as loan parts were purchased on the secondary market. Thus, there would have been investors who purchased a loan part, received interest from Lendy, and then sold their

loan part before the borrower had completed on a loan and become contractually obliged to pay interest to Lendy and the investors.

138. The investor Terms provide that upon completion of a sale on the secondary market (see clause 10.4 at **page 675**):

"… you and the borrower shall be released from further obligations to each other under the relevant Loan Contract in respect of that loan part ("Discharged Obligations") and shall be treated as if the loan represented by the relevant loan parts had been repaid by the borrower in full. At the same time the borrower and the transferee shall be treated as if the loan represented by the relevant loan parts had been advanced by the transferee to the borrower. At that point the borrower and the transferee shall assume the Discharged Obligations towards each other as if the transferee had been the original lender in respect of the relevant loan parts, including the right to collect unpaid interest and capital."

139. On the effective date of sale on the secondary market, the price of the loan part will have been re-allocated from the selling investor's account to the Lendy account of the purchasing investor. This was automatically reallocated, but there was no physical transfer of funds.

140. The investor Terms also state at clause 10.6 (see **page 675**) that "*the legal terms governing the transfer of your loan are set out in Clause 13 (Changes to the Parties) of the Loan Agreement."* Clause 13 of the Model 2 loan agreement (see **page 498**) confirms that an existing investor may assign any of its rights, or transfer by novation any of its rights and obligations, to a new investor approved by Lendy. The loan agreement goes on to say that upon the transfer, the new investor will become a party to the loan agreement and be bound by obligations equivalent to the original investor. Despite the investor Terms and conditions stating that "*requests for copies of Loan transfer agreements are subject to an administration fee…"* (see clause 10.7 at **page 675**) suggesting that the intention was for transfer agreements to be in place, the Joint Administrators have not seen any assignment agreements, novation agreements or notices of transfer amongst Lendy / SSSHL's books and records.

141. Many investors used the secondary market to their tactical advantage. A holder of a loan part would receive the interest in respect of that loan part if they were holding the loan part at the end of the month. This was the case even if an investor had not owned the loan part for a whole month. Investors would therefore put their loan part up for sale and if it was unlikely to sell before the end of the month, take if off the market for sale for the month end to earn interest, and then put the loan part up for sale at the start of the following month (although the loan part would go back to the bottom of the list of loan parts for sale).

142. Lendy purchased loan parts themselves in order to fulfil loans to enable completion for a borrower. Lendy would then sell that loan part on the secondary market. However unlike with ordinary investors, Lendy would go straight to the top of the list of loan parts for sale. The value of loan parts sold by Lendy on the secondary market were in the region of tens of thousands of pounds.

143. Investors could buy and sell loan parts on the secondary market up to 180 days after the maturity date of the loan.

144. The FCA felt that Lendy needed to give a greater warning to investors in relation to the risk of the secondary market. An example of such concerns being raised can be found in the FCA's letter to Lendy dated 1 June 2017 which can be seen at **pages 3-13**. A new clause 10.3 was accordingly inserted into the investor terms and conditions (see paragraph 133 above) and a risk assessment warning was inserted onto the platform website:

"Selling of a loan part on the secondary market relies on another investor buying that loan part. Although loan parts can sell within days, we cannot guarantee timescales or delays. Part loans are sold at par value and Lenders cannot apply a premium or discount to the outstanding value, Loans that are closer to maturity (i.e. term expiry) can have an increased risk for your capital."

145. In addition, as a result of the FCA's comments concerning the risk of the secondary market, particularly in relation to defaulted loans, Lendy inserted a new warning onto the defaulted loans tab of the platform (see **page 318**) which stated:

"These are loans where we are no longer confident about the borrowers ability to repay the loan and have therefore officially defaulted on the loan. Monthly interest payments are not guaranteed. We are taking all appropriate steps to recover 100% of the capital from these loans."

146. If an investor proceeded to select a defaulted loan part to purchase, a further risk warning would pop up asking the investor to confirm whether they still wished to purchase the loan part. The pop up would say how many days overdue the loan part was, inform the investor that it may be considered as a high-risk investment and direct them to the "Recent Updates" information for the respective loan for more information (see **page 318**).

147. The Joint Administrators have attempted to ascertain how many investors hold "live" loan parts which were traded on the secondary market, as opposed to original loan parts. We have liaised with Lendy's IT providers who have confirmed that this is not something which can be categorically ascertained. I am informed by the remaining Lendy staff that the only way to ascertain whether an investor's "live" loan parts are original or secondary market purchases is to cross check the date of each loan part purchased by each investor with the date when that particular loan went "live" (or a

development tranche went "live"). If the loan part was purchased prior to a "Go Live" date, the Joint Administrators could reasonably assume that this was an original purchase. If the loan part was purchased after a "Go Live" date, the Joint Administrators could reasonably assume that this was a secondary market purchase.

148. There are approximately 10,500 investors on the platform and significantly more individual loan parts, potentially into the millions. This secondary market analysis would therefore be a tremendous exercise which may have to be carried out as part of the consideration of investors' proofs of debt.

149. To provide some indication as to the scale of the secondary market and the potential number of secondary market investors, Lendy's IT providers have been able to run reports to determine the total amount of turnover on the secondary market for each loan. They have calculated the total of all loan parts sold for each loan. I attach a spreadsheet setting out the secondary market turnover for each loan, and what percentage of the loan amount the secondary market turnover is ("**SM Turnover Ratio**") (see **pages 319-323**).

150. The SM Turnover Ratio varies greatly between loans, ranging from 0% to 327.79%. The average SM Turnover Ratio for all loans, including PBL and DFL loans is 105.28%. Therefore, on average, for each new loan sold on the platform, the loan was sold again, in its entirety, on the secondary market.

Administration Progress

151. As set out in the Joint Administrators' progress report dated 19 December 2019 (see **pages 324-354**), the Joint Administrators' key objective for the administration of Lendy is to affect a controlled wind down of Lendy's loan book. By retaining key Lendy staff and systems, this will achieve a significantly greater value for assets for the benefit of creditors than would have been achieved in a "shut down" liquidation scenario. Upon appointment, the loan book had a total value of £152m, split between bridging loans in the sum of £36m and development loans in the sum of £116m.

Staff

152. Immediately after appointment, I spent a significant amount of time at Lendy's then registered office, Branksmere House, to become familiar with Lendy, the staff, their operations, the platform etc. Upon appointment, there were approximately 13 members of Lendy staff & contractors. It became apparent relatively quickly that there were a number of members of Lendy staff who were not effective in their roles and/or did not add anything to Lendy's administration. Therefore, over the period of May 2019 to date, I have made 8 members of staff redundant and a further two contractors

have been released. As stated above, the remaining skeleton staff are Alan Darling, Zaydur Rahman and Shane Lewin.

153. As a result, the Joint Administrators had to allocate more employees of RSM RA than had been previously envisaged to work on the Lendy administration to fulfil roles which we had expected Lendy staff to fulfil. In addition, as the Joint Administrators became more engrossed in the detail of Lendy and the platform, it became clear that there were many issues with Lendy (some of which are set out in this witness statement) which would need to be addressed and complications which would take a lot more time spent by the Joint Administrators than was initially envisaged.

154. On 1 October 2019, the remaining Lendy staff were relocated from Lendy's premises to Shoosmiths' offices in Solent.

Wind Down of the Loan Book

155. Following the Joint Administrators' appointment, we have been working with the remaining Lendy staff to wind down the loan book by collecting in defaulting loans. This includes liaising with the borrowers, administrators who have been appointed over borrower companies, fixed charge receivers who have been appointed over borrowers' properties and each respective parties' solicitors to obtain updates on how loans are going to be repaid including sales or refinancing. The Joint Administrators have been providing an update to investors on an individual loan basis once the property sale or refinance has completed.

156. There are currently 17 "live" DFL loans and 13 PBL loans. The estimated gross realisations of these remaining loans are £55,145,500. SSSHL in its capacity as secured creditor, acting by the Joint Administrators, has placed 3 DFL and 2 PBL loans into insolvency proceedings post administration of SSSHL.

157. At paragraphs 224 to 229 below, I have set out a summary of the loans which have been recovered to date and the realisations to Lendy and investors.

Claims Underway

158. Following the realisations of secured assets, the next step taken by the Joint Administrators is to assess any other potential claims which could be pursued to make additional recoveries.

159. In addition, the Joint Administrators are also considering any potential claims against third parties such as negligence claims against valuers for overvaluing assets at the time loans were incepted and potential claims against Lendy's former professional advisors for negligence.

160. The Joint Administrators have instructed Shoosmiths, Harrison Clark Rickerbys, and JMW Solicitors LLP to assist with these potential claims in assessing their merits and, where instructed, to pursue those claims. Lambert Smith Hampton and Avison Young are also assisting the Joint Administrators and, where requested, are providing retrospective valuations as part of the process in assessing the merits of these potential claims. A number of letters before action have been issued in relation to these claims. At this stage it is not clear how much value will be realised from these claims.

Advice on Loan / Security Documentation

161. The Joint Administrators swiftly identified that there was a need to take legal advice and fully understand the legal implications of the loan and security documentation which was in place. The Joint Administrators instructed Shoosmiths, who in turn instructed Leading and Junior Counsel from South Square Chambers, to advise on the documentation, as set out in detail below at paragraphs 174 to 200.

Waterfall Calculations

162. Once a loan or secured asset has been realised, the Lendy team, together with accounting support at RSM RA, have produced a waterfall calculation, in accordance with the loan and security documentation for that particular loan. This waterfall calculation reflects the order of priority of Model 2 security realisations as set out in the Model 2 debenture ("**Distribution Waterfall**"). The detail of the Distribution Waterfall is set out below. The calculation is then reviewed and checked by Shoosmiths before the Joint Administrators finally review the file. Given the potential variance in documentation (interest rates and fees etc), the Joint Administrators are unable to confirm the estimated outcome to Model 2 investors under the waterfalls until the calculation has been prepared.

Anti-Money Laundering "AML"

163. The Joint Administrators have reviewed Lendy's existing AML procedures and noted deficiencies which had to be addressed. Following advice from Fieldfisher, the Joint Administrators together with the remaining Lendy staff undertook a Know Your Client ("**KYC**") and AML revalidation exercise for all investors with funds on account.

164. Electronic Experian checks were carried out against each investor's account details. Only approximately 77% of the investors passed the electronic tests. The remaining investors have been asked to provide further information and certified documentation to complete the checks. This is a time consuming manual exercise which is ongoing as a number of investors are awaiting significant funds on account before providing this information.

Investigations

165. The Joint Administrators have carried out extensive investigations into transactions into Lendy's affairs, including a forensic analysis of Lendy's electronic and financial records. The investigation process has also included interviewing the directors appointed in the relevant period. Pinsent Masons LLP have been assisting and advising in relation to the investigations. The investigations are ongoing.

FCA

166. The Joint Administrators have been keeping the FCA abreast of key actions and pertinent matters in the administration. I have assisted the FCA with any questions they have raised and discussed their concerns surrounding the construction of the loan and security documentation, in particular, the Distribution Waterfall. I have set out below further details in relation to the Joint Administrators' communications with the FCA.

Conflict Administrators

167. Lendy and SSSHL identified potential areas of conflict for the Joint Administrators. The potential conflict arose because SSSHL had previously appointed myself, and other RSM RA insolvency practitioners, as joint administrators of various borrower companies who had borrowed monies from Lendy and provided security to SSSHL pursuant to Model 2 ("**Borrower Companies**"). In addition, SSSHL (prior to administration) had also appointed Phillip Sykes and I as fixed charge receivers over various properties owned by Borrower Companies, and individuals, against which SSSHL held security.

168. The current Borrower Companies and individuals comprise Mederco Block A Limited, Mederco (Huddersfield) Limited, Arboretum Devon (RLH) Limited, Killean Estate Limited, Southern Minerals Limited, Charlotte Thornley A'Court Roberts, HH Property 4 Limited and Thornley Property (Stroud) Limited.

169. Upon appointment of the Joint Administrators to SSSHL, a number of steps were taken by RSM RA to safeguard against any potential conflict:

    a. Damian Webb immediately ceased to have any active involvement in the administrations of the Borrower Companies;

    b. Staff working on the administration of Lendy, SSSHL or LPF immediately ceased to have any active involvement in the administrations of the Borrower Companies;

c. The administrations of the Borrower Companies and the fixed charge receiverships would be and are undertaken by teams in different physical locations; and

d. Damian Webb resigned as joint administrator of the Borrower Companies with effect from 15 & 16 July 2019 (as relevant) following service of a Notice of Intention to Resign on the various parties.

170. In addition to the above points, it was considered prudent for conflict administrators to be appointed to act on behalf of SSSHL (rather than RSM RA) in relation to Borrower Companies administrations, any individual borrowers and fixed charge receiverships where the appointed insolvency practitioners are from RSM RA.

171. It was also considered that any appointed conflict administrators could provide an independent oversight in relation to the charging structure between Lendy and SSSHL. Lendy are the administrative entity performing all the enforcement duties of SSSHL as security trustee. Prior to administration there was no agreement between Lendy and SSSHL to govern the basis of Lendy's fees for providing this service. It was therefore proposed that the conflict administrators could independently negotiate and agree the fee position on behalf of SSSHL, with Lendy. However, for the reasons set out below in respect of the Distribution Waterfall, a service fee has been deducted by Lendy but is being held by the Joint Administrators pending final determination of the Distribution Waterfall.

172. Accordingly, Christine Mary Laverty, Helen Julia Dale and Trevor Patrick O'Sullivan of Grant Thornton UK LLP ("**Conflict Administrators**") were appointed as conflict administrators of SSSHL on 26 July 2019 (see **pages 375-385**). Attached to the Notice of Appointment was a letter setting out the scope of the Conflict Administrators' role. Their role was stated as follows:

a. To provide an independent oversight in relation to the charging structure and priority where Lendy is proposing to deduct costs and charges from the loan recoveries being made by SSSHL under the security it holds on behalf of Model 2 investors and agree what represents a fair recharge as between the parties.

b. To act on behalf of SSSHL in relation to any conflict issues that may arise in connection with the appointments of RSM RA individuals as administrators over the Borrower Companies or fixed charge receivers over their assets. This will include, but not be limited to:

i. considering and approving the administrators' proposals,

ii. approving the fees charged by those insolvency practitioners in connection with the Borrower Company appointments, and

iii. acting in the investors' interest should any conflict arise between SSSHL and creditors in Borrower Companies, particularly in relation to the extent of 'security' claimed to be held by such creditors.

173. As SSSHL acts as security trustee it does not have any investor creditors. The creditors of SSSHL consist of trade and expense creditors and potentially a claim by Lendy for unpaid service fees incurred prior to administration. Therefore, unlike for Lendy, it was not practical for a creditors' committee to be established for SSSHL. The Conflict Administrators wished to consult with investors in relation to the steps they were taking. On 21 November 2019, the Conflict Administrators set up a creditor liaison body of 5 Model 2 investors ("**CLB**"). The body has been established for the Conflict Administrators to consult only. Attached at **pages 386-388** is a copy of the note sent to all investors on 8 November 2019, inviting nominations for CLB membership. The CLB does not have any statutory function or standing.

Model 1

174. As set out above, the first lending Model adopted by Lendy was "Model 1". The Joint Administrators have sought legal advice on the construction of the Model 1 documentation. Issue 1 and Issue 2 seek directions in relation to the Model 1 investors' claim in the Lendy administration and the standing of Model 1 security realisations.

175. There are three key documents to the Model 1 structure;

a. Loan agreement between (1) the borrower and (2) Lendy (see **pages 389-403**)

b. Debenture between (1) the borrower and (2) Lendy (see **pages 404-445**); and

c. Terms and conditions between Lendy and investors (see **pages 446-461**).

Attached at **pages 462-475** is also the Model 1 personal guarantee between (1) the borrower and (2) Lendy. All Model 1 documents were in the same format (subject to loan specific amendments) as the attached template documentation.

176. In accordance with Model 1, there was a loan from the investors to Lendy (each acting as principal), and a back-to-back loan from Lendy to the borrower (each acting as principal). The borrowers granted security to Lendy to secure the borrowing. Unlike Model 2 (see below) Lendy acted solely as principal which is evident from the following:

a. Both the Model 1 loan agreement and the debenture identify Lendy as the Lender. There is no suggestion that Lendy is acting as agent for the investors.

b. It is apparent from clause 2 of the Model 1 loan agreement that all of the relevant rights and obligations are between Lendy (as Lender) and the borrower. The investors are not involved in this arrangement. See also clause 16.1 of the Model 1 loan agreement, which states that *"the Lender [Lendy] may assign any of its rights under the Finance Documents*". There is no suggestion in clause 16.1 that the underlying investors have any rights under the Finance Documents.

c. It is clear from clause 3 of the Model 1 debenture that the security is granted by the borrower to Lendy (as Lender). There is no security agent or security trustee, and SSSHL is not a party to the Model 1 debenture.

177. The terms and conditions for Model 1 govern the relationship between Lendy and the investors. The terms and conditions for Model 1 do not suggest that Lendy acts as agent of the investors (in contrast to Model 2). Further:

a. Clause 4.5 states that "*by funding a loan, you are agreeing to enter into a Loan Agreement with Lendy.*"

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

178. Under Model 1, Lendy is entitled to receive the entire proceeds of the security up to the value of (i) the costs, charges and expenses incurred by or on behalf of Lendy (and any Receiver, Delegate, attorney or agent appointed by Lendy) under or in connection with the debenture, and of all remuneration due to any Receiver under or in connection with the debenture; and (ii) the Secured Liabilities (as defined in the debenture) which are owing to Lendy: see clause 20.1 of the debenture. The Secured Liabilities include all monies owing by the borrower to Lendy under the Model 1 loan agreement. Any remaining surplus is payable to the borrower.

179. The monies owing to Lendy by the borrower include (i) principal amount, (ii) interest and (iii) any fees payable to Lendy by the borrower under the Model 1 loan agreement (or under any supplemental terms and conditions between Lendy and the borrower).

180. Once Lendy receives the asset realisations, the entirety of the proceeds will form part of Lendy's administration estate and be available for distribution to unsecured creditors *pari passu* after the payment of the expenses of the administration. On this basis, the Joint Administrators have concluded that all Model 1 investors are creditors of Lendy. The Joint Administrators seek directions from the Court on this conclusion.

Model 2

181. Under Model 2, Lendy acted as agent. It did not borrow money from investors or assume any repayment obligation in its own right. Rather, Lendy entered into loans with borrowers on behalf of investors as their agent. Borrowers granted security for the loans to SSSHL as security agent. Issue 4 seeks the Court's direction in relation to the distribution of Model 2 security realisations.

182. The key contractual documentation for Model 2 can be divided into three categories:

a. Lending documents. The lending documents record the contractual terms of the loans between investors and borrowers. In particular:

i. The key lending document is the Model 2 loan agreement entered into by (1) the borrower and (2) Lendy as agent for the investors (trading as Saving Stream). There is a different form of Model 2 loan agreement for individual borrowers (see **pages 476-489**) and corporate borrowers (see **pages 490-502**).

ii. There is also a Model 2 term sheet (see **pages 503-505**) which contains the commercial terms of each loan. The Model 2 term sheet is signed by the borrower and Lendy. The Model 2 term sheet is incorporated by reference into the Model 2 loan agreement.

iii. In addition to the Model 2 loan agreement, there are also terms and conditions for borrowers (see **pages 506-516**) which were entered into in conjunction with the Model 2 loan agreement by (1) the borrower (2) Lendy as agent for the investors (trading as Saving Stream) and (3) SSSHL

b. Security documents. The security documents create proprietary and personal security for the loans. In particular:

i. There is a standard form of debenture (see **pages 517-557**) entered into by (1) the borrower and (2) SSSHL as security trustee, which creates fixed and floating security over all of the borrower's property.

ii. In addition to the Model 2 debenture, there is a legal charge entered into by (1) the borrower and (2) SSSHL as security trustee, which creates security over real property. There is a different form of legal charge for individual borrowers (see **pages 558-587**) and corporate borrowers (see **pages 588-616**).

iii. Where the borrower is a corporate entity, the loan is guaranteed by a designated individual under the terms of a personal guarantee (see **pages 617-630**). The personal

guarantee is granted by the guarantor to Lendy as agent for the investors and Lendy (trading as Saving Stream), unlike the other security which is granted to SSSHL.

c. Terms and conditions for investors. Finally, the contractual relationship between Lendy and SSSHL (on the one hand) and the investors (on the other hand) is governed by the terms and conditions for investors (see paragraph 201 below). The Model 2 investor terms and conditions were changed over the course of the platform. I discuss the variations to the Model 2 investor terms and conditions below at paragraphs 201 to 213 .

183. Following significant analysis of the Model 2 documentation, and receipt of legal advice, there are a number of issues which the Joint Administrators have identified with the documents, the capacity in which Lendy acted, the capacity in which SSSHL holds the security, who is entitled to the security proceeds and whether the secured liabilities are unenforceable.

Lendy's capacity

184. Given the inconsistencies within the Model 2 documentation, I obtained legal advice in relation to the role in which Lendy acted in entering into Model 2 documents.

185. The following contractual provisions suggest that Lendy acted as agent for the investors and that the investors authorised Lendy to act as their agent:

a. The Model 2 loan agreement is expressed to be made between the borrower and Lendy "*as agent for the [investors]*". Lendy is referred to as "*the Agent*" throughout the loan agreement.

b. Recital (C) of the Model 2 loan agreement states: "*The Agent is entering into this agreement as the agent of the [investors]*".

c. Clause 1.2 of the borrower terms and conditions provides that "*[Lendy] is authorised by the [investors] to enter into the Loan Contract as agent for the [investors]*".

d. The investor terms and conditions contain the following provisions:

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

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

186. There is a potentially contradictory provision in the investor terms and conditions (clause 25.8) which states as follows:

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

187. I am advised that it is likely that this clause can be ignored when construing the contractual documentation as it appears to have been included in error. It is a key aspect to the Model 2 documentation that Lendy acts as agent of the investors.

188. Notwithstanding my comments above, some provisions of the loan agreement appear to treat Lendy as a principal acting on its own behalf:

a. The representations and warranties in clause 9 are given "*to the [investors] and the Agent*", as are the undertakings in clause 10. This suggests that the borrower owes obligations to the investors and to Lendy in its own right.

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

c. Lendy is given a number of contractual rights, including the right on the investors' behalf to accelerate the loan upon an Event of Default (see clause 12.12). If Lendy were not able to benefit from this provision, it is not clear how or whether the loan could be accelerated. There is no suggestion in the loan agreement that the investors themselves are entitled to accelerate the loan. It appears to be contemplated that Lendy, acting in its own right, will be responsible for giving notice of acceleration.

d. As to the payment of interest:

i. Clause 6 of the loan agreement requires the borrower to pay interest at the Interest Rate, which is defined by reference to the Model 2 term sheet. The Model 2 term sheet distinguishes between the "*Interest Rate payable to [investors]*" and the "*Interest Rate payable to [Lendy]*". This suggests that the borrower has a bifurcated obligation to pay interest, partly to Lendy and partly to investors.

ii. Likewise, the investor terms and conditions state (at clauses 9.2 and 9.3) that "*Borrowers are liable to repay the loans to [investors] and pay any interest on such*

loans to you and [Lendy] ... The Loan Contract governs these amounts and the interest rates applied to the loans due to you and [Lendy]" (emphasis added).

e. In addition, the borrower terms and conditions on their own, appear to be a document between the relevant borrower and Lendy in its own right. It is not clear that the investors are parties to the borrower terms and conditions, or that Lendy acted as agent for the investors when entering into the Borrower terms and conditions. To that extent, it appears that Lendy's role is not that of a pure agent.

189. I consider that Lendy's capacity in entering into the Model 2 documentation can be summarised as follows:

a. Lendy has a contractual relationship with the borrower pursuant to the borrower terms and conditions. The terms of that contractual relationship include Lendy's entitlement to receive the fees and other benefits set out in the borrower terms and conditions.

b. Lendy entered into the loan agreement in a dual capacity. It primarily acted as agent of the investors, but it also acted in its own right for the purposes of certain clauses. To that extent, Lendy is a party to the loan agreement in its own right.

c. Many of the key provisions in the loan agreement do not involve Lendy. The obligation to lend under clause 2, for example, is plainly an obligation of the investors (not Lendy), and the borrower's repayment obligation under clause 4 is owed to the investors (not Lendy).

d. However, some provisions of the loan agreement (in particular the clauses identified in paragraph 188 above) are binding on Lendy in its own right.

SSSHL's capacity

190. The Joint Administrators also sought advice as to the capacity in which SSSHL holds the security (being the debentures and the legal charges). SSSHL is a special-purpose vehicle which was established for the sole purpose of holding security on behalf of the investors and Lendy; it was never intended that SSSHL would be the beneficial owner of the security.

191. I am advised that SSSHL holds the security as trustee for itself, Lendy and the investors, based on the following contractual provisions:

a. In both the debenture and the legal charge, SSSHL is identified as "*the Security Agent*".

b. All of the security under the debenture and the legal charge is expressly granted in favour of SSSHL (rather than Lendy or the investors). Therefore, SSSHL is the mortgagee.

c. Clause 14.1.1 of the debenture provides:

"*The Security Agent shall hold and administer all the rights benefits and interests constituted in its favour by or pursuant to this Debenture together with all proceeds of enforcement, exercise of realisation of the same (the Security Property) upon trust to pay and apply the same for the benefit of the Beneficiaries in accordance with their respective entitlements under the Finance Documents subject to and in accordance with the terms thereof*."

The Beneficiaries are identified as "*the [investors], the Security Agent, [Lendy], a Receiver or any Delegate*". This makes it clear that SSSHL holds the security under the debenture on trust for itself, the investors and Lendy.

d. The terms of the trust are set out in clause 21.1 of the debenture. The Joint Administrators seek a direction as to the validity and enforceability of this clause of the debenture (Issue 4a):

"*All monies received by the Security Agent, a Receiver or a Delegate pursuant to this deed, after the security constituted by this deed has become enforceable, shall (subject to the claims of any person having prior rights and by way of variation of the LPA 1925) be applied in the following order of priority:*

21.1.1 in or towards payment of or provision for all costs, charges and expenses incurred by or on behalf of the Beneficiaries, the Security Agent, (and any Receiver, Delegate, attorney or agent appointed by it) under or in connection with this deed, and of all remuneration due to any Receiver under or in connection with this deed;

21.1.2 in or towards payment of or provision for the Secured Liabilities in any order and manner that the Security Agent determines; and

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

e. The existence of a trust is recognised on several occasions within the Model 2 Terms. See, in particular, clauses 12.2, 12.4 and 12.6. By way of example, the latter provision states: "*Saving Stream Security Holding will hold the assets charged under any security upon trust for itself and for all [investors] to that borrower (including you) and [Lendy] (in respect of any amounts due to [Lendy]).*"

f. The Model 2 legal charge does not include any equivalent of clause 14.1.1 in the debenture. As a result, there is nothing in the Model 2 legal charge which expressly describes SSSHL as a trustee. However, in light of the express provisions of the investor terms and conditions (namely clauses 12.2, 12.4 and 12.6), it is clear that SSSHL holds the security on trust. Although the legal charge does not expressly mention a trust, the waterfall under clause 15.1 is strongly suggestive of a trust (clause 15.1 of the legal charge is materially identical to clause 21.1 of the debenture, quoted above).

Entitlement to Security Proceeds

192. On the basis that SSSHL hold the security as trustee and mortgagee, I am advised that SSSHL is entitled to enforce the security. This is also expressly stated in clause 16.2 of the Model 2 debenture and clause 10.2 of the Model 2 legal charge:

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

193. I am advised that if SSSHL realises any security, then the proceeds will not form part of SSSHL's administration estate. The proceeds must instead be treated as trust monies and applied in accordance with clause 21.1 of the Model 2 debenture or clause 15.1 of the Model 2 legal charge as stated above. I am also advised that SSSHL remains a trustee of the security, notwithstanding the fact that SSSHL is in administration.

194. Under clause 21.1 of the Model 2 debenture and clause 15.1 of the Model 2 legal charge, the proceeds of the security must be applied in the following order of priority:

a. First, towards the payment of the costs and expenses of SSSHL, Lendy and the investors "*under or in connection with this deed*";

b. Second, towards the payment of the Secured Liabilities "*in any order and manner that the Security Agent determines*"; and

c. Third, in payment to the Borrower or any other person entitled to it.

195. I set out further below how the Distribution Waterfall has been applied by the Joint Administrators in practice. However as to the second limb, I note that this purports to give a broad discretion to SSSHL to determine the order and manner in which the "Secured Liabilities" are to be discharged.

The Secured Liabilities are defined as "*all present and future monies, obligations and liabilities of the Borrower to the Beneficiaries, whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity together with all interest (including, without limitation, default interest) accruing in respect of those monies, obligations or liabilities pursuant to any Finance Document*". Therefore, the Secured Liabilities include the sums owing to the investors and the sums owing to Lendy. The latter category includes, for example, any interest payable to Lendy under the Model 2 term sheet. Issue 4b related to the Secured Liabilities and what liabilities fall within this definition.

196. I have obtained legal advice specifically in relation to the second limb of the Distribution Waterfall and have been advised that the security process should be applied *pro rata* between the Secured Liabilities (in the event of a shortfall). All of the remaining loans on the Lendy loan book are in default and there will be a shortfall. Therefore, at the second limb of the Distribution Waterfall, the Joint Administrators have taken the view to pay the Secured Liabilities on a pari passu basis. The Joint Administrators seek the Court's direction as to whether the Secured Liabilities should be discharged on a pro rata or some other basis (Issue 4d).

Default Interest

197. As set out above, Secured Liabilities are defined in the Model 2 debenture and includes without limitation, default interest. Clause 6.3 of the Model 2 loan agreement provides that if the borrower fails to make any payment due under the loan agreement on the due date for payment, interest on the unpaid amount shall accrue at "*3% above the aggregate Interest Rate*".

198. The Model 2 loan agreement does not specify whether the default interest is payable to Lendy, the investors, or both. As far as I am aware, investors were never paid any element of default interest and investors only ever received standard interest, and bonus interest in a few cases (see paragraph 118).

199. However, from the Second Terms (defined below) and in all subsequent investor terms, clause 13.4 provides that "*the borrower will pay default fees to Lendy (for its own account) on any overdue amounts under the Loan, as described in the Loan Agreement."*

200. The reason that Lendy charged a default interest rate at a rate of 3% was to cover the costs of dealing with defaulting borrower loans which were often high risk and therefore timely in managing. Issue 4c seeks a direction as to the validity and enforceability of the liabilities owed to Lendy, including default interest.

Investor Terms and Conditions

201. The investor terms have changed multiple times over Lendy's trading history. Unfortunately, following extensive investigation, including liaising with Lendy's IT provider, we have been unable to ascertain when the various amended investor terms and conditions were uploaded to the platform. A number of investors have suggested that the investor terms changed frequently with minor amendments. Without having the ability to go back and retrospectively look at each time the investor terms were changed on the platform, the Joint Administrators have reviewed the following five dated versions of the investor terms, which are all of the versions that have been located that we can confirm to the best of our knowledge are final form:

    a. 6 July 2017 (**"First Terms"**) which are at **pages 446-461**;

    b. 19 September 2017 (**"Second Terms"**) which are at **pages 631-647**;

    c. 17 January 2018 (**"Third Terms"**) which are at **pages 648-667**;

    d. 11 July 2018 (**"Fourth Terms"**) which are at **pages 668-687**; and

    e. 21 August 2018 (**"Lendy Wealth Terms"**) which are at **pages 688-714**.

    Together the (**"Substantiated Terms"**)

202. There are suggestions of further additional drafts of the investor terms within internal and external correspondence, including dated 23 June 2017, 4 August 2017 and 5 March 2018 but we have been unable to locate these versions in Lendy's records and so cannot confirm their contents and do not refer to them in this statement, save for where correspondence dictates.

203. There are the following main significant differences between the Substantiated Terms:

    a. The First Terms relate to Model 1, the Second Terms, Third Terms, Fourth Terms, and Lendy Wealth Terms relate to Model 2 (see below).

    b. The Second Terms, which represent the switch to Model 2 introduced, inter alia, the following significant differences to the First Terms:

        i. Lendy enters a loan contract as agent on behalf of the lenders, their role being limited to administrative functions and expressly does not perform any investment management activities;

ii. SSSHL is introduced as security trustee to hold and enforce security (replacing Lendy security);

iii. Lendy is authorised to instruct SSSHL in relation to the finance and security documents;

iv. Clause 10 (selling your loan) was introduced, including provision that an investor irrevocably and unconditionally appoints Lendy as agent on the investor's behalf when placing electronic instructions to sell a loan or loan part, and clarification that an investor will stop accruing interest as a fee to Lendy from the date that they put the loan-part up for sale;

v. It was expressly confirmed that investors have no rights to enforce security against borrowers except via Lendy or SSSHL; and

vi. The order of payments in the event of a shortfall was introduced (see paragraph 211 & 212 below).

c. The Third Terms introduced the following measures:

i. incorporated Lendy's 'Managing Risk' information, directing investors to this particular section of the Lendy website (the **"Risk Policy"**) at the head of the terms;

ii. explicit reference to the 'secondary Market', although the concept of the re-sale of loan parts pre-dates this (see paragraphs 132 and 133 above).

iii. Introduction of Clause 16 (Opinion of Lenders) (see paragraph 211 below).

d. The Lendy Wealth Terms include the Lendy Wealth provisions for the first time (see paragraphs 68 to 73 above).

204. In some circumstances, the investor terms were drafted and/or amended in accordance with the FCA's comments. For example, in a letter from the FCA dated 1 June 2017, the FCA raised issue with Lendy's credit underwriting and debt recovery processes, and in particular that Lendy enabled investors to purchase loans that are either late or in default on the secondary market (see **pages 10-11**). The First Terms included clause 10.3 in response to this (**pages 452-453**) and inserted new wording into the Risk Policy, which read:

'Selling of a loan part on the secondary market relies on another investor buying that loan part. Although loan parts can sell within days, we cannot guarantee timescale or delays. Part loans are sold at par value and Lenders cannot apply a premium or discount to the outstanding value. Loans

that are closer to maturity (i.e. term expiry) can have an increased risk for your capital [my emphasis].'

In addition, Lendy introduced a "pop-up" risk statement to draw specific attention to an investor that the loan in question is non-performing and therefore bears an increased investment risk. The investor had to close the risk warning before proceeding.

205. We do not consider that any of the differences materially affect the contractual relationship between the parties and critically do not amend the Distribution Waterfall which is set out in the security documentation (between the borrower and SSSHL) nor the contractual documentation between Lendy and investors.

Model 1

206. As far as I have been able to ascertain from Lendy's records, there was only ever one version of Model 1 investor terms and conditions which are the First Terms.

Model 2

207. From the Second Terms onwards, the terms relate to Model 2 loans. When terms and conditions were varied, these were uploaded to the Lendy platform. As far as I have been able to ascertain, there was no notification to investors each time the terms and conditions had changed (although, as set out above at paragraph 32, Lendy placed a notification on the platform of the change from Model 1 to Model 2).

208. The investor terms (from the Second Terms onwards) state that Lendy could make changes to the terms and conditions without the investors' specific agreement, but the new terms, once introduced, would be posted on the platform (see for example clause 24 of the Terms at **page 686**). The investor terms (from the Second Terms onwards) provide that by continuing to use the platform, investors agree to be bound by the terms of any updates and amendments. The changes to the terms and conditions would apply to pre-existing loans where the investor continues to use the platform, unless the investor notifies Lendy to the contrary. The Lendy Wealth Terms did not provide for investors to express notification against acceptance of new Terms.

209. As set out above, the investor terms were amended from time to time. The changes to the investor terms were often instigated by Mehar (once he had joined the business). Some changes to investor terms and the loan and security documentation generally, were reactionary to events taking place on particular loans, for example following Homer Row (DFL017), Lendy tried to get the borrowers to sign amendments to the loan documentation to confirm that the borrowers understood that Lendy

did not hold monies on account for developments. Development tranches had to be raised on the platform. Lendy did not get many borrowers to agree to these amendments.

210. Lendy had a process for notifying the FCA about material changes to the investor terms, sometimes prior to making changes and sometimes, particularly in the earlier days, notifying the FCA after the event.

211. In an email from the FCA dated 6 March 2018 (see **pages 715-717**), the FCA raised concerns that Lendy had updated the investor terms without FCA approval and as a result may not be operating an FCA compliant peer-to-peer model. In an email to the FCA on 9 March 2018 (see **page 723**), Paul Coles set out changes which had been made to the waterfall for recoveries from defaulting loans in the Third Terms. These changes to the investor terms were introduced to clarify the existing position and therefore deemed by Lendy to be 'non-material'. In that same email, Paul sought Lendy's approval from the FCA for the introduction of clause 16 (Opinion of Lenders) which was seen as a substantive change. The email stated that the 'Opinion of Lenders' clause was not live on the platform and wouldn't be made live without the FCA's formal approval. The FCA's response did not deal with the new clause 16, focusing on the changes to the waterfall clause and how historic errors had been made with the drafting and publication of the investor terms. It is noted however, that according to our records, clause 16 was in the published Third Terms.

212. I note that the explanation provided by Lendy to the investors in the Third Terms (see clause 13.3 and paragraph 218 below), as to the order of payment of available proceeds in the event of default is entirely inconsistent with the Distribution Waterfall set out in the Model 2 debenture and legal charge.

213. Importantly, it is evident that the following features are common throughout the variations to the Model 2 investor terms:

    a. Lendy act as agent;

    b. investors authorise Lendy to act as their agent;

    c. SSSHL hold assets on trust;

    d. consistent explanation of distribution of proceeds in the event of a shortfall;

    e. an exclusion of liability by Lendy or SSSHL for loss (including income or profits) or damage suffered by investors arising under the loan contract or security documents.

214. For this reason, the differences between the various versions of the Model 2 investor terms may not ultimately matter for the purposes of this application.

Waterfall and Investor Communications

Distribution waterfall prior to administration

215. Prior to Lendy entering into administration, there was no set structure or process for distributing security proceeds. The distributions were not carried out in accordance with the loan and security documentation. In the early days of Lendy, Lendy deducted everything that was due to them first, i.e. all costs, fees, expenses and interest payments. Investors would then be paid after the distributions to Lendy.

216. Following authorisation from the FCA, the FCA were keen to understand and have input on the Distribution Waterfall. The FCA were not concerned with the loan and security documentation, rather they were concerned with ensuring that investors received as much as possible, especially in situations where the loans had been underperforming and there was a significant shortfall recovered.

217. Lendy did not obtain any legal advice in relation to the waterfall of security proceeds. Lendy discussed the matter internally and considered comments from the FCA. One of the waterfalls which was considered by the FCA and revised on multiple occasions was Herculaneum Quay (DFL012). The main points which were discussed and revised were the order in which Lendy, investors and other third parties (i.e. professional fees) were paid, the entitlement of Lendy versus the investors, the amount that Lendy was paid by way of a "service fee" for administering the loan and the third party indirect costs paid by Lendy. The FCA on this particular loan considered that investors should be paid more than Lendy had originally allocated to them.

218. On the 17 January 2018, Lendy included a new term in the Third Terms (clause 13.3) in relation to security proceeds realisations:

"in the event of a shortfall in the amounts available for repayment of the Loan, the available proceeds will be paid in the order set out in the Loan Agreement as follows: ***first****, payment of any unpaid fees, costs and expenses of the Agent under the Finance Documents;* ***second****, payment of any accrued interest, fee or commission due but unpaid under the Loan Agreement;* ***third****, payment of any principal due but unpaid under the Loan Agreement; and* ***fourth****, payment of any sum due but unpaid under the Finance Documents. However, Lendy may, and Saving Stream Security Holding may, vary this order in their discretion."*

219. Again, I note that the above clause does not accurately reflect the Distribution Waterfall set out in the Model 2 debenture (see below).

Investor Communications

220. Following the receipt of legal advice in relation to the construction of Model 1 and Model 2 documentation, and the order of distribution of security realisations, the Joint Administrators decided to make interim distributions in relation to a number of loans which had been recovered. At the time of our decision, we appreciated that there needed to be further analysis undertaken and / or legal advice before making a final decision as to the order of distribution of security realisations. However, we also envisaged that this would take time, and potentially a significant amount of time. Therefore, in order to make some repayments, especially where a number of investors were experiencing hardship issues, we started to make interim distributions in October 2019. The interim distributions were distributions which the Joint Administrators considered they could safely make i.e. the minimum amount which we considered would be payable to the investors.

221. The Joint Administrators sent a note to all known investors on 29 November 2019 (see **pages 740-744**) explaining how loan realisations were being distributed. This was also explained in the Joint Administrators progress reports for both Lendy and SSSHL (see **pages 324-354** and **355-374**).

222. The note explained the following:

Model 1

a. That the recoveries from borrowers under the Model 1 loans will sit on the balance sheet of Lendy for the benefit of Lendy creditors. Investors under Model 1 are creditors of Lendy for the value of their investment.

Model 2

b. The Joint Administrators explained that pursuant to Model 2, investors have lent money to borrowers via Lendy as agent, and that SSSHL held / hold the security as security agent for the benefit of SSSHL, Lendy and investors. The note explained that each loan has to be reviewed individually and there may be certain contractual reasons why a loan distribution will vary from the general distribution principles set out in the note.

Order of Priority

c. The note explains that the order of priority of Model 2 security realisations will be as follows:

"All recoveries from the Model 2 loans, will be held on trust by SSSHL and must be distributed by SSSHL in accordance with the terms of the security documents. The security documents set out an order of priority of payment. In summary, the order of priority will generally be as follows:

1. Firstly, towards the payment of the costs and expenses of Lendy, SSSHL and the investors in connection with the enforcement of the security ("Costs Deduction");

2. Secondly, towards the payment of the Secured Liabilities, which are all the sums due to be paid by the borrower(s) to Lendy and the investors in accordance with the contractual documentation ("Dividend Apportionment");

3. Thirdly, in the event that there are sufficient realisations, in payment to the borrower.

Each of the steps identified at points 1 to 3 above shall be collectively referred to as the "Distribution Waterfall". "

Costs Deduction

d. The note went on to provide further details in relation to the cost's deduction (first limb of the waterfall):

"The costs which are permitted to be deducted as a Costs Deduction under the Distribution Waterfall will include costs directly associated with the enforcement of the relevant borrower's security. Typically, the security documentation will provide/permit the following deductions:

a) Lendy's service fee for providing services to SSSHL in connection with the enforcement of any security that SSSHL may hold.

In practice, whilst SSSHL hold the security for Model 2 loans, Lendy, under the supervision and management of the Administrators, is the operational entity responsible for overseeing the recovery of the remaining loan portfolio. Lendy has proposed to Grant Thornton as conflict administrators of SSSHL a new service agreement, at standard market rates in connection with undertaking this enforcement work ("Service Agreement").

In accordance with the terms of the service agreement, Lendy's fee for providing enforcement and recovery services to SSSHL is proposed to be 3% per annum of the gross realisations from the date of the default capped at a maximum of 10% of the gross realisations. This arrangement will replace any other fee arrangement that Lendy had in place prior with SSSHL and is considered by the Administrators to be reasonable, proportionate and market standard. It is subject to final approval by the conflict administrator.

Notwithstanding the above comments, the sums to be paid to Lendy pursuant to the Service Agreement will be held by Lendy pending further consideration and determination by the Administrators. If the Administrators determine that there are sufficient realisations in the administration of Lendy to pay the Administrators' costs and expenses in full, the sums deducted under the Service Agreement will be distributed to the relevant Model 2 investors.

b) The costs and expenses of any appointed receivers or administrators of borrowers relating to the recovery of the borrower's assets or in relation to any refinance of the borrower's assets;

c) To the extent that there are any, the costs of the Security Agent; and

d) Valuation Fees."

e. In relation to the Service Fee, as defined in the investor note, these sums are being held by Lendy pending final determination of the Distribution Waterfall. Based on current information and financial analysis, if the Distribution Waterfall is upheld as I have set out in this witness statement, there will be sufficient realisations within the Lendy administration estate to pay the Joint Administrators' fees.

f. Whereas if the Court determines that the Distribution Waterfall should not be applied as set out in this witness statement and / or the Court determines that the sums payable to Lendy are significantly less than calculated by the Joint Administrators, then the Service Agreement will need to be put in place to remunerate Lendy for the services they are providing to SSSHL. The Joint Administrators fees can be paid from this remuneration.

g. Following investigation into the peer to peer sector, the Joint Administrators concluded that 2 - 3% was an industry standard rate for peer to peer lending service agreements. Given the complexities with the Lendy loan book and following the Joint Administrators modelling of the anticipated costs involved in resolving the Lendy loan book, a service fee of 3% is being deducted at the stage. However, the details of the Service Agreement and the fee of 3% will need to be negotiated and agreed between the Joint Administrators (on behalf of Lendy) and the Conflict Administrators (on behalf of SSSHL).

<u>Dividend Apportionment</u>

h. The note also provided further details in relation to the dividend apportionment (second limb of the waterfall):

"As the Administrators of Lendy are obligated under the Act to maximise recoveries available to creditors of Lendy, the Administrators are obligated to ensure that all payments due to Lendy under certain terms of the contractual documentation are recovered for the creditors of Lendy. In practice, this means that all sums payable as part of the Dividend Apportionment in the Distribution Waterfall will be paid to investors and Lendy on a pro rata basis (in the event that there is a shortfall), after the Costs Deduction. The Administrators do not have any discretion to alter Lendy's contractual entitlement under the documentation and the Administrators will need to apply the terms of the contractual documentation to maximise the returns for the benefit of Lendy's creditors.

i. In order to determine the dividend apportionment, the contractual entitlement of Lendy and the investors has to be calculated. There are variances between the documentation for each loan, however, as a general rule, the following factors comprise Lendy's contractual entitlement (and in respect of Issue 4b, constitute Secured Liabilities);

   i. Lendy's Standard interest rate - Clause 6.1 of the Model 2 loan agreement provides that the borrower shall pay interest on the loan at the interest rate which is stated in the Model 2 term sheet. The interest rate is split between interest which is payable to Lendy and interest which is payable to investors. The Lendy standard interest rate is in the region of 0.2 - 0.4% per month from the date of loan agreement until repayment. In some circumstances the Model 2 term sheet says that the interest is compounded.

   ii. Lendy Default Interest – this is contained in clause 6.3 of the loan agreement. This clause provides:

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

   The Default Interest is paid to Lendy and is calculated at 3% on the gross amount of the loan, from the date of default of the loan until repayment / realisation.

   iii. Exit Fees – The exit fee is defined in the borrower's terms and conditions on the cover page. The exit fee was usually 2% of the value of the gross loan. If a loan is extended, the exit fee is often amended within the extension documentation.

   iv. Any other bespoke fees due to Lendy written into a particular loan agreement.

j. The investors contractual entitlement is calculated as follows (and in respect of Issue 4b, constitute Secured Liabilities):

   i. Original Gross Loan – this is the total amount invested by the investors in the relevant loan.

ii. Investors Standard Interest rate – as stated above, this is defined in the Model 2 term sheet. The interest payable to investors is typically 0.8 – 1% (resulting in a total interest payable by borrowers of 1 - 1.4%) per month. Again, in some circumstances this can be compounded.

iii. Any other bespoke fees due to investors written into a particular loan agreement.

k. Once the total contractual entitlement of Lendy and the investors has been calculated, the sums actually received by investors and Lendy are deducted, to give a net contractual entitlement. The Costs (first limb) are deducted from the amount realised from the borrower and then the balance is split between the investors and Lendy on a pari passu basis.

l. To assist in understanding the Distribution Waterfall mechanism, the investor note set out a hypothetical example of a Distribution Waterfall with fictional figures:

Original Gross Loan	£2,000,000
Contractual Entitlement due to Investors: Original Loan of £2,000,000 Interest of £60,000	£2,060,000
Contractual Entitlement due to Lendy: Interest of £30,000 Default interest of £500,000 Exit Fee of £10,000	£540,000
Total Contractual Entitlement of Lendy and the Investors: £2,600,000 of which the Investors are owed 77% (£2,060,000) and Lendy is owed 23% (£540,000)	
Borrower Refinance / Sale of Asset achieved	£1,500,000
Cost Deduction	
Lendy's service fee	(£30,000)

Other direct costs (eg Valuers & Legal Fees)	(£70,000)
Balance Due after Cost Deduction	£1,400,000
Dividend Apportionment	
Investors are owed 77% of £1,400,000	£1,078,000
Lendy is owed 23% of £1,400,000	£322,000

Enforceability of contractual terms in favour of Lendy

m. The investor note recognised that following further consideration of the contractual documentation, it may be determined that Lendy is not entitled to all or part of the sums accruing to Lendy, i.e. interest, default interest, default charges and/or exit fees. Issue 4c seeks the Court's direction on the enforceability aspect. Therefore, the note stated that "…*for the time being all sums accruing to Lendy under the Dividend Apportionment will be deferred and held pending further consideration by the Administrators and their legal advisors as to the enforceability of the contractual terms in favour of Lendy, and whether Lendy is the correct beneficiary in accordance with the legal position*." Following the investor note, the Joint Administrators have utilised elements of Lendy's contractual entitlement under the Dividend Apportionment, as set out at paragraph 229 below.

n. The Joint Administrators confirmed that the interim distributions had been made to "*avoid any undue delay in making distributions to investors*". The note also stated that the Joint Administrators "*have taken the view to process Waterfall Distributions where possible for certain loans, pending further consideration of Lendy's entitlement, rather than waiting for a final determination and to pay investors such amounts as are unequivocally theirs, and not Lendy's.*"

223. The investor note concluded that "*to the extent that any investor suffers a shortfall following the Distribution Waterfall, those investors will be at liberty to file a proof of debt against Lendy, fully setting out their claim for the Administrators' consideration. The investor's rights will not be affected by filing a proof of debt."*

Processed Waterfalls

224. In the Joint Administrators progress report dated 23 November 2019, a table was included setting out an overview of the interim distributions made as at the date of the progress report (see **page 335**):

Loan Ref	Gross asset realisation - £	Third Party Costs - £	Costs paid by Lendy direct - £	Lendy Service Fee - £	Lendy Contractual entitlement - £	Investors Contractual entitlement - £
DFL012 Herculaneum Quay, Liverpool	7,450,000.00	376,675.00	281,196.99	189,821.92	1,693,975.04	4,908,331.05
DFL034 Land at Mongleath Road, Falmouth	1,597,154.37	0.00	2,728.97	12,733.48	22,303.20	1,559,388.72
DFL037 Land at Penmere Manor Hotel, Mongleath Road	560,290.63	0.00	958.03	0.00	6,586.35	552,746.26
DFL032 Clewers Lane, Waltham Chase, Southampton(plot 1 sale)	348,500.00	0.00	0.00	0.00	0.00	348,500.00
DFL032 Clewers Lane, Waltham Chase, Southampton(plot 5 sale)	301,750.00	0.00	0.00	0.00	0.00	301,750.00
PBL163 Numbers 17,18,19,20 and 21 Towan Valley, Porthtowan, Cornwall	532,610.50	56,793.00	5,821.20	28,247.22	206,327.13	235,421.94
PBL164 Phase 2 Towan Valley, Porthtowan, Cornwall	948,207.00	198,207.00	5,821.20	52,450.14	276,155.45	415,573.21
PBL103 Site with planning for 117 units nr Hastings (Blocks A & B)	2,150,000.00	9,525.01	4,262.50	144,373.97	831,388.36	1,160,450.16
PBL193 Northfield Road, Rotherham	775,000.00	68,841.93	17,528.00	24,969.86	173,431.78	490,228.43
PBL056 Walrow Farm, Somerset	180,000.00	11,716.80	32,272.80	14,054.79	121,955.61	0.00

225. Following the administrators progress report, the following further distributions have been made, in accordance with the Distribution Waterfall articulated above:

Loan Ref	Gross asset realisation - £	Third Party Costs - £	Costs paid by Lendy direct - £	Lendy Service Fee - £	Lendy Contractual entitlement - £	Investors Contractual entitlement - £
PBL177 - The Winelodge 58 Bridge Road and flats 9,10 & 11.	384,183.00	87,074.83	21,275.20	10,451.88	69,418.84	195,962.25
PBL178 - 1-8 and 12-19, 58 Bridge Road, Oulton Broad, Lowestoft, Suffolk NR32 3LJ	425,817.00	96,511.15	23,580.80	11,584.55	73,329.44	220,811.06
DFL032 Clewers Lane, Waltham Chase, Southampton(plot 4 sale)	348,500.00	0.00	0.00	0.00	0.00	348,500.00
DFL032 Clewers Lane, Waltham Chase, Southampton(plot 2 sale)	318,750.00	0.00	0.00	0.00	0.00	318,750.00
DFL002 Exeter Quayside Development	2,400,000.00	146,089.93	48,072.11	174,378.08	2,031,459.88	0.00
DFL020 Jocelyn Square, Glasgow	2,650,000.00	167,301.60	12,000.00	64,035.62	655,830.49	1,750,832.29
DFL031 - The Lodge Hotel, 82 Unthank Road, Norwich	1,650,000.00	35,501.20	3240.00	56,145.21	502,376.00	1,052,737.00
DFL032 - Clewers Lane, Waltham Chase, Southampton	118,969.00	0.00	0.00	0.00	1,113.00	117,856.00
DFL021 - Heritage House, 29 Jewison Lane, Sewerby	532,800.00	29,462.40	2,520.00	11,867.57	125,633.97	363,316.05
PBL196 - Flat 2, 89 Hatherley Road, Sidcup	182,134.60	3,393.00	0.00	2,784.00	29,455.00	146,503.00
PBL197 - Church Avenue, Sidcup **SECOND CHARGE LOAN**	108,413.46	2,019.00	0.00	1,657.00	17,034.00	87,703.00
PBL137 - 19 Pilmuir Street, Dunfermline, Fife	50,000.00	4,744.00	14,337.00	4,151.00	12,078.00	14,690.00

226. DFL032 is a loan which is within term and not in default. Two units which were owned by the borrower and secured by SSSHL have been sold, resulting in the above distributions to investors. The Distribution Waterfall does not apply as security has not been enforced. The borrower made advanced interest payments to pay Lendy and the investors' interest payments in full.

227. PBL056 is a Model 1 loan and the realisations have been allocated to the Lendy estate rather than distributed through the Distribution Waterfall. Therefore, there have been no distributions to investors.

228. DFL002 is a loan where the intention appears to have been for it to be a Model 2 loan in accordance with the borrower's documentation as the security is held by SSSHL in accordance with the standard Model 2 documentation. However, the investors terms and conditions on the platform are Model 1 terms and conditions and therefore Lendy has not been appointed as agent on behalf of the investors as required by Model 2. As the contractual documentation does not satisfy the "Model 2" legal requirements, the proceeds of DFL002 have been treated as a Model 1 loan and will form part of Lendy's general estate for distribution to creditors.

229. The Joint Administrators have utilised a portion of Lendy's contractual entitlement of the processed waterfalls (as set out in the tables above at paragraphs 224 & 225) for administration costs and expenses. However, the utilised sum has been limited to a sum equivalent to the 3% service fee (as discussed at paragraph 222(d)-(g) above), as follows:

Loan Reference	**Utilised Contractual Entitlement (£)**
DFL012	189,821.92
DFL034	12,733.48
PBL163	28,247.22
PBL164	52,450.14
PBL103	144,373.97
PBL193	24,969.86
PBL177	10,451.88
PBL178	11,584.55
DFL020	64,035.62
DFL031	56,145.21

Future Distribution Waterfalls

230. At **page 745** is a spreadsheet setting out all the waterfall distributions which have been processed to date, together with a list of the loans which have been realised and where waterfall calculations are being prepared.

231. In addition, this spreadsheet sets out anticipated gross realisations and anticipated completion dates for recovery action / borrower refinances. This is all based on current information and could be subject to significant change, if for example an adverse issue comes to light on a property which materially reduces the valuation. Likewise, the anticipated completion dates are estimates only and may take longer to complete than estimated on the attached spreadsheet, especially in light of the Covid-19 pandemic.

Creditors' Committee

232. On 15 July 2019, the Joint Administrators issued their proposals for Lendy. The Joint Administrators were required to call a physical meeting in accordance with section 246ZE(4) of the Insolvency Act 1986 as at least 10 creditors in number had requested a physical meeting. On 31 July 2019, the Joint Administrators held a physical meeting and their proposals were approved.

233. In addition, on 31 July 2019 a creditors' committee (the "**Committee**") was formed of 5 members; Oliver Linch, Alan Jones, Bruce Hattersely, Anoop Vasishta and Adam Bunch. 9 investors put their names forward at the creditors meeting, and a vote was taken to appoint 5 committee members. The Committee is only comprised of Model 2 investors and in summary their total investments (excluding interest), as at March 2020 were as follows (see **pages 746-747** (Oliver Linch) **748-770** (Alan Jones), **771-779** (Anoop Vasishta), **780-785**, (Bruce Hattersley) and **786-805** (Adam Bunch)):

Name	**Live Loan Parts**	**Repaid Loan Parts**	**Sold Loan Parts**
Oliver Linch	[redacted]		
Alan Jones			
Bruce Hattersley			
Anoop Vasishta			
Adam Bunch			

234. There have been four Committee meetings to date on:

a. 18 September 2019;

b. 22 November 2019;

c. 20 February 2020; and

d. 9 June 2020.

235. At these Committee meetings, the items which have been discussed are updates on the loan book, progress on the administration, investigation updates, Model 1 and Model 2 documentation, this Court application, remuneration of the Joint Administrators, remuneration of the Conflict Administrators and any other business which the Committee wished to discuss.

236. In addition to the meetings, there has been written correspondence between the Joint Administrators and the Committee. This correspondence is attached at **pages 806-809, 810-813, 814-815** and **816-828**.

237. By way of a letter dated 23 December 2019 (see **pages 806-809**) from the Committee to the Joint Administrators, the Committee raised a number of allegations:

a. Conflict of Interests Creditor Status – the Committee alleged that the Joint Administrators were conflicted as we are administrators of both Lendy and SSSHL. The assertion was that the Joint Administrators could not assess whether Model 2 investors were creditors of either the Lendy or SSSHL estate.

b. Conflict of Interests Waterfall Application – the Committee say that the Joint Administrators are conflicted because upholding and challenging the legality of the waterfall in the contractual documentation would be advantageous for Lendy's creditors and disadvantageous for SSSHL creditors.

c. Conflicts of Interest Conflict Administrators – the Committee questioned why they were not consulted prior to the appointment of the Conflict Administrators and then went on to say that they did not consider that the Conflict Administrators' appointment easily resolved the conflict issues which "*go to the heart of the administrations of Lendy and SSSHL*"

d. The Committee asked the Joint Administrators to step down as administrators of SSSHL and for the CLB to appoint an administrator of SSSHL on behalf of SSSHL's creditors.

e. The Committee informed the Joint Administrators that they would not approve any further fees until the matters set out in their letter were addressed.

238. Upon reading the Committee's letter dated 23 December 2019, without any discourtesy intended, it was evident that the Committee had not understood several aspects of the administration, the roles of the Joint Administrators, the Conflicts Administrators, the CLB and indeed the Committee's own role in relation to the Lendy administration.

239. The Joint Administrators responded by letter dated 10 January 2020 (see **pages 810-813**) addressing each of their concerns:

a. Alleged Conflict of Interest – the Joint Administrators confirmed that they firmly do not agree that RSM RA are conflicted in their roles as administrators of Lendy and SSSHL which cannot be reconciled by the appointment of the Conflict Administrators. The letter also stated that the Committee have not actually articulated how a conflict arises for RSM RA. The Joint Administrators confirmed that they would monitor their ongoing obligation to address any conflicts of interest.

b. Distribution Waterfall:

i. The Joint Administrators reminded the Committee that their "*role as a member of the creditors committee of Lendy is to assist us in discharging our functions as administrators of Lendy. You are required to act in the best interests of the Lendy creditors as a whole*." The letter also addressed the Joint Administrators' concern that the Committee appear to be "*seeking to challenge the Distribution Waterfall in [their] capacities as Model 2 investors and not in [their] capacity as creditors of Lendy*."

ii. The letter reminded the Committee that the distributions which had been made to date, were only interim distributions. In the event that the final determination of the distribution waterfall resulted in different realisations for the Model 2 investors / Lendy and if the Service Fee which has been deducted is not required to be deducted, then there would be further distributions to Model 2 investors under the Distribution Waterfall.

c. CLB – the Joint Administrators reminded the Committee that the CLB are a liaison body appointed to act in a consultancy capacity for SSSHL. The CLB do not act on behalf of Lendy and nor should the Committee be acting in the interests of SSSHL's creditors.

d. Court Application – the Joint Administrators informed the Committee that following discussions with the Committee, and other parties (including the FCA), "*we have concluded that as part of the next steps in reaching a final determination of the Distribution Waterfall, we shall apply to*

the Court for directions on this issue." We invited the Committee to set out in writing, any matters which they would like us to consider as part of this Court application by 24 January 2020.

240. The Committee replied on 14 January 2020 (see **pages 814-815**) and said that they would be unable to meet the deadline of 24 January 2020 and said that they would aim to respond with any comments on the waterfall by 21 February 2020. The Committee also asserted that the costs of the Committee obtaining legal advice to provide their comments on the waterfall should be borne by the administration of Lendy.

241. The Joint Administrators replied on 29 January 2020 (see **pages 816-828**):

    a. They confirmed that the preparation of the Court application would be a significant undertaking given the amount of information and documentation which would need to be reviewed and inserted into the application. Therefore, the Joint Administrators would not be in a position to file the application before the end of February 2020. If the Committee provided their comments by 21 February 2020, this would be considered before an application was issued.

    b. They confirmed that the Joint Administrators do not consider it appropriate for the Lendy administration estate to bear additional legal costs of the Committee where the Joint Administrators have already incurred costs in procuring legal advice for the benefit of Lendy's creditors and for the Joint Administrators to discharge their duties.

242. In advance of the most recent Committee meeting, the Committee emailed RSM RA on 1 June 2020 asking for some further information / clarification (see **pages 829-831**), which my colleague, Matthew Foy responded to on 3 June 2020 (see **pages 829-831**). The questions were as follows:

    a. The Committee considered that Leading Counsel's advice obtained by the Joint Administrators did not support the Joint Administrators' position in respect of the Distribution Waterfall and asked whether any further Counsel's opinion could be obtained. The response confirmed that this would be discussed at the meeting. At the meeting, Shoosmiths explained that the Counsel Opinion does support the Joint Administrators' approach to the Distribution Waterfall and confirms that security proceeds must be distributed in accordance with the contractual documentation.

    b. The Committee asked for confirmation as to the Conflict Administrators' role in this Court application. The response confirmed that the Conflict Administrators would be joined as a Respondent to the application to bind them to the Court's decision, however, the Conflict Administrators would be a neutral party.

c. The Committee asked for the loan documentation detailing the fees comprising the waterfall. The response confirmed that copies of the template Model 1 and Model 2 loans had already been provided to the Committee, and the actual interest rates and fees would vary between each loan.

d. The Committee were concerned that the process of adjudicating on tens of thousands of proofs of debts would be prohibitively expensive. The response states that the Joint Administrators have a duty to adjudicate on all claims.

e. The Committee asked for a detailed account of the secondary market and the difference between original and secondary loan part purchases. The response confirmed that this Court application would seek directions in respect of the secondary market investors.

243. Following the latest Committee meeting, the Committee sent me a follow up email on 15 June 2020 (see **pages 832-836)** in relation to fees and Model 2 investors' status as creditors.

244. The Committee have not provided any substantive comments in relation to the application in writing. At the most recent Committee meetings, the Committee were primarily concerned with addressing whether Model 2 investors were creditors of Lendy, as the Committee felt that this would overcome the requirement to "challenge" the Distribution Waterfall. The Joint Administrators confirmed that they cannot simply to choose which mechanism to pay investors / creditors, for example either through the Distribution Waterfall, as creditors of Lendy or any other "moral" justification. The Joint Administrators have a duty to distribute the Distribution Waterfall in accordance with the trust arrangements on behalf of SSSHL as security trustee and to adjudicate on all creditor claims in the administration of Lendy following the receipt of legal advice (where necessary). The Joint Administrators confirmed that these would be points which would be addressed in this Court application. The Joint Administrators have sought directions in relation to the Model 2 investors and the Distribution Waterfall by virtue of Issues 3 and 4.

FCA Correspondence

245. Since appointment, the Joint Administrators have been liaising with the FCA in relation to the progress of the administration of Lendy, and if requested, have provided information and documentation.

246. The FCA have had sight of the investor communication sent on 29 November 2019 explaining the loan and security documentation and the basis of the Distribution Waterfall. The FCA had the opportunity to provide their comments. The FCA reiterated that any of their comments were advisory

only and must not be considered as authorisation or endorsement by the FCA of the Joint Administrators' position, nor should the Joint Administrators rely on the comments made.

247. One of the main requests of the FCA was to ensure that all communications by the Joint Administrators were fair, clear and not misleading to investors, given that the subject matter can be quite complex. The FCA noted that the administrations of Lendy and SSSHL raise a number of complicated legal issues which the Joint Administrators do not have authority to disclose. The FCA do not express any position on the legal issues, but they have expressed the view that the Joint Administrators should apply to court for determination of the legal issues before making any final decisions on the distribution of the SSSHL trust assets.

Lendy Action Group Correspondence

248. The Lendy Action Group ("**LAG**") was originally set up by a group of investors to provide support and factual information from news articles and other publicity available information regarding the administration of Lendy.

249. The LAG state that their goals are:

a. "*To act as a point of support and provide co-ordination, news and information to Lendy investors affected by their collapse.*

b. *To work collectively to recover our investment. We are many but dispersed – together we become strong.*

c. *To be a voice for lenders to the administrators, regulators and press.*

d. *To explore potential opportunities for further actions if they become necessary and legal basis can be defined for such."*

250. Lisa Taylor, the spokeswoman for the LAG and the First Respondent, has recently instructed Gunnercooke LLP to act on behalf of the LAG. The First Respondent holds loan parts in both Model 1 and Model 2 loans, however, her investments are primarily in respect of Model 2 (see **pages 861-862**). Attached at **pages 837-844** and **845** is a copy of the letter from Gunnercooke LLP to Shoosmiths dated 28 February 2020 and an email dated 30 March 2020.

251. The LAG has raised concerns in relation to the Distribution Waterfall. Their concerns fall into two categories, firstly the Dividend Apportionment and secondly the Service Charge (which the Joint Administrators have sought directions on in Issue 4). The LAG considers that "*in a situation where recoveries under Loan Agreement are insufficient to repay lenders in full, those amounts should be*

for the sole account of LAG members." However, the letter does not go on to explain why the LAG consider they are entitled to these amounts.

252. The LAG has also questioned the Service Charge and asked whether this is limited to the actual costs of Lendy. Shoosmiths responded on 16 March 2020 in relation to this particular point (see **pages 850-853**) as follows:

"The Administrators are still making a 3% service charge deduction from asset realisations under the first limb of the Waterfall Distribution. This sum represents Lendy's fee for carrying out the security trustee role on behalf of SSSHL….Whilst the 3% service charge is being deducted, it is being held by the Administrators pending final determination of the Waterfall. If the Waterfall is upheld, we anticipate that there will be sufficient realisations within the estate of Lendy to pay the Administrators' fees costs and expenses in full. If so, the Administrators will not need to deduct the 3% fee and any service charge monies which have already been deducted will be paid to investors under the Waterfall."

253. The LAG also raised a number of points in relation to the Court application:

a. The LAG asked to contribute to the preparation of the Court application;

b. The LAG asked for their costs from 13 February 2020 to be paid from the proceeds of recoveries of assets, alternatively as an expense of the Lendy administration estate;

c. An assertion that Lendy acted in breach of fiduciary duties (as set out in the Gunnercooke letter dated 28 February 2020) by entering into agreements which benefited Lendy to the detriment of the LAG, failing to disclose the terms of loan agreements to LAG members and unilaterally varying investor terms and conditions. The LAG consider that they have proprietary claims for any "improper deductions" (as defined in the Gunnercooke letter dated 28 February 2020) made by Lendy prior to or after administration of Lendy;

d. An assertion that Lendy made representations on the platform which were misrepresentations, including but not limited to:

i. assurances that all loans made would be covered by security with an LTV of less than 60%;

ii. assurances that Lendy's policy was "incredibly cautious", that its choice of borrowers was "clinical" and that it was the "safest peer to peer lender in the marketplace"; and

iii. assurances that all valuations would be robust, properly reviewed, and would not fail to take into account ease terms of other matters which impacted value.

The LAG consider that they are entitled to damages claims against Lendy for losses sustained as a consequence of relying on misrepresentations.

e. An assertion that the above representations were made clearly to the secondary market investors as well as original investors.

254. Shoosmiths responded on 1 April 2020 (see **pages 854-857**) and confirmed the following:

a. The Joint Administrators do not agree with the LAG's assertion that where there is a shortfall in the recovery from borrowers, that the recoveries should be paid solely to LAG members and recited the terms of the Model 2 debenture.

b. That the Joint Administrators would consider the comments of the LAG as part of this application and that we would not be providing them with a copy of the application prior to issuing.

c. The Joint Administrators agree in principle that original Model 2 investors may have a claim in the Lendy administration for misrepresentation, however this court application for directions is not the forum for the Court to opine on whether Lendy did breach any duties.

d. The Joint Administrators are not convinced that Model 2 secondary market investors are creditors of Lendy for any breach by Lendy of their fiduciary duties. The Joint Administrators will seek the Court's direction on this point.

255. Gunnercooke LLP responded on 6 April 2020 (see **pages 858-860**), providing their further comments in relation to alleged breaches by Lendy, LAG members' claims against Lendy and the status of secondary market investors.

Extension

256. Pursuant to a Court Order dated 3 April 2020, the administration of Lendy has been extended for 3 years and will expire at midnight on 23 May 2023 (see **page 863**). The administration of SSSHL has been extended for 12 months by creditor consent (see **pages 864-867**).

Reason for the Court Application

257. As set out in this witness statement, the Joint Administrators have identified a number of issues with the loan and security documentation and the way in which the platform was run by Lendy prior to administration. The Joint Administrators have undertaken a review of the documentation, discussed the mechanics of the platform with the remaining Lendy staff and sought legal advice on the construction and various legal issues set out.

258. Given the complexity of a number of the legal issues identified, the opposing positions of the various stakeholders involved (the FCA, the LAG & the Committee) and the implications that the final determination of these issues will have on a large number of investors, the Joint Administrators consider that they are obliged to make this Court application for directions to fulfil their duties.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed by 
……..
Damian Webb

Dated the 9 day of July 2020

CASE NO: CR-2019-BHM-000443 & CR-2019-BHM-000444

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERY COURTS
IN BIRMINGHAM, INSOLVENCY & COMPANIES LIST

IN THE MATTER OF LENDY LTD (IN ADMINISTRATION)

AND IN THE MATTER OF SAVING STREAM SECURITY HOLDING LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

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

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

Applicants

And

(1) Lisa Taylor

(2) Christine Mary Laverty, Helen Julia Dale and Trevor Patrick O'Sullivan as Joint Conflict Administrators of Saving Stream Security Holding Limited (in Administration)

Respondents

WITNESS STATEMENT OF
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Respondents

EXHIBIT DW2

THIS IS the Exhibit marked "DW2" referred to in the witness statement of Damian Webb dated 9 July 2020