Appeal number: BB0001/2011 ONWARDS

STRIKE OUT OF REFERENCES – References by ex-Bradford & Bingley shareholders – Challenge to Valuer's decision as to compensation for shareholders – Valuation – Reasonableness – Jurisdiction of Upper Tribunal in relation to points raised in References – Whether no reasonable prospect of Applicants' cases succeeding

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

BRADFORD & BINGLEY APPLICANTS **Applicants**
(Messrs D Green and M Shah, Mrs J Southworth, Mr M Tanwir and Mrs V Williams)

- and -

PETER CLOKEY **Respondents**
(As the Independent Valuer for the Bradford & Bingley plc Compensation Scheme)

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in public in London on 10 May 2011

David M Green, Applicant, attended hearing and made representations

Mrs Veronica Williams, Applicant, attended hearing and made representations

M Tanwir, M Shah and Mrs J Southworth, Applicants, made representations in writing but did not attend hearing

David Blayney, counsel, instructed by Linklaters Plc, Solicitors, represented the Valuer

DECISION

Introductory overview

1. The great majority of grievances expressed by ex-shareholders in Bradford & Bingley Plc (referred to as "Affected Shareholders") are understandably grounds for complaints. But that is not enough to make those grievances admissible issues that can be dealt with by this Tribunal. I will refer to the statutory framework that covers the right to compensation in more detail later. At this stage it is enough to say that laws put in place to deal with the transfer of ownership of Bradford & Bingley Plc from its shareholders to the Treasury, (including what I will call "the Compensation Scheme") were precise and comprehensive. They cover the transfer. They contain rules setting out the precise basis on which compensation for the dispossessed shareholders is to be calculated. For that purpose the Compensation Scheme prescribes the appointment of an independent Valuer whose function is to determine the compensation. The terms of the Compensation Scheme require him to proceed on certain assumptions when determining the value of the Shares for compensation purposes ("the Valuation"). And they give this Tribunal the authority to review determinations of the Valuer. The authority given to this Tribunal is limited to one function, namely whether the valuation determined by the Valuer is "reasonable". By reasonable is meant whether the valuation is one that a reasonable valuer, directing himself properly as to the law, might have made.

2. The authority given to this Tribunal has, as I have just mentioned, been limited. The Tribunal has been given no authority to, for example, challenge the decision to take the shares of Bradford & Bingley Plc into public ownership: or to question either the manner by which the Valuer was appointed or the rules governing his approach to valuing the compensation. As already observed, the law requires the Valuer to make certain assumptions when valuing the compensation. The Valuer and the Tribunal have to take the law underlying the Compensation Scheme as they find it and to apply it properly. The result is that issues raised by Affected Shareholders and referred to this Tribunal will be "admissible" if and only if they relate to the question of whether the law has been applied on the proper basis. (I refer to those as "Admissible Issues".) And even if the challenge is on the face of it admissible, the Tribunal must be satisfied that it has a reasonable prospect of success.

3. I have examined all the points and grievances advanced by all the hundreds of Bradford & Bingley Plc Affected Shareholders who have referred their cases to this Tribunal. I have attempted to identify all possible issues that might, arguably, come within the authority of this Tribunal. The present hearing was held to give the five particular Affected Shareholders (whom I refer to as "the Applicants"), who had raised what might arguably have been Admissible Issues and who were prepared to participate actively in the proceedings before the Tribunal, the opportunity to explain their cases. Since then, I have examined all the points raised at the hearing and I have reviewed the process of reasoning adopted by the Valuer in reaching his

determination of a nil amount. The conclusion that I have reached and which I will explain in greater detail below is that none of the Applicants has advanced any Admissible Issue that has a realistic prospect of success.

4. I am satisfied from my examination of the circumstances that the Valuer carried out his valuation function wholly in accordance with the Compensation Scheme.

This decision

5. To give context to the points advanced by the five Applicants in their submissions to me, both in writing and orally at the hearing held on 10 May 2012, I include, as a Schedule to this Decision, the Statement of Case of 6 June 2011 in which the Valuer sets out the facts and matters relied upon him in determining the Valuation for purposes of the Compensation Scheme. Many of the points raised are directed at the steps in the reasoning of the Valuer and will be cross-referred to the Statement of Case. The purpose of the hearing was to enable me to decide whether, in the light of the submissions made by the Applicants, I should strike out their References. Rule 8(2) of The Tribunal Procedure Upper Tribunal) Rules 2008 (2008 No.2698) requires the Tribunal to strike out the whole or part of proceedings covered by a Reference where the Tribunal does not have jurisdiction (i.e. authority) in relation to the proceedings. Rule 8(2) empowers the tribunal to strike out proceedings (or part of them) covered by a Reference where the Tribunal considers there is no reasonable prospect of the applicant's case (or that part) succeeding.

6. The Statement of Case, the Assessment Notice and the Revised Assessment Notice cover the many considerations taken into account by the Valuer : they raise many other issues dealt with by the Valuer which have no longer been pursued the Applicants (or by Affected Shareholders). For reasons that I will explain under the heading "Procedural History", the hearing and the issues to which this Decision relates go to the question of whether there are any permissible issues raised by the Applicants. This Decision is therefore directed at the question of whether those issues do indeed amount to admissible issues and whether on examination they have any reasonable prospect of success.

7. The Valuer has made a decision as to the amount of compensation; that has produced a nil amount for each of the Applicants in the present proceedings and, it must follow, for each Affected Shareholder irrespective of the size or the circumstances of his or her holding. The objections taken by each Applicant are relevant to every other Affected Shareholder. Out of respect to the careful and conscientious presentation made by the Applicants in writing and at this hearing, I shall attempt to deal with all the arguments of substance addressed to me. Where the argument fails to satisfy me that it raises an Admissible Issue, I will explain why. Where it appears to me that the argument may raise an Admissible Issue but it nonetheless one that has no reasonable chance of success, I shall also give my reasons.

8. This Decision starts with an explanation of the background to the present References. A fuller description will be found in the Statement of Case. The procedural history that follows aims to explain why the references of so few Affected Shareholders, namely the present Applicants, have actually reached the stage of the present hearing. The rest of this Decision will deal with the points specifically raised by the five Applicants.

9. The Valuer was appointed by Her Majesty's Treasury ("the Treasury") on 24 June 2009 as independent valuer for the purposes of the Bradford & Bingley plc Compensation Scheme ("the Compensation Scheme"), having been selected by a panel chaired by the Chief Executive of the Institute of Chartered Accountants in England and Wales. The Scheme is established under The Bradford & Bingley plc Compensation Scheme Order 2008 (SI 2008/3249) ("the Compensation Scheme Order"), which came into force on 19 December 2008 and was subsequently amended by the Bradford & Bingley plc Compensation Scheme (Amendment) Order 2009 (SI 2009/790) ("the Compensation Scheme Amendment Order").

10. The Valuer issued an assessment notice ("the Assessment Notice") on 5 July 2010 in accordance with paragraph 10 of the Schedule to the Compensation Scheme Order ("the Schedule"). The Assessment Notice explained that the Valuer had determined that no compensation is payable by the Treasury to former shareholders under the Scheme ("the Valuation") and set out the Valuer's reasons for the Valuation.

11. The Assessment Notice invited anyone dissatisfied with it to request the Valuer to reconsider the Valuation. Following consideration of such requests, the Valuer issued a revised assessment notice ("the Revised Assessment Notice") on 14 March 2011 in accordance with paragraph 11 of the Schedule. The Revised Assessment Notice explained that the Valuer upheld the Assessment Notice and the Valuation.

12. Paragraph 12 of the Schedule provides that persons who are affected by the determination of the amount of any compensation which is contained in the Revised Assessment Notice and who are dissatisfied with the Revised Assessment Notice may refer the matter to the Tribunal.

13. More than 700 Reference Notices ("Notices", each such Notice giving rise to a Reference) have been sent by persons claiming to be affected (Applicants) to the Tribunal challenging the Valuation.

Procedural history

14. On 31 August 2011, I gave directions that contemplated that the Chairman of the Bradford & Bingley Action Group (the "BBAG"), a Mr Blundell, would carry out the role of actively arguing the challenge to the Valuation.

15. However, Mr Blundell subsequently applied and was given permission to withdraw from the proceedings, leaving a position in which there was no active party to advance a case against the Valuation.

16. The matter came before me for a further directions hearing on 15 November 2011. I heard submissions from counsel for the Valuer and from Mrs V Williams, the only Applicant to attend the hearing, and gave directions dealing with (a) the issue as to which References were arguably within, and which were outside, the jurisdiction of the Tribunal, and (b) the issue as to how the Tribunal should deal fairly and justly with the References that did fall within its jurisdiction, having regard in particular to the then lack of any actively participating Applicant. I gave directions, released on 24 November 2011, which (in formal terms) dealt with these matters as follows:

(a) Issues that the Tribunal considered to be outside the scope of its jurisdiction

17.1 The Tribunal reaffirmed its direction of 31 August 2011 as to the five categories of issue that were arguably admissible, such issues being the "Admissible Issues" and other issues being termed "Non-Admissible Issues".

17.2 The Tribunal indicated that it had concluded that the appropriate course might be to strike out all References or parts of References raising Non-Admissible Issues, but before taking that step the Tribunal would give Affected Applicants an opportunity to make representations in relation to the proposed striking out.

17.3 The Tribunal therefore invited affected Applicants (i.e. Applicants who had sent in a Notice or Reply containing Non-Admissible Issues, and wished the Tribunal to consider arguments why their References should not be struck out in respect of such issues) to write to the Tribunal setting out reasons why he or she should be permitted to pursue those Non-Admissible Issues.

(b) Apparent lack of Applicants willing to participate actively in the proceedings

17.4 The Tribunal indicated that it was not currently aware of any Applicant who had sent in a Notice or Reply containing Admissible Issues and intended to participate actively in the proceedings.

17.5 The Tribunal indicated that it had concluded that the appropriate course may be to strike out all References or parts of References that were not actively pursued by at least one Applicant, but before taking that step the Tribunal would give affected Applicants an opportunity to make representations in relation to the proposed striking out.

17.6 The Tribunal therefore gave directions that:

(a) invited Applicants not wishing to participate actively in the proceedings to write to the Tribunal by 13 January 2012 setting out reasons why their References should not be struck out; and

(b) gave a further opportunity to Applicants to indicate whether they wished to participate actively in the proceedings, directing that parties wishing to do so were to write to the Tribunal by 13 January 2012 expressing that intention, and identifying by

reference to their Notices or Replies and if possible the Valuer's Statement of Case the Admissible Issues in relation to which the Applicant would participate actively.

18. Subsequent to the directions of 24 November 2011, five Applicants wrote to the Tribunal notifying an intention to participate actively in the proceedings. I concluded in relation to each of these five Applicants that it was not clear which of the points raised by that Applicant were contended to be Admissible issues in respect of which that Applicant intended to participate actively in the proceedings. I therefore gave further directions on 15 March 2012 to each of the five Applicants, by which:

18.1 Four of the five Applicants were directed to write within 21 days indicating which (if any) of the points raised by that Applicant were asserted to be Admissible Issues, and confirming that he/she intended to participate actively in the proceedings in respect of such points; and

18.2 All five Applicants were invited to attend a preliminary hearing at which the opportunity would arise to clarify his/her position and if appropriate to work out the next steps in preparation for the hearing of his/her Reference.

19. Only one of the four Applicants referred to in paragraph 0 above (Mr Green) has written to the Tribunal as required by the directions of 15 March 2012.

General Observations

20. It will not, in my view, be proper for any Reference to proceed to trial unless (a) it raises Admissible Issues having a real prospect of success and (b) the Applicant's case on those issues is set out with sufficient clarity and particularity that both the Tribunal and the Valuer and this can sensibly engage with the issues raised. If these conditions are not met the proceedings will be a waste of public money and perform no legitimate function. A purpose of this hearing has been to examine all the points and arguments raised by the Applicants in order to determine whether they raise Admissible Issues. To the extent that they do, I have proceeded to the next stage of considering, in the light of the representations of the Applicants, whether the point in question has a real prospect of success. If the point in question fails those conditions, the Applicants' Reference may then be struck out either in whole or as to the Non-Admissible Issues or as to those issues that have no reasonable prospect of succeeding. With those points in mind I have considered all the points of substance raised by each individual Applicant either in writing or at the hearing (or both).

21. I now examine the submissions and, avoiding repetition so far as possible, explain my conclusions. For that purpose I have used the Valuer's Statement of Case as the source of the statutory provisions involved. Save where I specifically refer to them, there have been no challenges to the content of the Statement of Case. In the main those challenges have been directed at particular facts and matters relied on by the Valuer in making the Valuation. Thus the actual account of the appointment and functions of the Valuer (paragraphs 1-9), of the tests to be applied by the Valuer

(paragraphs 10 and 11) and of the Statutory Assumptions (paragraphs 12-15) can be read as if they are part of this Decision. So far as concerns the "Challenges to the Valuation" and the allocation of these to "Complaints categories" (paragraphs 18-40), I adopt these as part of this Decision. Where the Valuer's reasoning for rejecting those challenges has been made the subject of a particular challenge by one of the Applicants, I shall address that matter separately.

Submissions relating to individual Applicants

Mr Tanwir

22. Mr Tanwir's Notice referred to and enclosed a copy of a letter from Mr Blundell to the Tribunal of 27 March 2011 setting out the case as then put by the BBAG. Mr Tanwir's response to the Valuer's Statement of Case consisted of a letter dated 3 July 2011, which merely attached a letter from Mr Blundell to the Tribunal dated 20 June 2011 and a document headed "Update No.12" produced by BBAG.

23. Mr Tanwir's letter to the Tribunal of 10 January 2012 referred to "my previous correspondences" (i.e. Mr Tanwir's previous letters attaching Mr Blundell's letters of 27 March 2011 and 20 June 2011), the BBAG website and a press release (issued by BBAG on 14 March 2011), and expressed an intention to participate actively in the proceedings. It did not specifically identify any Admissible Issues, or contain any submissions regarding the proposed striking out of Non-Admissible Issues. It is relevant to mention that Mr Blundell's letter of 20 June 2011 had made it clear that Mr Blundell considered that the Valuer was forced by the legislative terms of reference to give a nil valuation, which no doubt explains Mr Blundell's subsequent decision to withdraw his Reference. In particular, in the fourth sentence in the first paragraph of that letter Mr Blundell stated that "BBAG has already made clear that in its view PC's [Peter Clokey] terms of reference ensured he had no alternative other than an "in administration" approach thus ensuring a nil valuation".

24. In common with the other Applicants Mr Tanwir was not legally represented. I was concerned that he might have had other points to make or that he might have had other ways of substantiating the contentions originally advanced by Mr Blundell. However Mr Tanwir did not attend the hearing and I am therefore left with nothing on Mr Tanwir's part that displaces the reasonableness of the Valuer's decision. His Reference should therefore be struck out; he has not identified Admissible Issues with which the Valuer and the Tribunal can sensibly engage.

Mr Green

25. Mr Green's Notice referred to and attached the following:

25.1 A letter dated 7 April 2011 from Mr Green to the Tribunal. The letter asserted (among other things) that "The way the law is written forces Peter Clokey to give a nil valuation", and in the penultimate paragraph Mr Green stated "I Appeal to the upper tribunal to ask for a true valuation of the business

with out the restrictions placed up on the Valuer by the Bradford & Bingley PLC compensation scheme order 2008…";

25.2 An exchange of email correspondence between Mr Green and Philip Davies MP, in which, among other things, Mr Davies MP stated "As you know I very much agree with you about the valuation, although a zero valuation was inevitable based on the valuation criteria laid down by the previous Government";

25.3 An extract from the Revised Assessment Notice annotated with various manuscript comments; and

25.4 A copy of an article on the BBC website reporting that Bradford & Bingley made a pre-tax profit of £1.08bn in 2010.

26. Mr Green wrote to the Tribunal on 12 December 2011 in response to the Directions dated 24 November 2011. He expressed an intention to participate in the action and objected to the striking out of his Reference. He also referred to the five categories of Admissible Issues, but did not specify which of the points raised in correspondence he contended to be Admissible Issues and intended to pursue actively in the proceedings.

27. The 15 March 2012 directions addressed to Mr Green required him to specify in writing which, if any, of the points raised in correspondence he intended to be Admissible Issues and to confirm that he intended to participate actively in the proceedings.

28. Mr Green responded to this by a letter to the Tribunal dated 28 March 2012. That letter made various arguments and enclosed various attachments. Mr Green attended the present hearing and presented an oral argument that developed the points made in that letter.

29. Mr Green argued in that letter that the Valuation was "based on [the Valuer's] opinion only". In my view that argument fails to provide any comprehensible ground of challenge to the Valuation. When making the Valuation, the Valuer necessarily had to form and express an opinion, but it is very clear from the Assessment Notice and the Revised Assessment Notice that the opinion was based upon evidence and detailed analysis.

30. Mr Green referred to a copy of a letter dated 12 February 2010 to the Valuer from Charles Fussell & Co (the then solicitors for the BBAG). The letter from Charles Fussell & Co pre-dated the Valuation, and cannot therefore reasonably be relied upon as a document containing particulars of the grounds upon which Mr Green challenges the reasonableness of the Valuation. Furthermore, to the extent that the letter from Charles Fussell & Co contains points potentially relevant to the reasonableness of the Valuation, those points are addressed in the Assessment Notice, the Revised Assessment Notice and the Valuer's Statement of Case, and Mr Green's reference to the letter therefore does not identify any other points that are still in issue or that go to the reasonableness of the Valuer's decision.

31. Mr Green's letter alleges that "Further to the nationalization the government has continued to liquidize my assets and make large profits". That allegation does not in my view be amount to a comprehensible challenge to the Valuation. The Valuation is directed to be an amount equal to the value immediately before the "transfer time": see the paragraphs from the Schedule to the Compensation Scheme Order referred to in paragraph 5 of the Statement of Case.

32. Mr Green alleges that he has not (unlike the Valuer) had the opportunity to interview all the "major players" at Bradford & Bingley or had access to information that has not appeared in the public domain. That point has since been pursued further in a letter from Mr Green to the Valuer dated 23 April 2012, in which Mr Green requests copies of (1) all minutes of meetings between the Valuer and his team and the former and current board of Bradford & Bingley and (2) all working documents and valuations to complete the published valuation. The Valuer has submitted that that complaint and request by Mr Green are not legitimate.

33. I agree with the Valuer's submission, essentially for the following reasons. First, the jurisdiction to refer the Valuation to the Tribunal exists in order to enable Applicants to challenge the reasonableness of the Valuation by drawing to the attention of the Tribunal parts of the Assessment Notice or Revised Assessment Notice that appear to involve an incorrect interpretation of the law or incorrect reasoning. I cannot find any matters referred to in those Notices, nor did Mr Green rely on any such matters, that demonstrated any incorrect interpretation or incorrect process of reasoning on the Valuer's part. Second, it is evident from the terms of the Compensation Scheme Order that the jurisdiction to make references to the Financial Services and Markets Tribunal (now this Tribunal) was not intended to give rise to an entitlement for Applicants to receive disclosure of documents considered by the Valuer when making his Valuation. Specifically Part 3A of the Schedule to the Compensation Scheme Order (as inserted by the Compensation Scheme Amendment Order) contained detailed provisions dealing with information, which were clearly designed to ensure that the Valuer had unimpeded access to information relevant to his valuation but was not to disclose such information except to the extent that he considered such disclosure necessary for the purpose of exercising the functions of his office (paragraph 8D). I should add that the provisions for disclosure in the Financial Services and Markets Tribunal Rules 2001 (Rules 5(3), 7 and 8) were excluded by paragraphs 23(b) and 24 of the Schedule to the Compensation Scheme Order.

34. Mr Green argues in his letter that he has been deprived of the right to peaceful enjoyment of his property, and states that unless he is given some form of satisfaction by the Tribunal, he asks that the Tribunal pass the case to a Human Rights court. The thrust of Mr Green's case on this point is, I infer, directed at the Government's decision to secure the compulsory transfer of the Shares from Affected Shareholders to the Treasury. It reflects the grievances of the vast majority of the Affected Shareholders. I cannot give effect to that request. The Tribunal only has jurisdiction to deal with human rights issues where such issues are relevant to the determination of Admissible Issues. The "right to peaceful enjoyment" point is not relevant to the reasonableness of the Valuation. I cannot see that any other human rights issues

impact on matters within the jurisdiction of this Tribunal. Moreover, this Tribunal has no jurisdiction to transfer the Reference to any other court for the determination of Non-Admissible Issues.

35. It will be noted in this context that one of the shareholders affected by the Northern Rock valuation brought judicial review proceedings in the High Court challenging the assumption that the Northern rock valuer (like the Valuer in this case) was required to make by section 5(4) of the Banking (Special provisions) Act 2008. That challenge was dismissed in a decision upheld by the Court of Appeal: see *R (on the application of SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788. The Tribunal also took account of human rights issues, to the extent relevant to interpretation of the legislation, when rejecting the challenges to the valuation in the Northern Rock case: see *Northern Rock Applicants v Caldwell* [2011] UKUT 408 (TCC).

36. For those reasons I have concluded that Mr Green's Reference should be struck out because he has not identified any Admissible Issues with which the Valuer can sensibly engage. To the extent, if any, that he has raised Admissible issues, these in my opinion and for the reasons given have no reasonable prospects of success.

Mr Shah

37. Mr Shah's Notice gave the following reasons for referring the Valuer's decision to the Tribunal:

> "I believe that HM Treasury took a wrong and hasty decision.
>
> B&B should have been given time by putting into Administration or by helping with the Taxpayers money like it was done with Lloyds TSB and the RBS Group as it has been proved by the recent results of the B&B and the other Banks that given time B&B would have recovered fully and be making profit.
>
> It was also possible that it could have been sold as a going concern to a number of suitable prospectors which would have benefited everybody."

38. In response to the Directions dated 24 November 2011, Mr Shah wrote a letter to the Tribunal dated 11 January 2012 in which he stated that he intended to participate actively in the proceedings in relation to (i) the issues raised in his letter and (ii) "other issues raised by other applicants".

39. In its direction of 15 March 2012 addressed to Mr Shah, the Tribunal indicated its view that:

> (i) The reference to issues raised by other Applicants gave no indication as to which issues were referred to;

(ii) Mr Shah's arguments that HM Treasury's decision was "wrong and hasty" and that Bradford & Bingley should have been given time are criticisms of the conduct of the Government and as such did not raise Admissible Issues;

(iii) Mr Shah's argument that Bradford & Bingley should have gone into administration is consistent with the Valuation and therefore did not involve a challenge to it; and

(iv) Mr Shah's reference to Bradford & Bingley being "sold over" and to Virgin Money being "an interested party" are insufficiently particularised to enable the Valuer sensibly to engage with it.

Mr Shah was accordingly directed to specify particulars in writing.

40. Mr Shah did not attend the hearing. I am therefore bound to conclude that his Reference is to be struck out because he has not identified and provided sufficient particulars of any Admissible Issues with which the Valuer can sensibly engage.

Mrs Southworth

41. Mrs Southworth's Notice stated that her reason for referring the Valuer's decision to the Tribunal was as follows:

"I am referring to the Upper Tribunal, as being widowed I was relying on my shares as added income if needed."

42. Mrs Southworth wrote a letter dated 14 December 2011 responding to the directions made on 24 November 2011. In that letter she objected to any part of her Reference being struck out, and indicated an intention to participate actively in the proceedings. The only reasons she provided were as follows:

"…I wish to object to the Reference being struck out in whole or part on the basis of my representation namely being: the share price had been driven down artificially by speculators. Bradford and Bingley shares closed at 20p each on the final day of trading before nationalisation. Fair valuation would suggest that the said shares would have been trading on a higher valuation had it not been for the speculators. Valuation of banking shares are normally done by the stockmarket on the basis of trading at a % to book value. Dexia, the Belgium giant share price was recently also driven down to depressed prices by speculators – however, the government relisted the shares after financial adjustments and shareholders did NOT lose their money, as Dexia share are still listed today and have had an opportunity to recover from the speculators shorting practices. I ask the same fair and judicious approach from Mr Peter Clokey, of Pricewaterhouse Coopers. I rest my case."

43. My directions of 15 March 2012 addressed to Mrs Southworth contained the following statement:

"To the extent that Mrs Southworth's argument is based on Government's failure to take steps as described in relation to Dexia, the Tribunal is of the view that this is not an Admissible Issue. To the extent that Mrs Southworth raises an argument based on a depressed closing share price on 26 September 2008, it is evident that the Valuation was not based on the closing share price on 26 September 2008 (see paragraph 38(1) of the Statement of Case, section 4 of the Assessment Notice and section 8 of the Revised Assessment Notice). Mrs Southworth's argument therefore does not involve any challenge to the Valuation unless she also intends to argue that the Valuer was wrong not to base the Valuation on share price. Mrs Southworth is invited to clarify and particularise her case in this regard."

44. Mrs Southworth wrote to the Tribunal on 25 April 2012 in which she effectively restated the points made in her letter of 14 December 2011. For the reasons given in the Tribunal's letter of 15 March 2012, I cannot see that Mrs Southworth's Reference addresses any Admissible issue. She also referred to the FSA's report into Bradford & Bingley that had not been released. I cannot see how that could or would affect the reasonableness of the valuation. Mrs Southworth's Reference should therefore be struck out.

Mrs Williams

45. Mrs Williams sent a letter to the Tribunal on 28 June 2011 in which she raised some forty points, many of which referred specifically to the Valuer's Statement of Case (attached as a Schedule to this Decision). Mrs Williams attended the hearing and explained and developed those points. I shall address her contentions with reference, so far as is possible, to the Statement of Case.

Issues raised by Mrs Williams relating to bias

46. Mrs Williams emphasises, from paragraph 2 of the Statement of Case that the Valuer was appointed by the Treasury in June 2009 and that the Compensation Scheme (established by Order (SI 2008/3249)) came into force on 19 December 2008. Mrs Williams alleges that the "Valuer cannot be independent as he claimed since he was appointed by the Treasury", the Treasury being responsible for paying compensation. Therefore, she contends, if the Valuer has been appointed by the Treasury there is a conflict of interest.

47. That allegation, relating as it does to the statutory basis for the Valuer's appointment, does not in my opinion raise an Admissible Issue. The only question for this Tribunal is whether the Valuer's decision as to the amount of compensation is a reasonable decision. For this purpose the function of the Tribunal is limited to considering whether the Valuation is one that a reasonable valuer, directing himself properly as to the law, might have made.

48. Addressing paragraph 9 of the Statement of Case, Mrs Williams alleges that the valuation is unreasonable. This allegation is based on the explanation, given by

the Valuer in paragraph 3 of the Statement of Case, as to the statutory means by which the Financial Services and Markets Act 2000 ("FSMA") has been modified to confine this Tribunal's jurisdiction to the question of whether the decision as to the amount of compensation is a reasonable decision. I quote Mrs Williams' case as set out in a letter of 28 June 2011. In this letter Mrs Williams observes that the FSMA gave the FSA "sole regulatory authority for the financial services industry with powers of authorisation, supervision and enforcement". She contends that it followed from those words and from the other provisions referred to in paragraph 9 of the Statement of Case, that "there are biases in favour of the Treasury: therefore the valuation is unreasonable".

49. I cannot see any sustainable basis for Mrs Williams' allegations. Nothing in the provisions defining this Tribunal's jurisdiction gives any cause for, or indication of, bias on the part of the Valuer. In any event the particular argument alleging bias is a Non-Admissible Issue; it does not impact on the question of whether the Valuer's decision is itself unreasonable.

50. Mrs Williams then refers to paragraph 12 of the Statement of Case which refers to the provision in the Banking Act that for the purposes of section 5(4) "the references to the provision of financial assistance by the Treasury to the deposit-taker include any case where the Chancellor of the Exchequer announces that the Treasury (whether acting alone or with the Bank of England) would, if necessary, put in place relevant guarantee arrangements in relation to the deposit-taker". Observing that the Treasury, the Bank of England and the Government are all "one and the same", Mrs Williams alleges that the valuations are biased in favour of them. I cannot see that that produces any basis for an allegation of bias against the Valuer. The relevant provisions of the Banking Act provide the framework within which the Valuer is to make his valuation. The question for this Tribunal is whether that valuation is unreasonable. The statutory structure within which the valuation is to be made is wholly outside the scope of this Tribunal's authority.

51. Regarding the "bias" allegation, I refer to the Valuer's comment in paragraph 29 of the Statement of Case in which he denies bias and states that "in performing his task he has acted entirely independently of the Treasury and has reached what he considers to be the correct Valuation, applying the provisions of the Schedule, without favouring any party." For the reasons I have given, I cannot see that the reasonableness of the Valuer's decision is in any way undermined or affected by the nature of his appointment or by the statutory requirements. The allegation is not in any event an Admissible Issue as it does not impact on the decision-making process. But, even if it did, there is no explanation or evidence adduced by Mrs Williams as to how bias might have affected the decision. Even if that had been an Admissible Issue, there would in my view be no prospect of success on the bias contentions.

Has the Valuer misconstrued the meaning of the words "immediately before"?

52. Mrs Williams refers to the passages in paragraph 3, 4, 5 and 16(1) of the Statement of Case where, for example, he states his statutory function as being to determine the amount of compensation as "an amount equal to the value immediately before the transfer time of all shares in Bradford & Bingley plc held immediately before the transfer time by that person". He notes that the "transfer time" is defined as "8.00 a.m. on 29 September 2008". Mrs Williams asserts that the valuation date cannot properly be the 29th September at 8.00 a.m.. No valuation should be made with reference to any date later than the last working or trading day. She drew attention to the fact that the market for trading in Bradford & Bingley plc shares was not open at that time the valuation date should not, therefore, be taken as at 8.00 a.m. on the 29th.

53. The expression "immediately before" as used in paragraphs 3 and 6 of the Schedule to the Compensation Scheme order prescribes a precise moment of time. As I read it, Mrs Williams' challenge appears to involve an argument that the valuation should have been carried out by reference to some unspecified time other than the time precisely stated in the Transfer Order. I cannot see any reasonable prospect of that argument succeeding. Moreover, as I have already mentioned, it is not the function of this Tribunal to question the structure of the Compensation Scheme. The sole authority of this Tribunal is to determine the reasonableness of the Valuer's decision.

The Valuer's use of the expression "far from clear" in the Valuer's Notices

54. Referring to paragraph 10(1), Mrs Williams questions the "reasonableness" of the Valuer's decision on the grounds that his understanding of the law is evidently flawed on account of his use of the expression "far from clear" in paragraphs 3.19, 3.21 and 3.22 of the Revised Assessment Notice. In paragraph 3.19, for example, the Valuer addresses the "Discount Window Facility" (DWF). The Valuer observes that, while the DWF, being a new form of liquidity insurance provided by the Bank of England to the banking system, was not a direct successor to the Special Liquidity Scheme (the SLS), it was "far from clear that the DWF would fall within the statutory definition" (i.e. part of the Bank of England's "standing facilities in the sterling money markets"). In paragraph 3.22, the Valuer observed that as the DWF was solely designed to provide liquidity income it should be contrasted to the provision of standing facilities and open market operations which additionally served the purpose of setting interest rates; the latter would arguably fall within the definition of ordinary market assistance, but the limited function of the former would exclude it.

55. I do not see those examples of the Valuer's reasoning as in any way undermining the Valuer's understanding of the law, as has been asserted by Mrs Williams. The Valuer has, for reasons which I shall summarise below, directed himself properly as to the law and reached a justifiable conclusion that the SLS is not within the definition of ordinary market assistance; it cannot therefore be excluded from the application of the "No Future Assistance Assumption" referred to in

paragraph 11 of the Statement of Case. Contrary to Mrs Williams' assertion, the expression "it is far from clear that" is a phrase commonly found in legal opinions and judgments and is used to explain why an argument under consideration is not found to be persuasive. The point taken by Mrs Williams, based on the "far from clear" expression, does not in my opinion raise an arguable ground of challenge to the reasonableness of the Valuation.

Was the use of the Bank of England's SLS "ordinary market assistance" within section 5(4) of the Banking Act?

56. The answer to this question underlies several of the challenges made by Mrs Williams. The Valuer has interpreted and applied the No Future Assistance Assumption on the basis that the use of the SLS by Bradford & Bingley was not "ordinary market assistance offered by the Bank of England subject to its usual terms" within the meaning of section 5(4). His reasons are contained in paragraph 23 of the Statement of Case, in section 2 of the Assessment Notice and in section 3 of the Revised Assessment Notice.

57. Section 5(5)(b) of the Banking Act gives an exhaustive definition of the words "ordinary market assistance" stating that for the purposes of section 5(4) the expression means " assistance provided as part of the Bank's standing facilities in the sterling money markets or as part of the Bank's open market operations in those markets". The valuer has proceeded on the basis that the terms " the Bank's standing facilities in the sterling money markets" and "the Bank's open market operations in those markets" are references to two of the elements ("standing facilities" and "open market operations") of the Bank of England's published framework (the "Sterling Monetary Framework") for its operations in the sterling money markets. The documentation relating to that publication set out an official statement of what its standing facilities and open market operations in the sterling market comprised. The SLS did not figure as part of those standing facilities or open market operations. In that connection the Valuer (so the Statement of Case records) received confirmation from the Bank that what it considered to be standing facilities and open market operations were those referred to in that documentation. Those are undisputed features that the Valuer reasonably took into account in interpreting and applying the Assumption. The Valuer also relied on differences in purpose between the SLS on the one hand and open market operations on the other. Unlike the standing facilities and open market operations, the SLS had (the Valuer observed in paragraph 23(5) of the Statement of Case) no direct implications for monetary policy; its sole policy was to improve the liquidity of the banking system. Moreover, the Valuer went on to note in paragraph 23(6), there were differences in structure between the SLS on the one hand and the Bank's standing facilities and open market operations on the other.

58. The Valuer was in my view right to reject the argument that the SLS had in effect become part of the normal operations of the Bank of England to maintain adequate market liquidity. The term "Special Liquidity Scheme" suggests a scheme that is out of the ordinary. (The Bank, in its consultative paper published in October 2008 entitled "The Development of the Bank of England's Market Operations",

described the SLS as "exceptional".) Moreover, the Valuer notes in paragraph 23(8) of the Statement of Case, the SLS was out of the ordinary in the sense that it was only open for drawdown for a limited period and applied only to assets held at a particular balance sheet date.

59. With those observations in mind and noting that none of the matters on which he relies in paragraph 23 of the Statement of Case has been challenged, I am satisfied that the Valuer was right to conclude that the SLS was not "ordinary market assistance" as defined. His decision was reasonable in the circumstances and justified as a matter of language. I cannot therefore see that any challenge would have a reasonable chance of success.

Mrs Williams' other challenges to the Valuer's application of the statutory assumptions

60. Mrs Williams attacks the Valuer's adoption of the "Statutory Assumptions (set out in paragraph 11 of the Statement of Case). The Valuer, she contends, should have taken the circumstances of Northern Rock plc into account; he would then have appreciated that he had no right to make either of the Statutory Assumptions.

61. To the extent that that argument seeks to establish that the Statutory Assumptions in section 5(4) of the Banking Act were non-applicable in the present case, that argument raises a Non-Admissible Issue. It attacks the statutory code and not the reasonableness of the Valuer's decision. Moreover, the argument has no realistic prospect of success. The wording of section 5(4) is clear and unequivocal. The Valuer is bound to make the Statutory Assumptions and nothing in the "Northern Rock" decision indicates a contrary interpretation. I refer to the second paragraph of the decision concerning the *References of Harbinger Capital Partners and other Northern Rock Applicants* (NR/001/2010) released by this Tribunal on 4 October 2011. Referring to the legislation passed by Parliament making arrangements for an independent valuer to assess the value of the shares immediately before the nationalisation date, this reads as follows:

> "One of the objectives of the legislation was to strike a fair balance between taxpayers and the former shareholders by ensuring that the amount to be paid to shareholders would not reflect added value resulting from the public financial assistance which had been provided from September to February. In pursuance of this objective the legislation contained some assumptions which the valuer was required to make."

The compensation code involved in the *Northern Rock* references was different but similar statutory assumptions had to be taken into account in making the valuation.

Paragraphs 13 and 14 of the Statement of Case – "non-exhaustive definition"

62. Mrs Williams refers to paragraphs 13 and 14 where the Valuer recites the non-exhaustive meaning given to "financial assistance" in section 15(1) of the Banking Act and where he refers to the "exhaustive definition" of ordinary market assistance ("OMA") in section 5(5)(b) of that Act. She alleges that the meanings of those expressions as adopted by the Valuer show an interpretation that was biased in favour of the Treasury. I take that allegation to be saying that by reading the Banking Act as giving a non-exhaustive meaning to "financial assistance", there was a necessary implication that the Banking Act contemplated that other means of "financial assistance" might be given.

63. Mrs Williams' allegation reflects, in my view, a misunderstanding as to what the Valuer's statement of case meant when referring to a "non-exhaustive definition". "Non-exhaustive", as used by the Valuer, means that some other types of assistance may also be included. Since the key issue here is whether SLS assistance was "ordinary market assistance", it is the exhaustive definition of the latter phrase (provided for by section 5(5)(b)) that is important. In my opinion, and for reasons already given, the valuer's approach to this definition was clearly correct and the allegation to the contrary has no reasonable chance of success. Moreover, insofar as Mrs Williams alleges bias in relation to this point, that is, for reasons given above, a Non-Admissible Issue.

Paragraphs 16, 23, 27, 34 and 38: the phrase "without prejudice"

64. Mrs Williams notes that the Valuer has used the expression "without prejudice" in each of those paragraphs. It is, she alleges, unacceptable for a valuer to use the phrase "without prejudice" in a legal case. I cannot see any force in Mrs Williams' point. Her challenge is based on a misunderstanding as to the sense in which the Valuer was using the term "without prejudice". It was not used in its technical legal sense where it refers to an offer of settlement which may not then be referred to in the proceedings. Further, I cannot see that that point in any way impacts upon the reasonableness of the Valuer's decision.

Mrs Williams' attack on paragraph 16 generally

65. Paragraph 16 of the Statement of Case contains each of the reasons and the matters and facts relied upon by the Valuer in reaching his decision. Mrs Williams attacks virtually every one of these. I deal with these attacks in the following paragraphs.

Paragraph 16(3) – withdrawal of SLS

66. This states that during the week commencing 22 September 2008, the Bank of England did not approve Bradley & Bingley's request for further access to the SLS. The reason had been that collateral tendered by Bradford & Bingley to the Bank of England would be downgraded unless that collateral was restructured. Mrs Williams

observed that "the Bank of England did not stop Bradford & Bingley's SLS". It followed, she said, that the valuation was unreasonable as Bradford & Bingley had enough money at the time of the Transfer Order.

67. As I read it, the allegation here is that the Valuer should not have assumed that the SLS had been withdrawn because it was not in fact withdrawn. Mrs Williams has either misunderstood the effect of the Statutory Assumptions or she is asserting that the Valuer should not have made the relevant Assumption. Either way, Mrs Williams' allegation does not amount to an Admissible Issue. It amounts in effect to a challenge to the legislative provisions. Moreover, for reasons that I have given, the Valuer correctly applied the No Future Assistance Assumption on the basis that SLS did not fall within the expression "ordinary market assistance" in section 5(5)(b) of the Banking Act. He had to leave the SLS (or its availability) out of account in making his Valuation.

Paragraph 16(4) – restructuring of collateral

68. In paragraph 16(4) of the Statement of Case the Valuer states that Bradford & Bingley would not have been able to restructure the relevant collateral or take other steps to manufacture eligible SLS collateral sufficiently quickly to enable it to obtain further SLS funding to address its liquidity issues. Mrs Williams claims that the Valuer erred in concluding that SLS was not available: the Valuer, she says, failed to prove that restructuring of collateral was unavailable.

69. This argument is immaterial because the Valuer rightly applied the relevant Assumption on the basis that the definition of "ordinary market assistance" did not cover the use of the SLS by Bradford & Bingley. Mrs Williams advanced the further argument that Bradford & Bingley had been "deliberately given little or no time to restructure". That is immaterial for the same reason. Furthermore, had it been material, it would have been a Non-Admissible Issue because the criticism of the amount of time given to Bradley & Bingley to restructure is not a criticism of the Valuation.

Paragraph 16(5) – non-exhaustive definition

70. This allegation repeats the "non-exhaustive definition" point addressed in relation to paragraphs 13 and 14 of the Statement of Case. It appears that Mrs Williams is alleging that the Valuer has used the expression to demonstrate his conclusion in favour of the Treasury. That in my view is a misunderstanding of the meaning of the expressions "Financial Assistance" and "ordinary market assistance" used for the purposes of the Statutory Assumptions.

Paragraph 16(6) – 27 September 2008 : a Saturday

71. In that subparagraph the Statement of Case refers to the conclusion of the FSA that Bradford & Bingley was failing to satisfy the threshold conditions set out in Part 1 of Schedule 6 to FSMA in that, in the opinion of the FSA, Bradford & Bingley had

not satisfied the FSA that its resources were adequate in relation to regulated activities that it carried on. In particular, having regard to all the circumstances, the FSA is stated as having formed the opinion that Bradford & Bingley's capital resources and liquidity resources were inadequate. Mrs Williams asserts that the FSA's conclusion as to adequacy of resources was misplaced. The Valuer, she said, should have recognised that 27 September was a Saturday and that the FSA was not staffed to take decisions that day (or at least there is no evidence that it was staffed). Moreover, as she observes, the Valuer has not at any stage acknowledged that 27 September 2008 was a Saturday and not a normal working day.

72. The Valuer responds that it is not correct that he had failed to acknowledge that 27 September was a weekend. This fact, he says, was expressly referred to in the heading immediately before paragraph 3.14 of the Assessment Notice.

73. I cannot see that any of the points taken by Mrs Williams in relation to paragraph 16(6) raises a ground of challenge to the valuation, being a ground that can be engaged with by either the Valuer or the Tribunal.

Paragraph 16.7 – "insufficient time"

74. Referring to the First Supervisory Notice (the FSA Notice) to Bradford & Bingley of 27 September 2008 given by the FSA, Mrs Williams challenges this. The FSA Notice varied the permission to carry on regulated activities granted to Bradford & Bingley by imposing a requirement that it must not accept any deposits for new customers with effect from 7.00 a.m. (changed by a later notice to 9.00 a.m.) on 29 September 2008. The FSA Notice stated that it would not take effect if Bradford & Bingley were transferred into public ownership prior to that time. Bradford & Bingley, Mrs Williams contended, should have been given two weeks to respond to the FSA Notice. The Valuer should therefore have disregarded the FSA Notice when doing the valuation exercise. I cannot accept this as a criticism of the valuation. Mrs Williams' objection is directed at the FSA. It gives no grounds to support the assertion that Bradford & Bingley should have been given time. Nor, in my view, does Mrs Williams' challenge in any way impact upon the valuation exercise. To the extent that it is an allegation of unreasonableness by the FSA, it cannot be regarded as a challenge to the valuation; consequently it is a Non-Admissible Issue.

Paragraphs 16(8)-(9)

75. In those paragraphs the Statement of Case recites that in the days prior to the Transfer Time Bradford & Bingley experienced outflows of retail deposits and that it expected significant outflows of retail deposits on Monday 29 September. Also, it recites, Bradford & Bingley faced significant wholesale funding maturities soon after the Transfer Time. Mrs Williams appears to contend that the Valuer wrongly relied on the high volume of outflows of retail deposits and maturities of wholesale funding. Those factors, were, she said, "taken into account by the Valuer in favour of HM Treasury". I do not understand the objection; in any event I cannot see this as a

proper challenge to the Valuation. This is particularly the case as there is no suggestion that the Valuer was wrong.

Paragraph 16(11)

76. The Valuer, Mrs Williams contended, had wrongly relied on the conclusion that if "there had been no Transfer Order, Bradford & Bingley would have been unable to find an inadequate source of liquidity and its liquidity position would have prevented it from continuing as a going concern." The Valuer, she argued, was in error because there was in fact a Transfer Order.

77. I cannot see that this raises a comprehensible challenge to the Valuation. There has been a misunderstanding on Mrs Williams' part as to the effect of the Statutory Assumptions. In considering what would have happened "if there had been no Transfer Order", the Valuer was carrying out his valuation function in the manner required by the legislation.

Paragraph 16(12)

78. Referring to the statement in paragraph 16(12) of the Statement of Case that no private sector solution was available to Bradford & Bingley immediately before the Transfer Time that would have been compatible with the No Future Assistance Assumption, Mrs Williams (as I understand her) points to the fact that the FSA could not have been working on a Saturday and should have given two weeks before finalising its FSA Notice. I cannot see how that in any way impacts on the reasonableness of the Valuer's decision.

Paragraphs 16(13) and (14)

79. Observing that no administration order had ever been sought by the board of Bradford & Bingley, Mrs Williams challenges the accuracy of the Valuer's statements in paragraph 16(13) and (14). I cannot see any merit in that challenge. It is right that the Transfer Order took effect in the morning of 27 September; there was therefore no opportunity for the board of Bradford & Bingley to apply for an administration order before the Transfer Time. Consequently the Valuer's statutory obligation to determine the amount of compensation was duly engaged.

Paragraph 16(17)

80. The next argument advanced by Mrs Williams is that the Valuer would not have known that no residual surplus would have been available in the administration for distribution to the Shareholders. This is because there was no administration order. That argument, in my view, overlooks the impact of the Withdrawal Assumption which is that all financial assistance provided by the Bank of England has been withdrawn. To the extent that Mrs Williams is challenging that Assumption, her argument cannot succeed because it seeks to advance a Non-Admissible Issue.

The challenges to paragraphs 16(16)-(18)

81. The first of Mrs Williams' allegations is that the Valuer wrongly interpreted and applied the expression "immediately before the Transfer Time". I have already observed that there is no reasonable prospect of this argument succeeding.

82. The second argument advanced by Mrs Williams is that the Valuer wrongly applied the Withdrawal Assumption as regards SLS. She contends that the Bank of England had not in fact stopped Bradford & Bingley's SLS; consequently Bradford & Bingley had enough money at the Transfer Time. To the extent that that argument challenges the existence of the Withdrawal Assumption it has no impact on the question of whether the Valuer's determination was reasonable having regard to the law as prescribed in the Compensation Scheme. More to the point, however, the challenge is based on an obvious misunderstanding of the effect of the Withdrawal Assumption. For the reasons that I have given, the Valuer was right in concluding that the SLS was not "ordinary market assistance". He was therefore bound to leave the SLS out of account when making the Valuation in accordance with the relevant Statutory Assumption.

Paragraph 22

83. Mrs Williams objected to the Valuer's acceptance that the SLS was not "ordinary market assistance", as that expression is defined in section 5(5)(b) of the Banking Act, for the purposes of the No Future Assistance Assumption in section 5(4). I have already rejected that objection.

Paragraph 27

84. Mrs Williams attacks a number of propositions advanced by the Valuer in paragraph 27 of the Statement of Case. There he had explained how he had dealt with particular complaints directed at his determination that if the Transfer Order had not been made Bradford & Bingley would have successfully applied for an Administration Order before the Transfer Time and that an Administration Order would have been made in respect of Bradford & Bingley either before the Transfer Time or shortly after that. Mrs Williams observed that in paragraph 27(9) the Valuer had expressed the opinion (in the light of the circumstances summarised in subparagraphs (8)-(10)) that a core liquidity position of around £2.1 billion represented excess liquidity over Bradford & Bingley's minimum liquidity requirement imposed by the FSA of around £1 billion (on the most favourable of the bases reported by Bradford & Bingley to the FSA). However, the Valuer notes, that level of liquidity was insufficient to cover projected retail outflows and wholesale funding maturities in the week commencing Monday 29 September 2008 without breaching that minimum liquidity requirement. Mrs Williams' objection was that the projection had not been "based on fact and therefore this valuation is unreasonable and it should be reporting what actually happen throughout." I cannot accept that. The legislation (and particularly section 5(4) and (5) of the Banking Act) requires the Valuer to conduct a valuation on the assumed basis that Bradford & Bingley was not

nationalised and that all "financial assistance" was withdrawn. The argument to the contrary does not raise a comprehensible ground of challenge to the valuation and in my view has no chance of success.

85 Mrs Williams addresses the Valuer's conclusion in paragraph 27(11) that "absent sufficient support from the Treasury (which the No Future Assistance Assumption requires the Valuer to exclude) immediately before the Transfer Time there was no realistic alternative available to Bradford & Bingley other than administration". Mrs Williams contends that the Valuer is in error on this. She gives as her reasonable belief that it "is clear that the Government/HMT made a decision long before the deadline" to support Bradford & Bingley; and, she says, "To support my belief I request all correspondence between HMT and anyone relevant to Bradford & Bingley's from 2007 to present." I cannot see how such evidence would have given support to Mrs Williams' case. This is because the Valuer was required by the Withdrawal Assumption to assume the financial assistance would be withdrawn.

86. I should add that, as mentioned in relation to Mr Green's Notice, the relevant provisions for disclosure in the Financial Services & Markets Tribunal Rules 2001 were excluded for present purposes by the effect of the Schedule to the Compensation Scheme Order.

Paragraphs 28-31

87. In paragraphs 28-31 the Valuer addresses complaints that had been raised in connection with his determination that no residual surplus would have been available from the administration of Bradford & Bingley for distribution to the shareholders. As I interpret Mrs Williams' objection, it is that the Valuer would not have known that no residual surplus would have been available for distribution; this was because there had not been any administration order. Mrs Williams' argument, as I understand it, overlooks the fact that section 5(4) requires the Valuer to assume that all financial assistance has been withdrawn. To the extent that she is seeking to have that statutory assumption disregarded, this must be wrong as a matter of law. Any challenge on her part to the relevant assumption will therefore be a Non-Admissible Issue.

Paragraph 38(3)

88. Mrs Williams draws attention to the take-over approach by Resolution Ltd shortly before the Transfer Time. She alleges that the Valuer was incorrect and biased in failing to take that into account. On that basis the Valuation had, she claimed, been unreasonable. I note from the Statement of Case that the Valuer admits that in June 2008 Resolution Ltd had indeed expressed interest in making a significant equity investment in Bradford & Bingley based on a subscription price of 72p per share. This expression of interest had not progressed to the stage where Resolution Ltd had been given access to the books and records of Bradford & Bingley. The matter was duly addressed by the Valuer in section 6 of the Revised Assessment Notice where it was observed that there had been a significant deterioration in market

conditions from June 2008 until the valuation point immediately before the Transfer Time. In those circumstances, and taking into account the Administration Determinations, the Valuer asserts that he had been correct not to have placed reliance on the June 2008 expression of interest by Resolution Ltd.

89. I can see no reason for displacing the Valuer's conclusions as summarised above. Moreover Mrs Williams' allegation is based on assertion and fails to contain any particulars that make it a comprehensible ground of challenge to the valuation.

Paragraph 38(4)

90. The Valuer accepts that since the Transfer Time Bradford & Bingley has indeed benefitted from significant financial assistance from the Treasury. Mrs Williams emphasises the recent financial performance of Bradford & Bingley and the fact that Bradford & Bingley has made a profit since the Transfer Time. The Valuer acknowledged this but observed that the No Future Assistance Assumption required the valuation to be prepared on the basis that such assistance would not have been provided to Bradford & Bingley and that the valuation was required to have been prepared on a statutory basis immediately before the Transfer Time. Mrs Williams' responses were to assert that "the Valuer is unreasonable (because the past relates to the present) because he has refused to fully investigate Bradford & Bingley both past and present relevant to shareholders". I cannot accept that. Her argument, as I understand it, fails to take account of the Statutory Assumptions. Her retort is that those assumptions "victimise the common man". Nonetheless the Assumptions, as prescribed by the Compensation Scheme, were, for reasons I have given, properly applied by the Valuer. I therefore have to reject Mrs Williams' arguments. In my view they have no reasonable prospect of success.

Bradford & Bingley's indebtedness to Barclays Bank

91. Mrs Williams noted from the Revised Assessment Notice (paragraphs 9.15 and 9.16) that the Valuer had looked at the implications of a £1 billion borrowing from Barclays Bank. That borrowing had been secured over £1.7 billion of mortgage assets plus £0.2 billion of liquid assets as collateral. The Valuer had estimated that the assets held as security would have been realised at a discount of approximately 15% (i.e. for £1.6 billion) giving Bradford & Bingley a loss of around £0.3 billion. On that basis Bradford & Bingley would have received repayment in full plus an element of post-administration interest. Mrs Williams (as I understand her case) alleges that the Valuer should have assumed that an administrator would have negotiated a lower repayment settlement with Barclays Bank and so, presumably, left more to be distributed to the shareholders. I accept the Valuer's case that an administrator would not, in that situation, have sought to induce a creditor such as Barclays Bank to settle at an undervalue or otherwise compromise the claim: to do so could have exposed the administrator to liability. Moreover, for any assumed administrator to have sought to persuade a creditor (such as Barclays Bank) to agree a reduction in its entitlement in order to increase the dividend available to creditors would not be consistent with the purposes of there being an administration: see

paragraph 3 of Schedule B1 to the Insolvency Act 1986 (quoted in paragraph 9 of the Assessment Notice). Mrs Williams' contention to the contrary has in my view no reasoned basis. I cannot therefore see that it has any realistic prospect of success.

The brand value of Bradford & Bingley

92. Mrs Williams contended that the Valuer had incorrectly ignored the brand value of Bradford & Bingley within the Assessment Notice. Moreover, she pointed out, "Abbey" had continued to use the Bradford & Bingley brand for a period of time. In paragraph 9.31 of the Revised Assessment Notice the Valuer recognises that brand assets can in some instances be sold by an administrator for material value. But that would not have been the case in the present circumstances. Much of the value of a bank's "brand" assets arises, the Valuer says, through the confidence that customers, particularly depositors, derive. If Bradford & Bingley had entered administration, this would have eroded this confidence and with it the value of the brand assets. On that basis the Valuer did not consider that an administrator could have realised significant value from the disposal of the brand or related assets. He goes on to acknowledge that Abbey continued to use the Bradford & Bingley brand for a period of time but ultimately undertook to rebrand Bradford & Bingley. Taking those factors into account, however, he had reasonably concluded that the value of Bradford & Bingley's brand assets was not material to his assessment.

93. Mrs Williams produces no further reasoning or evidence to support her assertions relating to "brand value". I do not therefore consider that her allegation raises a comprehensible ground of challenge to the valuation. In saying – "I note that Abbey continued to use the Bradford & Bingley brand for a period of time …" the Valuer was not agreeing or conceding that he was wrong. He was pointing to the fact that Abbey did not perceive there to be sufficient value in the brand name to continue using it.

Further points taken by Mrs Williams

94. Mrs Williams contends that the valuation is based on laws that are flawed and ambiguous in favour of HMT, full of assumptions and the use of scenarios which aim to victimise the common man. Thus the Valuer's decision is unreasonable as it has been based on unclear rules and regulations. In this connection she refers to expressions used by the Valuer such as "in my view" and "in my opinion". Those, she says, emphasise the lack of clarity in the law.

95. For reasons already given I cannot see that this is a sustainable or even proper argument. The Valuer is required to address the directions in the Compensation Scheme as enacted. He is required to make his own interpretation of the particular rules. To the extent that the allegation made by Mrs Williams is that the legislation is biased and unreasonable, I have already explained that that is a Non-Admissible Issue. So far as the Valuer uses expressions such as "in my view" or "in my opinion" this does not raise any possible ground of challenge. Valuers are required to use such language by the nature of their task.

96. Mrs Williams complains that the relevant legislation was rushed through and that the goal posts were moved. On that basis, she said, the Valuation is unreasonable. Those points are, in my view, unarguable. They amount to complaints about the legislation itself and as such are Non-Admissible Issues.

97. Mrs Williams then complains that she had not been provided with the requisite correspondence between Bradford & Bingley and others. I cannot see how that affects the Valuation or its reasonableness. It appears to relate to her desire to find evidence to support her allegation that the Government itself acted unreasonably.

98. Mrs Williams then alleges incompetence on the part of the Valuer evidenced, she says, by his admission that the legislative requirements were "far from clear". If there were a genuine debate as to the meaning of a particular legislative requirement in the Compensation Scheme, that might raise an Admissible Issue, assuming that it impacted on the decision as to valuation. As I read the Revised Assessment Notice, however, the Valuer has indeed addressed all matters required by statute for the purpose of his Valuation. Mrs Williams has not alleged any particular error of law on his part. I cannot therefore see that her argument on this score stands any reasonable chance of success.

99. Mrs Williams then contends that the legislation is too vague and obscure for it to enable any reliable valuation to be made. This, as I see it, amounts to a challenge to the legislation and as such is a Non-Admissible Issue.

Conclusions on Mrs Williams' contentions

100. For the reasons given in relation to each of the points advanced by Mrs Williams, I have concluded that they either have to be struck out by this Tribunal on the basis that they relate to Non-Admissible Issues or they should be struck out as a matter of the Tribunal's discretion because there is no reasonable prospect of their succeeding (or for both reasons). I would, however, like to pay tribute to the industry of Mrs Williams which has produced, for the benefit of herself and for all the other Affected Shareholders, a wide range of arguments for testing and challenging the Valuer's decision. I can think of no other points that could have been raised in support of her case. I therefore strike out her reference.

Direction

101. For the reasons given in this Decision I direct that the References of the five Applicants be struck out.

Appeal

102. Pursuant to section 13(11) if the Tribunals, Courts and Enforcement Act 2007, the Court of Appeal in England and Wales is specified as the relevant appellate court.

103. I do not consider that this Decision or any parts of it are such that I should grant permission to appeal to the Court of Appeal. The five Applicants are notified, pursuant to Rule 45(4)(b) of the Upper Tribunal Rules, of the right to make an application to the Court of Appeal for permission to appeal. Such application is to be made within 21 days of the date of release of this Decision and must be made in accordance with Part 52 of the Civil Procedure Rules.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL

Release Date: 19 July 2012

THE SCHEDULE

The Statement of Case of the Valuer

Introduction

1 This is the Statement of Case of the Respondent (the **Valuer**). It is made in accordance with paragraph 4 of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and the directions made by the President of the Upper Tribunal (the **Tribunal**), Tax and Chancery Chamber on 23 March 2011 and 28 April 2011.

2. The Valuer was appointed by Her Majesty's Treasury (the **Treasury**) on 24 June 2009 as independent valuer for the purposes of The Bradford & Bingley plc Compensation Scheme (the **Scheme**). The Scheme is established under The Bradford & Bingley plc Compensation Scheme Order 2008 (SI 2008/3249) (the **Compensation Scheme Order**), which came into force on 19 December 2008.

3. Under paragraphs 3 and 6 of the Schedule to the Compensation Scheme Order (the **Schedule**), the Valuer is required to determine the amount of any compensation payable under the Scheme by the Treasury to persons (**Shareholders**) who held ordinary shares (**Shares**) issued by Bradford & Bingley plc (**Bradford & Bingley**) immediately before they were transferred to the Treasury Solicitor, as nominee for the Treasury, by The Bradford & Bingley plc Transfer of Securities and Property etc. Order 2008 (SI 2008/2546) (the **Transfer Order**), which came into force at 8.00 a.m. on 29 September 2008.

4. The amount of compensation payable under the Scheme by the Treasury to a Shareholder is required to be "an amount equal to the value immediately before the transfer time of all shares in Bradford & Bingley held immediately before the transfer time by that person".[1] The "transfer time" is defined as "8.00 a.m. on 29th September 2008"[2] (the **Transfer Time**).

5. Following a detailed investigation and analysis of the condition of Bradford & Bingley immediately before the Transfer Time[3], the Valuer issued an assessment notice (the **Assessment Notice**) on 5 July 2010 in accordance with paragraph 10 of the Schedule. The Assessment Notice explained that the Valuer had determined that no compensation is payable by the Treasury to Shareholders under the Scheme (the **Valuation**) and set out the Valuer's reasons for the Valuation.[4]

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[1] Schedule, paragraph 3(2).

[2] Schedule, paragraph 2.

[3] Assessment Notice, paragraph 1.3.

[4] Paragraph 4 of the Schedule also refers to persons whose rights or other entitlements ("**Subscription Rights**") to receive Shares were extinguished by article 5 of the Transfer Order. The amount of compensation payable to holders of Subscription Rights is required to be an amount equal to the value of their Subscription Rights immediately before the Transfer Time. The Valuer's conclusion

6. The Assessment Notice invited anyone dissatisfied with it to request the Valuer to reconsider the Valuation. Following consideration of such requests, the Valuer issued a revised assessment notice (the **Revised Assessment Notice**) on 14 March 2011 in accordance with paragraph 11 of the Schedule.[5] The Revised Assessment Notice explained that the Valuer upheld the Assessment Notice and the Valuation. The Valuer's reasons for doing so were set out in the Revised Assessment Notice.

7. Paragraph 12 of the Schedule provides that persons who are affected by the determination of the amount of any compensation which is contained in the Revised Assessment Notice and who are dissatisfied with the Revised Assessment Notice may refer the matter to the Tribunal.

8. At the date of this Statement of Case, the Valuer has received a copy of over 700 Reference Notices (**Notices**) that he understands have been sent to the Tribunal challenging the Valuation.[6]

The test to be applied by the Tribunal

9. Part 5 of the Schedule (as amended by paragraph 176(d) to (j) of Schedule 3 to The Transfer of Tribunal Functions Order 2010 (SI 2010/22)) sets out provisions governing references to the Tribunal made under paragraph 12 of the Schedule. They provide for Part 9 of the Financial Services and Markets Act 2000 (**FSMA**) to apply in respect of such references, subject to certain modifications. One such modification is to section 133(5) FSMA which, according to paragraph 17(ii) of the Schedule (as amended by paragraph 176(h)(ii) of Schedule 3 to The Transfer of Tribunal Functions Order 2010 (SI 2010/22)), is substituted by the following[7]:

> "Where the Tribunal is satisfied that the decision as to the amount of compensation shown in the revised assessment notice was not a reasonable

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that the Subscription Rights had no value immediately before the Transfer Time followed from his conclusion that Shares had no value at that time. None of the Reference Notices seen by the Valuer make any separate arguments specifically in relation to Subscription Rights rather than Shares and this Statement of Case therefore focuses on Shares only.

[5] Under paragraphs 5 and 6 of the Schedule the Valuer is also required to determine the amount of any compensation payable under the Scheme by the Treasury to persons whose rights were extinguished by virtue of the provision made in article 6 or 7 of the Transfer Order. The only such rights identified by the Valuer were rights relating to certain dated subordinated notes. On 5 July 2010 the Valuer issued a separate assessment notice in respect of extinguished rights relating to dated subordinated notes in accordance with paragraph 10 of the Schedule. No requests for reconsideration were received by the Valuer in respect of that assessment notice and therefore the Valuer did not issue a revised assessment notice in respect of extinguished rights relating to dated subordinated notes.

[6] The Valuer has not verified that any applicant is affected by the Valuation for the purpose of paragraph 12 of the Schedule.

[7] The unmodified section 133(5) FSMA provides: "The Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it."

decision the Tribunal must remit the matter to the valuer for reconsideration in accordance with such directions (if any) as they consider appropriate." (Underlining added.)

10. It follows from the modified section 133(5) FSMA that:

(1) The Valuation is subject to review by the Tribunal only on the ground of unreasonableness. The Tribunal is limited to considering whether the Valuation is one that a reasonable valuer, directing himself properly as to the law, might have made. Within the bounds of reasonableness, the Tribunal has no power to direct the Valuer to adopt any particular approach.

(2) Only the Valuer is competent to make the Valuation. The Tribunal has no power to substitute a different Valuation, but only to remit the matter to the Valuer for reconsideration (together with such directions as may be required to avoid a repetition of the unreasonableness found to exist).

The statutory assumptions

11. In performing the Valuation the Valuer is required by section 5(4) of the Banking (Special Provisions) Act 2008 (the **Banking Act**) to make certain assumptions, namely:

(1) "that all financial assistance provided by the Bank of England or the Treasury to the deposit-taker in question has been withdrawn (whether by the making of a demand for repayment or otherwise)" (the **Withdrawal Assumption**); and

(2) "that no financial assistance would in future be provided by the Bank of England or the Treasury to the deposit-taker in question (apart from ordinary market assistance offered by the Bank of England subject to its usual terms)" (the **No Future Assistance Assumption**).[8]

12. Section 5(5)(a) of the Banking Act provides that for the purposes of section 5(4) of the Banking Act "the references to the provision of financial assistance by the Treasury to the deposit-taker include any case where the Chancellor of the Exchequer announces that the Treasury (whether acting alone or with the Bank of England) would, if necessary, put in place relevant guarantee arrangements in relation to the deposit-taker (as well as any case where any such arrangements are put in place, whether or not following such an announcement)."

[8] The Northern Rock plc Compensation Scheme Order 2008 (SI 2008/718) contains the additional assumptions that Northern Rock plc is unable to continue as a going concern and is in administration. The Schedule contains no equivalent assumptions in respect of Bradford & Bingley.

13. Section 15(1) of the Banking Act also gives a non-exhaustive meaning to "financial assistance". It provides that "financial assistance", in relation to any person, includes:

> "(a) assistance provided by way of loan, guarantee or indemnity,
>
> (b) assistance provided by way of any transaction which equates, in substance, to a transaction for lending money at interest (such as a transaction involving the sale and repurchase of securities or other assets), and
>
> (c) assistance falling within paragraph (a) or (b) provided indirectly to or otherwise for the benefit of the person (including the provision of assistance within paragraph (a) or (b) to any group undertaking of that person),
>
> whether provided in pursuance of an agreement or otherwise and whether provided before or after the passing of this Act".

14. Section 5(5)(b) of the Banking Act gives an exhaustive definition to "ordinary market assistance". It provides that for the purposes of section 5(4) of the Banking Act "ordinary market assistance" means "assistance provided as part of the Bank's standing facilities in the sterling money markets or as part of the Bank's open market operations in those markets."

The Valuer's reasons and matters and facts relied upon

15. The Valuer's reasons for the Valuation and the matters and facts upon which the Valuer relies to support the Valuation are those set out in the Assessment Notice and the Revised Assessment Notice.

16. Without prejudice to the generality of the foregoing, in summary the Valuation is based on the following principal reasons, matters and facts:

(1) Immediately before the Transfer Time the almost total closure of the wholesale lending market meant that the principal source of liquidity for Bradford & Bingley was the Bank of England.

(2) Continued access to the Bank of England's Special Liquidity Scheme ("**SLS"**) was a vital aspect of Bradford & Bingley's liquidity management plans.

(3) During the week commencing 22 September 2008 the Bank of England did not approve Bradford & Bingley's request for further access to the SLS. The reason provided by the Bank of England was that the rating agency, Fitch Ratings, had placed part of the collateral (covered bonds) tendered by Bradford & Bingley to the Bank of England for the purpose of the SLS on negative watch and would downgrade that collateral if it was not restructured.

(4) Bradford & Bingley would not have been able to restructure that collateral, or to take other steps to manufacture eligible SLS collateral to tender to the Bank

of England, sufficiently quickly to enable it to seek to obtain further SLS funding to address its liquidity issues.

(5) In any event, use of the SLS would amount to financial assistance by the Bank of England which is not "ordinary market assistance offered by the Bank of England subject to its usual terms" within the meaning of section 5(4) of the Banking Act. The No Future Assistance Assumption therefore requires the Valuation to be prepared on the basis that Bradford & Bingley would be unable to continue to use the SLS.

(6) On 27 September 2008 the FSA concluded that Bradford & Bingley was failing to satisfy the threshold conditions set out in Part 1 of Schedule 6 to FSMA in that, in the opinion of the FSA, Bradford & Bingley had not satisfied the FSA that its resources were adequate in relation to the regulated activities that it carried on. In particular, having regard to all the circumstances, in the opinion of the FSA Bradford & Bingley's capital resources and liquidity resources were inadequate.

(7) The FSA issued a First Supervisory Notice (the **FSA Notice**) to Bradford & Bingley on 27 September 2008 pursuant to section 45(1)(a) and (c) FSMA. The FSA Notice varied the permission to carry on regulated activities granted to Bradford & Bingley under Part IV FSMA by imposing a requirement that Bradford & Bingley must not accept any deposits from new customers with effect from 7.00 a.m. (changed by a later notice to 9.00 a.m.) on 29 September 2008. The FSA Notice stated that it would not take effect if Bradford & Bingley was transferred into public ownership prior to that time.

(8) In the days prior to the Transfer Time Bradford & Bingley experienced outflows of retail deposits and the Board of Bradford & Bingley expected significant outflows of retail deposits on Monday 29 September 2008.

(9) Bradford & Bingley faced significant wholesale funding maturities soon after the Transfer Time.

(10) As at the Transfer Time Bradford & Bingley had received SLS funding of £4.9 billion. The Withdrawal Assumption requires the Valuation to be prepared on the basis that this funding has been withdrawn.

(11) If there had been no Transfer Order, Bradford & Bingley would have been unable to find an adequate source of liquidity and its liquidity position would have prevented it from continuing as a going concern.

(12) No potential private sector solution was available to Bradford & Bingley immediately before the Transfer Time that was compatible with the No Future Assistance Assumption.

(13) The Board of Bradford & Bingley resolved over the weekend of 27 and 28 September 2008 that in the event that no clear Government decision as to the future of Bradford & Bingley was communicated in a timely manner before the markets were due to open on Monday 29 September 2008, an application to court for an administration order should be made before the markets opened.

(14) If there had been no Transfer Order, Bradford & Bingley would have applied to court for an administration order before the Transfer Time.

(15) An administration order would have been made in respect of Bradford & Bingley either before the Transfer Time or shortly thereafter.

(16) The appropriate basis of value is the economic value of Shares, represented by the value immediately before the Transfer Time of the cash flows that a Shareholder would have received in the administration of Bradford & Bingley.

(17) Taking into account the impact of the Withdrawal Assumption, an administration of Bradford & Bingley would have allowed the repayment of all principal outstanding on debts and would have generated a surplus of approximately £5 billion. This surplus would have been used in full in meeting post-administration interest. Accordingly, no residual surplus would have been available in the administration for distribution to Shareholders.

(18) It follows that immediately before the Transfer Time the Shares had no value and therefore no compensation is payable by the Treasury to Shareholders under the Scheme.

Challenges to the Valuation

17. This Statement of Case is intended to respond to the Notices received by the Valuer at the date of this Statement of Case to the extent that they raise complaints falling within one or more of the following six categories:[9]

(1) Complaints about the Valuer's interpretation and application of the statutory assumptions contained in section 5(4) of the Banking Act.

(2) Complaints about the Valuer's determination that if the Transfer Order had not been made Bradford & Bingley would have applied to court for an administration order before the Transfer Time and an administration order

[9] The Valuer proposed in a note to the Tribunal dated 18 April 2011 that this Statement of Case should only address complaints falling within one or more of these six categories. The Tribunal communicated to the Valuer its provisional approval of the six categories on 4 May 2011.

would have been made in respect of Bradford & Bingley either before the Transfer Time or shortly thereafter.

(3) Complaints about the Valuer's determination that no residual surplus would have been available from the administration of Bradford & Bingley for distribution to Shareholders.

(4) Complaints about how the Valuer has addressed in the Valuation the sale of the Bradford & Bingley deposit book and branch network to Abbey National plc ("**Abbey**").

(5) Other complaints about the Valuer's valuation approach and methodology.

(6) Complaints of bias or a lack of independence or impartiality in relation to the Valuation.

18. Rather than addressing each Notice separately, the Valuer has sought to identify common complaints made by applicants falling within one or more of the six categories listed above and to address each such complaint.

19. If and to the extent that the Tribunal considers that the Valuer, in adopting the above approach, has omitted to respond to any complaints – whether on the basis of an incorrect assessment as to whether they fall within one of the six categories listed above, or because the Tribunal determines that the Valuer should address an additional category of complaints, or as the result of erroneously treating two or more distinct complaints as raising the same point – the Valuer will seek permission to submit a supplemental Statement of Case on those complaints.

<u>Complaints category 1:</u> Complaints about the Valuer's interpretation and application of the statutory assumptions contained in section 5(4) of the Banking Act

20. A number of the Notices[10] challenge the Valuer's interpretation and application of the No Future Assistance Assumption on the basis that the Valuer was wrong to determine that the use of the SLS by Bradford & Bingley was not "ordinary market assistance offered by the Bank of England subject to its usual terms" within the meaning of section 5(4) of the Banking Act.

21. The following main arguments and alleged facts and matters are advanced in Notices in support of this challenge:

(1) More than thirty banks used or use the SLS.

[10] For example, the Notices with case references BB/0120/2011 and BB/0123/ 2011

(2) Asset swaps under the SLS could be renewed for a total of up to three years.

(3) The SLS had in effect become part of the normal operations of the Bank of England to maintain adequate market liquidity.

(4) The SLS was replaced by other similar measures to improve liquidity in the money markets – specifically the "Quantitative Easing programme" which, it is said, included an "Asset Purchase Facility" and a "Secured Commercial Paper Facility" providing similar facilities to the SLS. These measures have continued to underpin the operation of the money markets and therefore, it is said, have in practice become a normal part of the operations of the Bank of England since 2008.

(5) It is argued that the Government has, in its negotiations with the European Commission, "specifically argued to the EC that the SLS is part of the normal working of the BoE in order to justify the £61 billion support operation of the Royal Bank of Scotland and Halifax, Bank of Scotland some eight days after the nationalisation of B&B." Reliance is placed on a Commission document headed "Financial Support Measures to the Banking Industry in the UK" and dated 13 October 2008 by which the Commission notified its decision that various measures notified by the Government, including a proposal to make available about £200 billion to eligible banks under the SLS, were compatible with the common market. The document includes the following passage which, it is argued, records that the Government has accepted that the SLS is part of the Bank of England's "ordinary market assistance":

> "The UK authorities accept that the recapitalisation scheme and guarantee scheme contain State aid elements. In their view the extension of the SLS is part of the essential role of the Bank of England and therefore not a state aid. In the event that the Commission concludes that the Liquidity Measures do contain aid elements, the UK Government submits that they form part of a wider package to remedy a serious disturbance in the economy of the United Kingdom which is compatible with the common market."

(6) It is argued that the following extract from the statement of Lord Myners in a House of Lords debate on 15 December 2008 suggests that "the Government considered the SLS loans were ordinary market assistance":

> "By contrast, no such guarantee arrangements had been provided to Bradford & Bingley, and the Bank of England had provided no loan facilities to it that were not also open to all qualifying institutions. As a result, it is right to impose no further assumptions beyond the mandatory assumptions under the Banking (Special Provisions) Act 2008."

22. The Valuer's reasons for rejecting the challenge on the "ordinary market assistance" point and his position on each of the arguments and alleged facts and matters listed in

paragraph 21 above are set out in section 2 of the Assessment Notice and section 3 of the Revised Assessment Notice.[11]

23. Without prejudice to the generality of the foregoing, in summary the Valuer relies on the following principal reasons, facts and matters:

(1) An exhaustive definition of the words "ordinary market assistance" is set out in section 5(5)(b) of the Banking Act. Section 5(5)(b) of the Banking Act provides that for the purposes of section 5(4) of the Banking Act "ordinary market assistance" means "assistance provided as part of the Bank's standing facilities in the sterling money markets or as part of the Bank's open market operations in those markets."

(2) The terms "the Bank's standing facilities in the sterling money markets" and "the Bank's open market operations in those markets" are references to two of the elements ("standing facilities" and "open market operations") of the Bank of England's published framework (the **Sterling Monetary Framework**) for its operations in the sterling money markets.

(3) The documentation governing participation in the Bank of England's operations under the Sterling Monetary Framework set out at all material times an official statement of what its standing facilities and open market operations in the sterling money markets comprised. The SLS was not part of those standing facilities or open market operations.

(4) The Bank of England has confirmed to the Valuer that at all material times the only activities that it considered to be standing facilities and open market operations carried out by it in the sterling money markets were those described in the documentation governing participation in the Bank of England's operations under the Sterling Monetary Framework.

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[11] A number of Notices also enclose a copy of (or express general reliance on) a letter that was sent to the Valuer in August 2010 by the Chairman of the "Bradford & Bingley Shareholder Action Group". The letter was one of the requests for reconsideration of the Assessment Notice that the Valuer considered before issuing the Revised Assessment Notice (see paragraph 6 above). The letter contains a number of arguments that the use of the SLS is "ordinary market assistance offered by the Bank of England subject to its usual terms" within the meaning of section 5(4) of the Banking Act. The Valuer's position in relation to each of these arguments is set out in section 3 of the Revised Assessment Notice. The Valuer understands that no Notice has been submitted by anyone on behalf of the "Bradford & Bingley Shareholder Action Group". To the extent that any applicants whose Notices make reference to the letter intend to pursue arguments on the "ordinary market assistance" point that are set out in the letter and which are not covered by the facts and matters listed at paragraph 21 above, the Valuer's position on such arguments is as set out in section 3 of the Revised Assessment Notice. Similarly, to the extent that any applicants whose Notices make reference to the letter intend to pursue arguments on any other points that are set out in the letter, the Valuer's position on such arguments is as set out in the Revised Assessment Notice.

(5) There are differences in purpose between the SLS on the one hand and the Bank of England's standing facilities and open market operations on the other. Unlike the standing facilities and open market operations, the SLS had no direct implications for monetary policy and was not designed to align market interest rates with the official Bank Rate. The sole purpose of the SLS was to improve the liquidity of the banking system.

(6) There are differences in structure between the SLS on the one hand and the Bank of England's standing facilities and open market operations on the other. The SLS was a form of asset swap relating only to securities on balance sheet (or formed of assets on balance sheet) at the end of December 2007 and did not provide liquidity to the banking system directly in the form of cash (as was the case with the standing facilities and open market operations).

(7) In relation to the alleged facts and matters listed at paragraph 21(1) and (2) above, the SLS was used by over 30 banks and building societies[12] and asset swaps under the SLS could be renewed for a total of up to three years[13]. That is, however, irrelevant to the question of whether the SLS was part of the relevant elements of the Sterling Monetary Framework (and therefore constituted "ordinary market assistance" for the purpose of the Banking Act). It was not.

(8) The Valuer does not accept the argument recorded at paragraph 21(3) above that the SLS had in effect become part of the normal operations of the Bank of England to maintain adequate market liquidity. The name "Special Liquidity Scheme" suggests a scheme that is out of the ordinary and the SLS was described as "exceptional" by the Bank of England in its consultative paper published in October 2008 entitled "The Development of the Bank of England's Market Operations". The SLS was also out of the ordinary in the sense that it was only open for drawdown for a limited period and applied only to assets held at a particular balance sheet date. In any event, the argument that the SLS became part of the Bank of England's "normal operations … to maintain adequate market liquidity" is irrelevant to the question of whether the SLS was part of the relevant elements of the Sterling Monetary Framework (and therefore constituted "ordinary market assistance" for the purpose of the Banking Act).

(9) In relation to the argument concerning the "Quantitative Easing programme" recorded at paragraph 21(4) above, an assertion that other assistance that is similar to the SLS has in practice become a normal part of the Bank of England's operations does not mean that the SLS was "ordinary market assistance" for the purpose of the Banking Act. That, again, is irrelevant to the question of whether the SLS was part of the relevant elements of the Sterling Monetary Framework. In any event, the measures referred to are not similar to the SLS.

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[12] Assessment Notice, paragraph 3.7; Revised Assessment Notice, paragraph 3.35.

[13] Revised Assessment Notice, paragraph 3.29.

(10) The argument described at paragraph 21(5) above based on the European Commission document headed "Financial Support Measures to the Banking Industry in the UK" and dated 13 October 2008 is also irrelevant to the question of whether the use of the SLS constitutes "ordinary market assistance" for the purpose of the Banking Act. That question relates to a statutory definition which has no necessary relationship to the criteria being applied by the Commission in relation to state aid.

(11) In relation to the argument described in paragraph 21(6) above, the extract from Lord Myners' speech relied on does not support a view that use of the SLS is "ordinary market assistance" for the purpose of the Banking Act. The fact that all of the banks and building societies that were eligible to sign up to the standing facilities within the Sterling Monetary Framework were able to take part in the SLS does not mean that the SLS was part of the relevant elements of the Sterling Monetary Framework and therefore constituted "ordinary market assistance" for the purpose of the Banking Act.

<u>Complaints category 2:</u> Complaints about the Valuer's determination that if the Transfer Order had not been made Bradford & Bingley would have applied to court for an administration order before the Transfer Time and an administration order would have been made in respect of Bradford & Bingley either before the Transfer Time or shortly thereafter

24. In section 3 of the Assessment Notice the Valuer determined that if there had been no Transfer Order Bradford & Bingley would not have had adequate liquidity to continue as a going concern, the London Stock Exchange would have suspended trading in the Shares before the Transfer Time, Bradford & Bingley would have applied to court for an administration order before the Transfer Time and an administration order would have been made by the court in respect of Bradford & Bingley either before the Transfer Time or shortly thereafter (the **Administration Determinations**). Sections 4 and 6 of the Revised Assessment Notice addressed a number of arguments that were made to the Valuer to challenge the Administration Determinations.

25. A number of the Notices[14] challenge the Administration Determinations. The following main arguments and alleged facts and matters are advanced in Notices in support of this challenge:

(1) Bradford & Bingley was not placed in administration and has traded since the Transfer Time as a going concern.

(2) The support that Bradford & Bingley has received since the Transfer Time from the Treasury and the Bank of England is no different to the support that has been given to other UK regulated banks.

[14] For example, the Notices with case references BB/0123/2011 and BB/0604/2011.

(3) Immediately before the Transfer Time Bradford & Bingley was well capitalised, having raised an additional £401 million in fresh equity from its shareholders in the rights issue (the **Rights Issue**) that closed on 15 August 2008.

(4) Bradford & Bingley's tier 1 capital ratios were the highest of the UK listed banks and one of the highest in Europe.

(5) The financial statements published by Bradford & Bingley in relation to the Rights Issue (and the related KPMG "audit work") and the interim results for the 6 months ended 30 June 2008 published by Bradford & Bingley on 29 August 2008 evidenced a solvent, well capitalised bank that was a going concern and had net assets of over £1 per Share.

(6) Bradford & Bingley's published shareholder funds as at 30 June 2008, adjusted for the Rights Issue proceeds, were £1545 million.

(7) The Revised Assessment Notice records (at Figure 1 in section 9) that Bradford & Bingley Group shareholder equity as at 29 September 2008 was £1371 million.

(8) As at the Transfer Time Bradford & Bingley was solvent and "had enough funds to take them well into 2009, which would have carried them through the financial crisis."

(9) Bradford & Bingley would have been able to continue as a going concern either (i) without any financial assistance from the Treasury or the Bank of England, alternatively (ii) provided that it received financial assistance from the Treasury or the Bank of England.

(10) Bradford & Bingley could have borrowed funds from the Bank of England under the "lender of last resort facility" to enable it to continue as a going concern whilst it restructured its covered bonds so that they remained eligible for presentation as collateral for the purpose of the SLS.

(11) The FSA had not withdrawn Bradford & Bingley's "banking licence" or sounded any "warning bells".

(12) A private sector buyer could have been found for Bradford & Bingley.

(13) On 25 September 2008 Bradford & Bingley plc issued a press release containing the following quote from Richard Pym, Chief Executive: "We are a strongly capitalised bank now undertaking a complex transition with regrettable

job losses, but we are planning to put the problems of the past behind us and have a business which is fit for purpose going forward."

(14) Rod Kent, the former Chairman of Bradford & Bingley, told the Treasury Select Committee on 18 November 2008 "At the time when we transferred into public ownership we were both solvent and well above our regulatory minimum on capital, we were still well capitalised."

26. The Valuer's reasons for rejecting the challenge to the Administration Determinations and his position on each of the arguments and alleged facts and matters listed in paragraph 25 above are set out in section 3 of the Assessment Notice and sections 4 and 6 of the Revised Assessment Notice.

27. Without prejudice to the generality of the foregoing, in summary the Valuer relies on the following principal reasons, facts and matters:

(1) The Valuer repeats paragraph 16(1) to (15) above.

(2) In relation to the argument recorded at paragraph 25(1) above, the Valuer acknowledges that Bradford & Bingley was not placed in administration and has traded since the Transfer Time as a going concern. However, in accordance with the Administration Determinations, the Valuation has been prepared on the basis that an administration order would have been made by the court in respect of Bradford & Bingley either before the Transfer Time or shortly thereafter. As explained in section 7 of the Revised Assessment Notice, since the Transfer Time Bradford & Bingley has benefitted from significant financial assistance from the Treasury. The No Future Assistance Assumption requires the Valuation to be prepared on the basis that this assistance would not have been provided to Bradford & Bingley. Further, the Valuer has to prepare the Valuation in accordance with the Withdrawal Assumption.

(3) In relation to the argument recorded at paragraph 25(2) above, the similarity or otherwise of the support Bradford & Bingley has received since the Transfer Time from the Treasury and the Bank of England to the support received by other banks is irrelevant to the application of the No Future Assistance Assumption.

(4) There is no significant dispute as regards the facts summarised at paragraph 25(3) to (7) above to the extent that these facts relate to the net asset position and the level of capitalisation of Bradford & Bingley, which were taken into account by the Valuer in preparing the Valuation. As a result of the Rights Issue, Bradford & Bingley's tier 1 capital increased to over 9%, a level that compared favourably with other UK banks. No admission is made as to whether Bradford & Bingley's tier 1 capital ratios were the highest of the UK listed banks and one of the highest in Europe.

(5) Bradford & Bingley's inability to avoid administration was the result of a shortage of liquidity, notwithstanding its positive net assets and its level of capitalisation. The main reasons for this are set out in paragraph 16(1) to (15) above. The facts set out in paragraph 27(7) to (12) below are also particularly relevant in this respect.

(6) The arguments recorded at paragraph 25(8) to (10) above are disputed because, (i) insofar as they rely on the availability of borrowing or other forms of financial assistance from the Treasury or the Bank of England, they are inconsistent with the Withdrawal Assumption and the No Future Assistance Assumption, and (ii) insofar as they do not so rely, they are factually incorrect as explained in paragraphs 16(1) to (15) above and 27(7) to (12) below.

(7) The Board of Bradford & Bingley considered on the evening of 27 September 2008 that Bradford & Bingley was likely to have unacceptably low levels of liquidity within a matter of days, possibly as early as 29 September 2008.

(8) Bradford & Bingley's closing core liquidity position on Friday 26 September 2008 was around £2.6 billion. Retail activity over the weekend was expected to continue and result in significant cash outflows on Monday 29 September 2008. These outflows together with wholesale funding maturities were such that, at 4pm on Sunday 28 September 2008, Bradford & Bingley was projecting a closing core liquidity position on that Monday of around £2.1 billion.

(9) A core liquidity position of around £2.1 billion represented excess liquidity over Bradford & Bingley's minimum liquidity requirement imposed by the FSA of around £1 billion (on the most favourable of the bases reported by Bradford & Bingley to the FSA). However, that level of liquidity was insufficient to cover projected retail outflows and wholesale funding maturities in the week commencing Monday 29 September 2008 without breaching that minimum liquidity requirement.

(10) There was no realistic possibility that Bradford & Bingley could have disposed of assets to avoid breaching its minimum liquidity requirements. The nature of the assets that could have been sold was such that a disposal could only have been achieved at a significant discount in the prevailing market conditions. The value of assets that Bradford & Bingley would have been required to sell to avoid any breach of minimum liquidity requirements would have resulted in losses leading to a breach of applicable capital adequacy requirements.

(11) Consequently, absent significant support from the Treasury (which the No Future Assistance Assumption requires the Valuer to exclude) immediately before the Transfer Time there was no realistic alternative available to Bradford & Bingley other than administration.

(12) The Bank of England would not have been willing to provide support under a

"lender of last resort facility" to Bradford & Bingley. In any event, such support would not constitute "ordinary market assistance offered by the Bank of England subject to its usual terms" for the purpose of section 5(4) of the Banking Act and therefore the No Future Assistance Assumption requires the Valuer to assume that this support would not have been available to Bradford & Bingley.

(13) In relation to the alleged conduct of the FSA recorded at paragraph 25(11) above, the Valuer repeats paragraph 16(6) and (7) above.

(14) In relation to the reliance on a possible private sector buyer recorded at paragraph 25(12) above, the Valuer refers generally to paragraphs 3.23, 3.24 and 4.6 of the Assessment Notice and section 6 of the Revised Assessment Notice. Immediately before the Transfer Time there was no potential private sector solution available to Bradford & Bingley that did not require significant financial support from the Treasury (as was the case in relation to the transfer of the deposit business and branch network to Abbey). The No Future Assistance Assumption requires the Valuer to assume that this support would not have been available to Bradford & Bingley.

(15) Insofar as they assert that Bradford & Bingley had positive net assets and was well capitalised, the facts communicated in the statements of Mr Pym and Mr Kent referred to in paragraph 25(13) and (14) above are admitted. However, insofar as those statements are properly to be read as asserting that Bradford & Bingley had sufficient liquidity and was able to pay its debts as they fell due, the accuracy of such assertions is denied for the reasons set out above.

<u>Complaints category 3:</u> Complaints about the Valuer's determination that no residual surplus would have been available from the administration of Bradford & Bingley for distribution to Shareholders

28. In section 5 of the Assessment Notice the Valuer determined that an administration of Bradford & Bingley would have allowed the repayment of all principal outstanding on debts, that it would have generated a surplus of approximately £5 billion but that this surplus would have been used in full in meeting post-administration interest. Accordingly, the Valuer determined that no residual surplus would have been available for distribution to Shareholders (the **No Residual Surplus Determination**). Section 9 of the Revised Assessment Notice addressed a number of arguments that were made to the Valuer to challenge the No Residual Surplus Determination.

29. A number of the Notices[15] challenge the No Residual Surplus Determination. The following main arguments and alleged facts and matters are advanced in Notices in support of this challenge:

[15] For example, the Notices with case references BB/0123/2011 and BB/0604/2011.

(1) In section 5 of the Assessment Notice and section 9 of the Revised Assessment Notice the Valuer considered the impact of the withdrawal of SLS funding on the balance sheet over which an administrator would have had control at the start of the administration. The Valuer determined that the withdrawal of SLS funding would have resulted in a loss of approximately £750 million. It is argued that the Valuer should not have reduced shareholder equity by this amount in the administrator's opening balance sheet to reflect the withdrawal of SLS funding because Bradford & Bingley's SLS funding was not in fact withdrawn.

(2) The Valuer's determination in section 5 of the Assessment Notice that the impact of the administration would be to reduce the administrator's opening equity position by approximately £1.3 billion to a position of negative equity of £0.9 billion is based on "a series of subjective and highly speculative calculations and assumptions."

(3) In section 5 of the Assessment Notice the Valuer determined that administration would have triggered a winding up of the Bradford & Bingley defined benefit staff pension scheme resulting in a claim to the administration of £0.3 billion. It is argued that Bradford & Bingley's pension deficit was not crystallised and its accounts for the year ended 31 December 2010 show that it has benefitted from a pensions curtailment gain of £13.4 million.

(4) In section 5 of the Assessment Notice the Valuer determined that Bradford & Bingley's tax assets would be of no worth in administration as there would not be any taxable profits during the course of the administration and therefore no tax charge. It is argued, by reference to Bradford & Bingley's accounts for the year ended 31 December 2010, that Bradford & Bingley's deferred tax asset was not written off.

(5) Section 5 of the Assessment Notice and section 9 of the Revised Assessment Notice explained that Bradford & Bingley had borrowed £1 billion from Barclays Bank plc under the Barclays Senior Facility and had granted security over £1.7 billion of mortgage assets together with £0.2 billion of liquid assets as collateral in favour of a security trustee. The Valuer determined that administration of Bradford & Bingley would have led to the enforcement of security on behalf of Barclays by the disposal of the assets over which security was granted at a discount of approximately 15%. The Valuer determined that this would have resulted in Bradford & Bingley incurring a loss of £260 million (rounded to £0.3 billion in the Assessment Notice). It is argued that it is not clear what happened to Bradford & Bingley's Barclays Senior Facility and whether loans were realised at a 15% haircut to book value, but in any event the Valuer's arithmetic in the Assessment Notice was not correct and indeed was amended in the Revised Assessment Notice.

(6) The Valuer has failed to take into account the uplift to shareholder funds from the standard mark to market approach (also described as "the observed market

values"). The methodology adopted by the Valuer applies a haircut to the company assets but fails to consider an uplift to shareholder equity by applying a similar haircut to the company's liabilities, thus reflecting mark to market rather than carrying value. As a result it is said that the amount of shareholder equity recorded in the administrator's opening balance sheet as at 29 September 2008 (Figure 5 in section 5 of the Assessment Notice and Figure 1 in section 9 of the Revised Assessment Notice) is, arguably, substantially understated.

30. The Valuer's reasons for rejecting the challenge to the No Residual Surplus Determination and his position on each of the arguments and alleged facts and matters listed in paragraph 29 above are set out in section 5 of the Assessment Notice and section 9 of the Revised Assessment Notice.

31. Without prejudice to the generality of the foregoing, in summary the Valuer relies on the following principal reasons, facts and matters:

(1) In relation to the argument recorded at paragraph 29(1) above relating to the reduction of shareholder equity in the administrator's opening balance sheet to reflect the withdrawal of SLS funding, the Valuer acknowledges that Bradford & Bingley's SLS funding was not in fact withdrawn prior to the Transfer Time. The Withdrawal Assumption requires the Valuation to be prepared on the basis that Bradford & Bingley's SLS funding has been withdrawn. Further, as explained in paragraph 4.14 of the Revised Assessment Notice, if Bradford & Bingley had entered administration the administration would itself have led to the withdrawal of Bradford & Bingley's SLS funding. Similarly, once effective, the variation of Bradford & Bingley's permission under Part IV FSMA pursuant to the FSA Notice would have led to the withdrawal of Bradford & Bingley's SLS funding.

(2) In relation to the argument recorded at paragraph 29(2) above, that the reduction in the administrator's opening equity position is based on "a series of subjective and highly speculative calculations and assumptions", as explained at paragraph 9.9 of the Revised Assessment Notice, it was necessary for the Valuer to make a series of calculations and assumptions in order to assess the impact of administration on the administrator's opening equity position. Those calculations and assumptions were accurate and reasonable. Further, the Valuer's assumptions about the economic environment, the performance of the mortgage portfolios whilst in administration and the behaviour of the administrator and creditors were generally favourable to Shareholders and collectively result in a scenario that is favourable to Shareholders.

(3) In relation to the argument recorded at paragraph 29(3) above relating to the Bradford & Bingley defined benefit staff pension scheme, it is admitted that Bradford & Bingley's accounts for the year ended 31 December 2010 report a curtailment gain of £13.4 million arising as a result of the closure of the scheme to future service accrual. It is further admitted that the pension deficit was not "crystallised", although a pension deficit of £185.1 million was reported in

Bradford & Bingley's accounts for the year ended 31 December 2010. However:

(i) As explained in section 5 of the Assessment Notice, the administration of Bradford & Bingley (in accordance with the Valuer's Administration Determinations) would have triggered a winding up of the pension scheme resulting in a claim to the administration of £0.3 billion.

(ii) As explained in section 7 and paragraph 9.20 of the Revised Assessment Notice, since the Transfer Time Bradford & Bingley has benefitted from significant financial assistance from the Treasury. The No Future Assistance Assumption requires the Valuation to be prepared on the basis that this assistance would not have been provided to Bradford & Bingley.

(iii) The Valuation must be prepared by reference to the value of Shares immediately before the Transfer Time. Bradford & Bingley's accounts for the year ended 31 December 2010 reflect events that occurred after the Transfer Time and which are irrelevant to the Valuation.

(4) In relation to the argument recorded at paragraph 29(4) above relating to the Bradford & Bingley tax assets:

(i) As explained in section 5 of the Assessment Notice, in an administration of Bradford & Bingley (in accordance with the Valuer's Administration Determinations) there would be no taxable profits.

(ii) Paragraph 31(3)(ii) and (iii) above are repeated.

(5) In relation to the argument recorded at paragraph 29(5) above relating to the Barclays Senior Facility, there was no error, as alleged, in the Valuer's arithmetic on this issue in the Assessment Notice. In relation to the suggestion that it is not clear what has in fact happened in relation to the Barclays Senior Facility, the fact that Bradford & Bingley did not go into administration meant that an administration order did not trigger an event of default leading to the enforcement of the security. It appears from Bradford & Bingley's published financial statements that the Barclays Senior Facility has been redeemed in part by Bradford & Bingley on a number of occasions since the Transfer Time.

(6) In relation to the argument recorded at paragraph 29(6) above relating to "mark to market" value, as explained in section 9 of the Revised Assessment Notice,

the full nominal value of claims remains enforceable in an administration and any discount would only result from commercial negotiation. The Valuer determined that an administration of Bradford & Bingley would have allowed the repayment of all principal outstanding on debts but that the surplus would have been used in full in meeting post-administration interest. An administrator with this expectation would not seek to induce a creditor to settle at an undervalue or otherwise compromise its claim, as to do so would expose the administrator to liability. The only credible reason why a creditor would agree to accept a discount would be the early receipt of payment. Accelerated settlement of individual claims would require that sufficient funds were available. As explained in section 5 of the Assessment Notice, the Valuer has assumed that regular distributions to the creditors would be made over the course of the administration period and therefore an administrator would have had insufficient funds at any point in time to make material compromise payments to creditors or groups of creditors. The Valuer was correct to assume that an administrator would distribute funds to unsecured creditors without preference or early settlement and it is denied that the amount of shareholder equity recorded in the administrator's opening balance sheet as at 29 September 2008 (Figure 5 in section 5 of the Assessment Notice and Figure 1 in section 9 of the Revised Assessment Notice) is understated.

<u>Complaints category 4:</u> Complaints about how the Valuer has addressed in the Valuation the sale of the Bradford & Bingley deposit book and branch network to Abbey

32. Article 16 of the Transfer Order effected the transfer to Abbey, immediately after the Transfer Time, of all rights and liabilities in respect of retail deposits with Bradford & Bingley and of Bradford & Bingley's branch network.

33. A number of the Notices[16] challenge the Valuation on the basis that the Valuation fails to take any or adequate account of the transfer of the deposit book and branch network to Abbey or of the proceeds raised by that transfer.

34. The Valuer's reasons for rejecting these arguments are set out in section 5 of the Revised Assessment Notice. Without prejudice to the generality of the foregoing, in summary the Valuer relies on the following principal reasons, facts and matters:

(1) The Valuation reflected the value of Shares immediately before the Transfer Time in accordance with paragraph 2 of the Schedule.

(2) It therefore took no account of the transfer to Abbey effected by Article 16 of the Transfer Order immediately after the Transfer Time.

(3) Rather, the Valuation was prepared on the basis that the deposit book and

[16] For example, the Notices with case references BB/0036/2011 and BB/0238/2011.

branch network remained with Bradford & Bingley.

<u>Complaints category 5:</u> Other complaints about the Valuer's valuation approach and methodology

35. In section 4 of the Assessment Notice and section 8 of the Revised Assessment Notice the Valuer explained that he considers economic value to be the appropriate basis of value and that there would only be value to Shareholders if they would have received a distribution from the administration of Bradford & Bingley.

36. It has been argued that the Valuer has failed to take any or adequate account of:

(1) Bradford & Bingley's "market value" or the 20 pence per Share closing price on the London Stock Exchange on 26 September 2008;[17]

(2) the "book value" of the Shares at different points in time (calculated by dividing the amount of shareholder funds by the number of Shares);[18]

(3) the "takeover approach" by Resolution Limited shortly before the Transfer Time;[19] and

(4) the recent financial performance of Bradford & Bingley and the fact that Bradford & Bingley has made a profit since the Transfer Time.[20]

37. The Valuer's reasons for rejecting these arguments are set out in section 4 of the Assessment Notice and section 8 of the Revised Assessment Notice.

38. Without prejudice to the generality of the foregoing, in summary the Valuer relies on the following principal reasons, facts and matters:

(1) In relation to the "market value" argument recorded at paragraph 36(1) above, in view of the Administration Determinations it would not be appropriate to prepare the Valuation on the basis of either "market value" or the closing price of Shares on the London Stock Exchange on 26 September 2008. Further, neither of these approaches to valuation would reflect the actual position of Bradford & Bingley immediately before the Transfer Time (including as a

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17 For example, the Notices with case references BB/0072/2011 and BB/0123/2011.

18 For example, the Notices with case references BB/0003/2011 and BB/0604/2011.

19 The Notice with case reference BB/0136/2011.

20 For example, the Notices with case references BB/0063/2011 and BB/0132/2011.

result of events that took place over the weekend of 27 and 28 September 2008) or give effect to statutory assumptions contained in section 5(4) of the Banking Act.

(2) In relation to the "book value" argument recorded at paragraph 36(2) above, in view of the Administration Determinations it would not be appropriate to prepare the Valuation on a "book value" approach. A "book value" approach would fail to take account of events likely to occur in an administration.

(3) In relation to the argument recorded at paragraph 36(3) above, the Valuer admits that in June 2008 Resolution Limited expressed interest to the Board of Bradford & Bingley in making a significant equity investment in Bradford & Bingley based on a subscription price of 72 pence per Share. This expression of interest did not progress to the stage where Resolution Limited was given access to the books and records of Bradford & Bingley. As explained in section 6 of the Revised Assessment Notice, there was a significant deterioration in market conditions from June 2008 to the valuation point immediately before the Transfer Time. In these circumstances, and taking into account the Administration Determinations, the Valuer was correct not to place reliance on the June 2008 expression of interest by Resolution Limited.

(4) In relation to the argument recorded at paragraph 36(4) above in relation to Bradford & Bingley's recent financial performance, as explained in section 7 of the Revised Assessment Notice, since the Transfer Time Bradford & Bingley has benefitted from significant financial assistance from the Treasury. The No Future Assistance Assumption requires the Valuation to be prepared on the basis that this assistance would not have been provided to Bradford & Bingley. Further, the Valuation must be prepared by reference to the value of Shares immediately before the Transfer Time. Bradford & Bingley's recent financial performance reflects events that occurred after the Transfer Time and which are irrelevant to the Valuation.

<u>Complaints category 6:</u> Complaints of bias or a lack of independence or impartiality in relation to the Valuation

39. A number of the Notices[21] allege bias or a lack of independence or a lack of impartiality against the Valuer. The Valuer denies the allegations and repeats, as he stated in paragraph 2.9 of the Revised Assessment Notice, that in performing his task he has acted entirely independently of the Treasury and has reached what he considers to be the correct Valuation, applying the provisions of the Schedule, without favouring any party.

[21] For example, the Notices with case references BB/0024/2011 and BB/0113/2011.

Conclusion

40. For the reasons set out above, it is submitted that the arguments of the applicants challenging the Valuation should be dismissed and that there are no grounds to assert that the Valuation was unreasonable.