Thursday, 21 May 2015

(10.30 am)

Reply by MR ZACAROLI (continued)

MR JUSTICE DAVID RICHARDS: Mr Zacaroli.

MR ZACAROLI: My Lord, I'm turning now to deal with the CDDs, having finished with the CRA.

First of all, a point about the CDD's purpose. The purpose was not merely a quicker and more final process for proving claims, as it is put by the Senior Creditor Group. That underplays, we say, a critical element of the CDD process: namely that it involved a compromise of rights between the company and the creditors whereby, for example, the company itself gave up rights against the creditor. That forms no part of a normal proof process. It was intended to be a compromise of all rights, so as to achieve certainty and finality. The purpose of that is to end the possibility of further claims being advanced either way between the company and its creditor.

My Lord, one should be careful not to underestimate the benefit to creditors of this estate in those matters, finality, certainty. Because, for example, my Lord knows there has been an active trade throughout this administration in the debt and crystallising the amount that is in fact owed to the creditor undoubtedly

helps the creditor in realising that debt, either by selling in the market or otherwise.

These were not thrown-together contracts in any speedy or hasty way; these were carefully negotiated with creditors, as Mr Lomas' evidence shows, who tended to congregate behind a relatively small number of law firms, who would suggest amendments from time to time, which would be again negotiated. These were carefully negotiated documents throughout and the language the parties chose to use therefore must be given full respect.

It is in that context that one has to construe the language of the documents, the width of the release and the extent to which what they say in the document is now the claim is intended to be the only claim.

One very quick reference to one authority. It is to BCCI v Ali. It's a paragraph my learned friend took you to in the speech of Lord Hoffmann, but it's just the last five lines of that paragraph. My Lord may well have read it, but it wasn't pointed out expressly. Bundle 1A, tab 27, at paragraph 39. This is where his Lordship is explaining his commitments in the ICS v Bromwich case about the reference to the background facts. My Lord was shown particularly the beginning of that paragraph. I will show my Lord the sentence

beginning under F:

"But the primary source for understanding what the parties meant is their language interpreted in accordance with the conventional usage:

'"We do not easily accept that people have made linguistic mistakes particularly in formal documents."'

And he goes on to say:

"I was certainly not encouraging a trawl through background which could not have made a reasonable person think the parties must have departed from conventional usage."

So emphasising a point I made in opening that, yes, it's an iterative process, but a very important element of the iterative process is the language the parties have chosen to use.

My Lord, so far as the detail of my learned friend's arguments on the CDDs are concerned, can I take first the question of interest, non-provable claims to interest because that's a matter which covers all of the different forms of CDDs without variations. It's a blanket point.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: In essence, my learned friend's only argument on non-provable claims to interest was to repeat the Bower v Marris point that he made in relation to the

CRA. There was no other argument than that presented to my Lord. In other words, that the right to appropriation somehow remains.

I made the point in relation to the CRA that the Bower v Marris right to appropriate is wholly dependent upon there being a continuing right to interest ticking away in the background during the insolvency process. That simply is not the case under the CRA, nor is it the case under these documents.

The argument, we submit, fails to engage with the wording of the contracts in any material way and it's at this point worth turning up, by way of example, the CDD at tab 1A, the agreed claims CDD we've been looking at.

At page 7 of the document, clause 2.1 -- a familiar clause by now -- three points about it. First of all, these aren't surprising points but to repeat them, the claim is fixed at the agreed claim amount, which is the entire claim against the company. Secondly, the clause in 2.1.1 undoubtedly releases all claims arising or rights and obligations arising under the creditor agreement as well as not under the creditor agreement. Thirdly, that includes expressly all claims for interest which arise, whether or not under the creditor agreement. So the express language is very clear: any claim for interest under the underlying contract has

been released.
It's incumbent on anyone seeking to argue that a particular type of claim for interest has not been released to explain as a matter of construction how that will work. My Lord, we say that the Senior Creditor Group simply have failed to discharge that burden. The Bower v Marris point I've mentioned doesn't get there. They actually don't even appear to contend that the other potential non-provable claims to interest, such as compounding continuing after the debt has been proved as paid, they don't even contend there's any construction argument which can exclude that right of interest.
My Lord, the only other point mentioned in this context was that you wouldn't expect creditors to abandon their Bower v Marris rights particularly because part of the context of agreeing the claim was for client money purposes, ie you fix your claim for both a claim against the estate and for client money purposes.
That point actually goes nowhere and indeed it supports our case because under the client money rules there is no right to interest accruing after the PPE, the primary problem event.
As my Lord will remember, we've dealt with this briefly in our reply skeleton at paragraph 12, but my Lord will no doubt remember from MF Global that the

client money entitlement is fixed as at the PPE. And of course, the hindsight judgment was all about whether that could be changed in any way, and it can't; it's fixed as at that date.
Once the client money entitlement has been paid out of the client money pool -- again I can go to the rule if necessary, but my Lord probably remembers it -- 7.7, as then existed, requires that the surplus goes back to the firm. There is no provision for interest to be added to the client money entitlement. So the point by reference to the client money rules takes the case nowhere.
Turning then, my Lord, to the more substantive topic perhaps of currency conversion claims and the CDDs. We'll start, if I may, with the CDD at tab 1A, the agreed claims CDD. To remind my Lord of our case here, we only run an argument in relation to currency conversion in those cases where, for example, as in the one at tab 4, the agreed claim amount is denominated in sterling and the underlying currency of entitlement included a claim in, for example, dollars.
Generally, the agreed claim amount was in the same currency as the underlying entitlement, but where there were -- as there would have been in many cases -- mixed currency entitlements, it was the predominant currency

that was chosen. So that leaves the possibility that an underlying currency was in dollars and yet the agreed claim amount is in sterling. It's only in those circumstances we run the case on release of currency conversion.
So much of my learned friend's address to my Lord on the agreed claims CDD did not meet our point. My learned friend was dealing more with the fact that there's no release of a currency conversion claim by reason of the later conversion under clause 3 for the purposes of the claim then being admitted. We're concerned with the conversion as he called it at stage 1, that is stage 1 identifying the agreed claim amount. He said, I think at one point, that there is no question of conversion at that stage. Of course, the only circumstances in which we're interested in this CDD is where there has in fact been a conversion at that stage.
The one thing one can say about that conversion is, very clearly, it's not for the purpose of enabling the claim to be an admitted claim. Unlike the admitted claims CDD where we accept that the purpose, or one of the purposes, there is to enable the claim to be admitted and therefore it's converted to sterling before you enter into the CDD, that's not the case in relation

to the agreed claims CDD. The reason for conversion into a single currency under the agreed claims CDD is simply to identify the currency that's most predominant under the underlying contracts.
The version of this CDD which appears at tab 4 does have, as I think I mentioned at the outset, a few differences. There is one difference which is relevant to this point, so if my Lord turns to tab 4, page 9 of the document there, clause 3.2.1, which is part of the provision dealing with the later conversion of the agreed claim amount into sterling for the purposes of it being accepted as an admitted claim. This clause, 3.2.1, includes words in parentheses at the end of the second line:
"[It] will be converted (to the extent not already denominated in pounds sterling)."
Those words happen to be missing from the version at 3.2.1 in the version at tab 1A, but they reinforce the point that in some cases it won't be necessary to convert because the conversion's already happened, but the conversion that happened at the outset is not for the purposes of complying with rule 2.86 or for the purposes of enabling it to be an admitted claim.
Against that background, my learned friend's core argument that one has to read "agreed claim amount", as

it were, although it's stated to be in sterling, as somehow referring to the underlying contractual entitlement, some [inaudible] parentheses, once converted into sterling pursuant to rule 2.86, simply cannot work in this context, ie the agreed claim amount in the agreed claims CDDs. That argument doesn't have any purchase.

Therefore the only argument that can be run on the agreed claims CDD is that the form of the release wording is not as wide as it appears to be, but is limited in a way which prevents or excludes the right of the creditor to continue to claim in its underlying currency.

I'm going to deal with that alternative argument, which is: can the scope of the release clause be narrowed in any way? I'm going to deal with that point in one go, as it were, when we look at the admitted claims CDD. But that's the only argument, we submit, that can work in relation to the on the agreed claims CDD on this point.

MR JUSTICE DAVID RICHARDS: The point you previously made that it simply can't work to say that, as it were, the underlying contractual entitlement is preserved; can you just tell me why you say that?

MR ZACAROLI: Yes. The reason is because, as I understand

my learned friend's argument, the premise for that argument is that the reason the, let's say, dollar amount is converted into sterling to be put into the agreement as the agreed claim amount is because that mirrors the process which would have to happen in a proof process, ie converting it pursuant to rule 2.86. As I understood his argument, that's the reason my Lord should construe the reference to "agreed claim" and "agreed claim amount" as incorporating the underlying contractual entitlement as converted pursuant to rule 2.86.

That argument doesn't work because the reason the foreign currency claim is converted into sterling under the agreed claims CDD at stage 1 is not because that's what's required by rule 2.86, it's for an independent purpose.

MR JUSTICE DAVID RICHARDS: I see.

MR ZACAROLI: My Lord, then turning to the admitted claims CDD. Turning to tab 7 for this purpose, as I say, I understand my learned friend to have two ways of putting the point. The first, his primary way, is that when one looks at the reference to agreed claim amount and admitted claim, one is having to interpret that as meaning the underlying dollar entitlement converted solely for the purposes of being an admitted claim.

That's why, as I understand him, the fact the admitted claim is excluded from the release allows one to reach the conclusion that the admitted claim includes the underlying right to be paid in dollars.

His secondary argument is that the scope of the release in 2.3, in this case, is to be read down so as to exclude from that release the ability to be paid in dollars or the right to be paid in dollars.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The first point we make here is in the same way as under the agreed claims CDD, the conversion of the original currency amount into sterling does not take place pursuant to the admitted claims CDD. There is no part of the admitted claims CDD which requires any conversion to take place. It's something which has already happened as part of the background to this deal, this compromise being made.

The most that can be said is that the reason why -- and this appears from the background context, in particular the fourth progress report I took my Lord to earlier -- the claim would be converted to sterling in each case was because that was necessary in order for it to be admitted as a claim qualifying for proof in a liquidation or administration. So it's a reason why there has been a conversion prior to the entry into this

agreement, not under the agreement.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: As I noted at the outset this morning, it isn't the only purpose of this agreement to replicate a proof, acceptance or rejection process. A very important purpose is to reach a compromise, to reach a point of finality in the relationship between the company and its creditor and that aspect should not be underplayed. The recital to the agreement states just that. Recital B states in terms:

"In consideration of the claim of the amount, the claim being fixed at the agreed claim amount, the company and the creditor wish to release and discharge each other from any claim howsoever arising."

Against that background, we say, it's very important to identify what is the question of construction as a matter of construction of the contract. What is the appropriate question? We say the question here is: did the parties intend, by clause 2, to fix the sole and entire claim, their sole and entire claim against the company, in an amount denominated in sterling and to release all other claims under the creditor agreement? That's the critical question. Or is there to be an exception to that intention of fixing the claim at that amount? Is it in some way to be cut down in some way?

We say the answer is manifestly yes to that question when you look at the clear wording. It's very difficult to escape from that conclusion given the wording that:

"The entire claim shall be fixed at the agreed claim amount."

And there's nothing more. Clause 2.2:

"The admitted claim shall be fixed at the agreed claim amount and shall constitute the creditor's entire claim against the company."

And that is supported by the fact that the conversion that has taken place was necessary for the reason of it being admitted to proof because that was the reason why it was converted to sterling. Nothing in that fact derogates from the proposition that, having converted it, they are now agreeing that that shall be their only claim.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: So far as the question, "Did the parties intend to release all other rights or obligations which might have arisen under the creditor agreement?", then again the answer is clearly yes because that's what clause 2.3 tells us in the clearest terms. It includes the release not only of all claims, et cetera, but all rights and obligations on the fifth line and including those arising under the creditor agreement. So any

right to payment which would have existed under the creditor agreement has been released by this clause.

It's a necessary and obvious consequence of releasing all your rights to payment under the creditor agreement that you can't reassert those rights later. That would destroy the intention of achieving finality and certainty in the relationship. But the attempt to mount a currency conversion claim is, on a proper analysis, nothing more than an attempt to reassert a right to payment under the underlying creditor agreement.

If I can contrast the process I've just been through of identifying what the correct question here is with an inappropriate question of construction or a question that's irrelevant to construction, then that is: did the parties intend to release the currency conversion claim? That's not a relevant question. Again, I'm repeating myself very briefly, but that's partly or perhaps mainly because the parties did not have in mind that specific claim at the time they entered into the agreement. What they had in mind was the possibility of a whole number of claims that they hadn't thought about and agreed to release all of this.

So the question is as irrelevant as asking whether the parties intended to release any other claim which

subsequently transpires as existing. In each case you can't test the scope or the meaning of the release language by reference to that later occurring or later transpiring claim.

I don't understand my learned friend's case to be that any other of the rights and obligations under the underlying creditor agreement have not been released and so no other right is excluded from the breadth of this release clause. So the case depends upon establishing a reason, looking at those words in their context, to conclude that the parties intended to single out from the release one and only one right, namely the right to be paid in dollars. In other words, the right to be paid in dollars, although the parties have agreed to fix the claim in sterling somehow remains in the background with a sort of spectral presence to be reasserted later on. We say the terms of the release clause cannot be limited in that way.

I think I'm right in saying my learned friend did not really advance a case for limiting the width of the release clause beyond its widest terms other than by reference to the tree roots examples or the flood example. My Lord put to him whether there was a reasoned basis for a dividing line.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: He doesn't advance a positive case about that. He doesn't, for example, advance a positive case that there is a dividing line between provable and non-provable claims. That wouldn't work for the various reasons that I've been through about how the clause clearly contemplates releasing claims that are not provable. Nor does he or can he advance a case that there's some distinction between claims as to where they might rank against the insolvency estate. There's no basis for that in the agreement.

The agreement works by defining the claims released in three ways by reference to subject matter so, for example: claims arising out of the creditor agreement or not; secondly, by juridical basis, and every type of juridical basis is covered; and, thirdly, temporally, claims here or hereafter arising. He doesn't in any way seek to distinguish between claims on the basis of which part of the waterfall they might come under.

The language chosen, the third line of 2.3:

"Forever discharged a whole variety of claims."

Is inconsistent with it being released temporarily as opposed to forever.

MR JUSTICE DAVID RICHARDS: I was just wanting to look at the language in the rules about provable debts, which everyone here has trawled over many times.

MR ZACAROLI: 12.3?
MR JUSTICE DAVID RICHARDS: It's all now 12A, isn't it?
MR ZACAROLI: Is my Lord looking at the most recent version of The Red Book?
MR JUSTICE DAVID RICHARDS: I am.
MR ZACAROLI: I'm looking at the 2008 version.
MR JUSTICE DAVID RICHARDS: Well, fair enough.
MR ZACAROLI: My Lord, if you'd like to see the version that's relevant to the administration, we do have a spare copy.
MR JUSTICE DAVID RICHARDS: Yes, okay. (Handed). Thank you very much.
MR ZACAROLI: 12.3. I think it is 13.12 my Lord might be looking for.
MR JUSTICE DAVID RICHARDS: I think it might be 13.12. Let me just see. Yes. So just focusing on the words:
"... whether in existence now or coming into existence at some time in the future ..."
That qualifies ... I'm just trying to see ...
MR ZACAROLI: The governing rule is rule 13.12.1, I would submit.
MR JUSTICE DAVID RICHARDS: Yes. Sorry, yes, absolutely. I'm just ... So (a) and then (b). (b):
"Any debt or liability to which the company may become subject after that date by reason of any

obligation incurred before that date."
The words in 2.3:
"... whether in existence now or coming into existence at some time in the future."
Qualifies -- it's quite difficult to:
"... demands action, causes of action, liabilities, rights and obligations, including those which arise hereafter upon a change in the relevant law."
So you would say the words:
"... whether in existence now or coming into existence at some time in the future ..."
Qualifies the words:
"... rights and obligations as well as the rights, causes of action and liabilities"?
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: So clearly, a liability may arise after the commencement of the administration.
MR ZACAROLI: And might be provable.
MR JUSTICE DAVID RICHARDS: And might be provable.
MR ZACAROLI: That's true, but not an obligation.
MR JUSTICE DAVID RICHARDS: Not an obligation, yes. Yes, thank you.
MR ZACAROLI: My Lord, that really leaves this point, which is that part of the context for fixing the agreed claim amount in sterling was to enable that sum to qualify for

dividends in an administration or liquidation. Part of the purpose. But we say that simply provides no good reason, no sufficient reason for inferring that the parties intended by the language they had used in clause 2 to fixing the amount in sterling meant anything other than that, ie fixing in sterling, for all purposes.
The agreement was intended to achieve finality. They've chosen a sterling-denominated sum and said nothing else.
MR JUSTICE DAVID RICHARDS: Can I just interrupt you, sorry? Part of the purpose was to enable it to be admitted for proof. What other purpose was there?
MR ZACAROLI: Sorry, I put that badly. Part of the purpose of the CDD included the fact that the sum had been --
MR JUSTICE DAVID RICHARDS: Was there any other purpose in expressing the sums in sterling?
MR ZACAROLI: There's none in the evidence that I could point you to.
MR JUSTICE DAVID RICHARDS: Nor in the context which --
MR ZACAROLI: No, I can't suggest that. One doesn't know whether a particular creditor wanted its claim in sterling --
MR JUSTICE DAVID RICHARDS: But they had to be in sterling, didn't they?

MR ZACAROLI: Yes, the administrators converted into sterling as a matter of course.
MR JUSTICE DAVID RICHARDS: The admitted debt, whatever it's called, the admitted claim amount had to be an amount in sterling, didn't it?
MR ZACAROLI: That's correct.
MR JUSTICE DAVID RICHARDS: And the purpose of that was to enable it to be admitted to proof, hence the use of the word "admitted" I suppose.
MR ZACAROLI: Yes. So the question is whether the fact that part of the purpose of the agreement as a whole included that, then is that sufficient to lead to the inference that the parties intended by the words of compromise, which is what clause 2 is all about, intended that compromise to be other than limiting the claim to a sterling amount. We submit that the explanation as to why that conversion had taken place is not a sufficient reason to disregard or give any other interpretation than the clear meaning of the words.
MR JUSTICE DAVID RICHARDS: Yes, I follow.
MR ZACAROLI: As I say, this reflects my opening comments this morning about the breadth of the purpose of the CDD being to achieve finality and certainty for all purposes. The idea being --
MR JUSTICE DAVID RICHARDS: And mutuality.

MR ZACAROLI: And mutuality.
MR JUSTICE DAVID RICHARDS: This is, I'm afraid, repetition, but just very quickly remind me of the submission you make as to why, despite the breadth of 2.2 and 2.3, it does not exclude the admitted claimant's right to receive statutory interest.
MR ZACAROLI: That's because the reference to "admitted claim" in 2.3, the opening words, "Save only for the admitted claim", takes you back to the definition of admitted claim at page 2, which is:
"A claim which qualifies for dividends from the estate of the company, available to its unsecured creditors, pursuant to the Insolvency Rules and the Insolvency Act."
And part of the broadly stated dividends to which the creditor is entitled under the Act and the rules is interest on that admitted claim. So it's an attribute of the admitted claim that it necessarily qualifies for dividends under the statute.
On a completely strict and literal reading I would accept that the reference to including within the release all claims for interest could be read as broadly as excluding a right to statutory interest, but we accept that in the context where the admitted claim is intended to be one which qualifies for dividends under

the insolvency legislation, that can't have been what the parties intended.
MR JUSTICE DAVID RICHARDS: And there is a distinction which you make between statutory interest, the root of which is the Insolvency Rules --
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: -- and a currency conversion claim, which is based on the survival of a contractual right, which you say has been released.
MR ZACAROLI: Indeed. It's based on a remission to the underlying contractual rights, the pre-existing contractual rights; that's the distinction.
My Lord, the point in this case is in some ways, but I don't want to draw the analogy too closely, one can compare it with the debate or the difference of opinion which took place in the Court of Appeal in Waterfall I in relation to rule 2.86 because the difference of opinion really comes down to this: that Lord Justice Lewison considered that rule 2.86 converted the claim for all purposes permanently, whereas Lord Justice Briggs and Lord Justice Moore-Bick took the opposite view that said it was a temporary conversion not intended to take away the creditor's rights.
MR JUSTICE DAVID RICHARDS: Yes. Can I just mention now, given that we have the Court of Appeal judgment, and

that Mr Dicker said yesterday that a submission he made in Waterfall II(a) found support in the Court of Appeal's judgment, perhaps at a later stage in this hearing you'd just give consideration as to whether any of you wish to submit anything briefly in writing by reference to the Court of Appeal judgments which you say supports your submissions or defeats another party's submissions in Waterfall II(a). It would be totally bizarre for me to ignore that judgment.
MR ZACAROLI: Of course, my Lord.
MR JUSTICE DAVID RICHARDS: Because if you could add that, as it were, to the agenda at some point.
MR ZACAROLI: We can.
So that was the debate in the Court of Appeal as to the meaning of rule 2.86. In a sense my Lord is faced with a similar debate, but here as to the construction of this compromise agreement --
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: -- was it intended that the statement of the right to be paid in sterling as your sole surviving claim was a permanent matter or only temporary? That's going back to my point about the dollar claim being some spectral claim in the background.
We submit that really, taking into account those considerations which can properly be taken into

account -- so excluding questions with the benefit of hindsight now we know the claim and what claimants exist -- taking into account what can be taken into account, there is really only one answer: the bargain was struck so as to achieve finality mutually so that all rights under the creditor agreement are released, the intention being the parties can't thereafter return to them for any purpose.
So in short, the mere fact the conversion to sterling had been necessary, had taken place for a purpose, which was to enable it then to be incorporated in the proof process subsequently, is simply not enough to displace the clear intention expressed in the agreement in the words the parties had chosen to fix the claim for all purposes in a sterling amount.
My Lord, unless I can assist with any further questions, those are my reply submissions.
MR JUSTICE DAVID RICHARDS: I don't think so.
MR ZACAROLI: There is one point I meant to pick up on that my Lord asked me about yesterday, the statement of facts.
I spoke correctly in that we do accept that the statements that do appear in the statement of facts are agreed and admissible for my Lord to rely upon for the

purposes of the question of construction.
The reservation is intended to pick up the fact that the cross-reference to the relevant paragraphs in the evidence is not accepted, so they're not to be incorporated by reference into the statement.
MR JUSTICE DAVID RICHARDS: It's only the statement of fact which you accept rather than the rest of those paragraphs, the rest of the contents of the paragraphs?
MR ZACAROLI: It may be that the way it's put in the paragraph may not be quite the right way, but one looks to the statement of facts to see --
MR JUSTICE DAVID RICHARDS: That is helpful to know that, Mr Zacaroli. Can I just jog back to see whether there's anything. (Pause)
Thank you very much indeed.
Mr Trower?
Reply by MR TROWER
MR TROWER: My Lord, I just have, I think, five topics to very briefly cover.
The first one related to a question my Lord asked yesterday in relation to foreign exchange movements for the period of the administration.
MR JUSTICE DAVID RICHARDS: Oh yes.
MR TROWER: Can I just hand up something which has been prepared overnight?

MR JUSTICE DAVID RICHARDS: I'm very grateful, thank you. (Handed)
MR TROWER: The convenient place, I think, to put it is in volume 9 behind tab 30.
There are three pages that I will take your Lordship briefly through. The first is a simple graph with US dollars and euros, and that shows you in terms of a graph what £1 sterling would buy in the form of dollars and euros for the duration of the administration.
MR JUSTICE DAVID RICHARDS: I see, yes.
MR TROWER: Then we have exactly the same information, what $1 million buys, in tabular form for every quarter on the next page.
Then the final page is an illustration which is done for convenience in this way in relation to people who had proofs originally denominated in respect of contractual rights originally denominated in dollars and originally denominated in euros. What has been done is, looking at the US dollar one by way of illustration, the contractual right is expressed as 179.37 US dollars and the reason that's done is because that reflects directly the exchange rate at the commencement of the administration. So we can see that the admitted claim on that basis would be £100.

This is done entirely for convenience.
MR JUSTICE DAVID RICHARDS: So if you had a claim of £100 --
MR TROWER: No, if your original contractual right was $179.37, your admitted claim would be £100.
MR JUSTICE DAVID RICHARDS: I'm with you. I understand, that's helpful.
MR TROWER: That's done for convenience using that figure.
Then you can see for the four distributions what you would have got by way of sterling at each of the dividend dates.
At each of those dates the US dollar exchange rate is given so that you can see what that sterling amount would have bought you in dollars as at that relevant exchange rate.
Your Lordship then sees on this example there's $158, which is the total amounts that you would have been able to buy had you bought dollars with sterling on each of the dividend dates. That you then compare with the contractual right at the beginning, which shows you effectively the currency conversion claim.
MR JUSTICE DAVID RICHARDS: Yes. And I can see with the euros, although the point there is that it's only got above the line since the last distribution ...
MR TROWER: Yes. So that's hopefully, obviously, very simplified.

MR JUSTICE DAVID RICHARDS: Very helpful. Is there a figure in the evidence as to -- this is very difficult to ...
Well, just the total value of the US dollar foreign currency claims?
MR TROWER: I think there may be somewhere. We'll look.
MR JUSTICE DAVID RICHARDS: I appreciate it then breaks down because a lot of people's claims may not have been, on Mr Zacaroli's submissions, released, but a lot will have been. It's just to have a global figure giving some sense of it.
MR TROWER: I have a feeling we may not have it in the evidence for this tranche, but I'm pretty sure it's somewhere. We'll look it out for my Lord.
MR JUSTICE DAVID RICHARDS: Thank you very much.
MR TROWER: So that's the first topic.
The second point is also foreign exchange related and is simply this: the question arose, I think during Mr Dicker's submissions, as to whether it is possible to contract out of rule 2.86. My Lord asked that question and Mr Dicker said probably and only in the context of a scheme or CVA by which everyone is bound.
We would agree with that sort of idea because, obviously, otherwise some groups of creditors will be affected differently from others. In a normal case where you don't have a surplus, you wouldn't -- the

effect of contracting out with one category of creditors will affect other people in a way that's inconsistent with that which the statute contemplates.

But the reason just for raising this in reply is so my Lord understands what the position was under the CRA. Under the CRA any conversion from euros, yen or any other foreign currency -- or indeed sterling for that matter -- to US dollars, which was done under clause 24.1 for the purposes of quantifying the close-out amount is effected as at the administration date. I can just show my Lord how that works if we go to volume 3, page 464.

We need to start at 24.1, which is page 361. So just to remind my Lord, 24.1:

"All close-out amounts shall be denominated in US dollars. To the extent that a close-out amount is denominated in a currency other than US dollars, the company shall convert such a close-out amount into US dollars using the spot rate as of the relevant FX conversion time."

And that is defined as the administration date if you go to page 464.

So when there is the subsequent conversion from that US dollars amount to sterling for proof purposes under rule 2.86, there should be exactly the same result as if

the conversion had been from the original foreign currency to sterling as required by rule 2.86 in the first place because all the conversions, whether euro, dollars, sterling, or euros straight into sterling are done on the same day.

MR JUSTICE DAVID RICHARDS: Yes. It's possible it wouldn't be quite the same because the rate is a spot rate, which is defined as the rate for purchasing --

MR TROWER: Yes.

MR JUSTICE DAVID RICHARDS: -- the target currency. So I don't --

MR TROWER: It may not be absolutely identical, but it's about as close as one can get.

MR JUSTICE DAVID RICHARDS: Yes, I follow that.

MR TROWER: And my Lord, if I can then move on to the third point before my Lord puts away -- actually, most of my points are on the CRA, so if my Lord could keep the CRA open. I think we got there during the course of the submissions but, just for confirmation, it relates to the NTA condition, my third point.

MR JUSTICE DAVID RICHARDS: Oh yes, yes.

MR TROWER: And that, as my Lord knows, is on page 480, paragraph 9 of schedule 1 to the CRA. The position which we got to -- and I'm sorry that I was probably slightly unclear in my opening in relation to this --

was that the condition is only satisfied on the occurrence of certain events, any one of which must occur before 30 June 2010, which was six months after the effective date, or was capable of extension.

They're all events which would lead to a scheme of arrangement not being proceeded with. None of those events or circumstances occurred and therefore the condition was, as matters turned out, never satisfied.

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: The purpose of looking at the NTA offeree position was to show that the draftsman did contemplate that the CRA might prove to be an appropriate mechanism for resolving non-trust claims, but it doesn't go any further than that.

Just to deal with a point that, I think, was raised by Mr Dicker or mentioned in passing, no NTA signatory had its claim actually ascertained under the terms of the NTA, although many of them will have subsequently entered into a CDD and have had their claims determined under the consensual approach.

My Lord, the next point, fourth point, relates to the references to interest in 2.88 in the CRA. There are a number of submissions made to my Lord on the two different references to rule 2.88. One is at paragraph 20.4.7 on page 352 and the other is at 25.1 on

page 362.

These clauses and these references are doing two very different jobs. 20.4.7 is concerned with what happens to interest in the determining as part of the determination process of the close-out amount. It appears in the overriding valuation provision, so it's part of the close-out determination process. So what the draftsman of 20.4.7 are concerned to do is to exclude interest on a liability from the calculation of the close-out amount, save to the extent that -- and that's the words at the end of that clause -- it would accrue under rule 2.88.

It's not entirely clear why this was done, but it may have been because there was a question in the draftsman's mind as to whether -- and if my Lord turns up rule 2.88 -- interest borne on a debt proved in the administration for the purposes of rule 1, 2.88.1, would or would not catch interest accruing on any unpaid liability of the company for the purposes of 20.4.7.

So in other words, it may have been uncertain, so far as the draftsman was concerned, as to how 2.88.1 operated when you're seeking to quantify the amount of the close-out amount as the provable debt, what actually could and what could not be included. So what we suggest is the most likely explanation for those words

there, given that they're within the demonstration provision, is that he used the proviso to ensure that 20.4.7 reflected what would happen on a calculation and determination in the context of the application of the rules rather than what the contract may have specifically required.
MR JUSTICE DAVID RICHARDS: Well, that I understand.
MR TROWER: It probably doesn't go much further than that.
MR JUSTICE DAVID RICHARDS: As I would understand it -- well, you could have had a termination before 15 --
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: -- September 2008, but the loss hasn't been calculated --
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: -- in which case there would be capable of proof both the loss and interest under the contract up to the relevant date up to 15 September.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: That's unaffected by 20.4.7.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: What 20.4.7 says is that no interest shall accrue on any unpaid liability from the administration date.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: Then you have the saving words

suggesting that interest will nonetheless accrue.
MR TROWER: Well, might:
"... save to the extent that interest would accrue."
So what it's doing, we think, what the draftsman might have had in mind -- and I think I have to accept on any view that it's not very clear what it's doing -- was the draftsman was simply saying was, well, we're not going to get into what may be a complex question here.
MR JUSTICE DAVID RICHARDS: Can I interrupt you? Under 2.88, apart from 2.88.7, so what we've called statutory interest, can any post-administration interest be provable?
MR TROWER: No. But the question is -- I think it may be a question of characterisation, which was the debate at one stage, as to whether, when you're quantifying the close-out amount, how you characterise the elements that go into quantifying the close-out amount for the purposes of the rule. But in a sense this doesn't matter too much because the important point is that this is part of the determination of the close-out amount, it's not part of -- whereas what's going on in 25.1 is different. That's the substance of the point I wanted to draw to my Lord's attention.
MR JUSTICE DAVID RICHARDS: Thank you.
MR TROWER: Because I think at one stage -- and I might have

misunderstood what was being said -- there was a suggestion that maybe the two didn't hang together very well. What's going on in 25.1 is that that last sentence is dealing with interest entitlements on the net financial claim, which itself is the product of the close-out amount, so it's the next stage in the process. In other words, that's dealing with interest accruing on any net financial claim --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- which is the result of the calculation that one's seen going on in 20.4.
MR JUSTICE DAVID RICHARDS: Yes. Let me just remind myself (Pause):
"... which shall constitute an ascertained unsecured claim in the winding-up. For the avoidance of doubt, no interest shall accrue save to the extent provided."
Well, that means that no post-administration interest will accrue at any rate until you reach a surplus.
MR TROWER: Yes. Put in simple terms, 25.1 is dealing with the second part of rule 2.88 --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- statutory interest and it looks as if in 20.4.7 the draftsman was concerned about the impact of the exclusionary element of rule 2.88 at the earlier

stage of calculating the amount of debt.
MR JUSTICE DAVID RICHARDS: The concern I had in relation to this was -- I mean, as I understand it, what goes into the net contractual position are the close-out amounts going both ways, of course.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: But if those close-out amounts result in what's called a positive number, then that is the net amount due from the company to the signatory --
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: -- and is said to be provable.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: But the close-out amount includes an element of non-provable interest by virtue of 20.4.7.
MR TROWER: Yes. Well, it may well not include an element of ... It may well not include an element of non-provable interest. What it can't do, on the face of it, is -- once you've got a close-out amount, you've got a close-out amount, whatever it may be. 20.4.7 is dealing with the determination process.
MR JUSTICE DAVID RICHARDS: What is an unpaid liability of the company? What's the definition of "liability"? This only matters to this extent. It may be that my concern is misplaced here, but it suggested to my mind

that the drafting here was really directed to arriving at net financial positions for the purposes of the trust claims.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: There's no reason in determining trust claims or determining liabilities for the purposes of determining trust claims why you shouldn't include an element of post-administration interest because it's not directed to creating a provable debt.
MR TROWER: No, that's ... What it's directed towards is ensuring that all the liabilities -- I mean, at the end of the day what it's directed towards is nothing more than ensuring that all the liabilities which the signatory may have to the company are fully discharged before the trust property is delivered out.
MR JUSTICE DAVID RICHARDS: Quite so.
MR TROWER: Absolutely.
MR JUSTICE DAVID RICHARDS: But in determining it one gives him credit for some post-administration interest.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: There's absolutely nothing wrong with that. It may be that there was a sort of -- that was then used for the secondary purpose of determining what would be a provable amount.
MR TROWER: There's no doubt on the evidence that the

starting point in relation to this was undoubtedly limited to the trust claim.
MR JUSTICE DAVID RICHARDS: Exactly, that was the scheme.
MR TROWER: The scheme and you go through that process. There's no doubt about that. But what also seems to have happened is that as the process went on -- and one does see this from both the progress reports and the evidence -- it became apparent that the processes that were gone through under this document were, at the very least, of assistance in procuring the proving of claims.
MR JUSTICE DAVID RICHARDS: I see that.
MR TROWER: But my Lord is certainly entitled to take into account, when construing the document, how it started and how it developed when considering exactly how far the construction points go --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- because that's the reality of the genesis and development of the document.
MR JUSTICE DAVID RICHARDS: Just going back then to 20.4.7 if we could just take the straightforward case of an automatic termination of a contract by virtue of the insolvency. So you have to, under the terms of the contract, determine loss as at 15 September 2008.
MR TROWER: Yes.
MR JUSTICE DAVID RICHARDS: So you arrive at $1 million.

For the purposes of determining the close-out amount, is there added to the $1 million interest post-administration interest under 2.88.7 and 8?
MR TROWER: Yes. I understand that that is the question. That sends you straight back to 2.88.1 to ask oneself the question as to whether or not 2.88.1 permits interest to be included.
MR JUSTICE DAVID RICHARDS: "Where a debt proved in the administration bears interest, that interest is provable as part of the debt except insofar as it is provable in respect of any period after the administration (in which case it is not)."
That's not what it says.
You're saying all it's intended to do is to say, well, interest isn't added post-administration.
MR TROWER: Yes. My slight difficulty with this is I don't actually make a positive submission in relation to how this actually works. The important point is really no more complicated than this: that all my Lord, for the purposes of this construction argument, can probably get from this is that it appears to relate to part of the determination of the figure point rather than the running of interest subsequent to the determination of the figure --
MR JUSTICE DAVID RICHARDS: Yes, okay.

MR TROWER: -- and that was the underlying point.
MR JUSTICE DAVID RICHARDS: Thank you, Mr Trower. Thank you very much.
MR TROWER: I've just been handed a note in relation to my first point.
MR JUSTICE DAVID RICHARDS: Yes, a global figure.
MR TROWER: The best we've got is in Mr Lomas' ninth witness statement, paragraph 70 where he says:
"The total value of currency conversion claims could be in excess of 1.3 billion."
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: Mr Dicker has handed me something else, which Mr Bayfield had also handed me, which I rejected for some reason; I've no idea why. Volume 6, "Surplus entitlement proposal". It's page 23 and fortunately the figure is fairly similar, it's 1.29.
MR JUSTICE DAVID RICHARDS: Right, thank you very much. Good, well, I'm grateful for that.
MR TROWER: And it has a breakdown now too.
MR JUSTICE DAVID RICHARDS: Thank you very much.
MR TROWER: My Lord, my final point relates to some submissions that were made in relation to the quasi-judicial duties of the administrator, which I think I ought to address briefly. They were largely made by Mr Dicker, and Mr Zacaroli briefly touched on

them in his reply.
One may need to distinguish between the way it was put in parts of Mr Dicker's skeleton argument and the way he put it when he addressed my Lord, just for this reason: in his skeleton -- and he didn't repeat it in quite these terms in his oral argument -- he suggested that the quasi-judicial duties extended to the joint administrators' role in returning trust assets and identifying claims as well as in dealing with proofs of debt.
MR JUSTICE DAVID RICHARDS: Right.
MR TROWER: We do suggest that goes a little too far.
Of course we accept that the joint administrators act as officers of the court in everything they do. But in exercising their power of compromise, for example, they are not required to exercise quasi-judicially, and indeed it would be inconsistent with the whole concept of compromise were they to do so.
Furthermore, in the present case, the participants in the CDD process -- and I think in this stage of the argument it arose in this context -- had agreed it was to be different from a normal process of proof. So while there is, of course, a quasi-judicial element in the decision that they make, it is rather limited and qualified in a case like the present one because the

parameters of what the joint administrators were required to do were restricted to the issue of a LBIE determination in accordance with the relevant methodology and the creditor always had the right to reject the LBIE determination and pursue its usual rights to prove through the normal proof process, if it chose to do so, when of course the normal principles applied.
I don't go so far as to say -- of course I don't -- that there isn't a quasi-judicial element that arises at the time the decision is actually made.
MR JUSTICE DAVID RICHARDS: Decision on?
MR TROWER: On the proof. Because that's what we're doing. But when one looks at the authorities the position is clear. One can see, even within the proof process, there's a little sort of transition that goes on because you act quasi-judicially when you're making the decision itself and then you then move into an adversarial role when there is any appeal.
Just as a sort of adjunct to this point, we do take issue with the idea that the joint administrators are required to return trust assets in a quasi-judicial manner, which is the way it was put in Mr Dicker's skeleton in paragraph 14. As I say, I don't think he repeated that in his oral submissions, but it's wrong

for a rather different reason. The joint administrators' duty was to manage the affairs and business of LBIE as trustee -- LBIE as trustee -- in accordance with their statutory functions. They had no freestanding duty as trustees. What they're doing is they're managing the affairs of a trustee --
MR JUSTICE DAVID RICHARDS: Yes.
MR TROWER: -- and it's quite important one keeps that in mind when one's thinking about quasi-judicial concepts as well and the actual role they're fulfilling as an officer of the court.
MR JUSTICE DAVID RICHARDS: I think the point really is, I would think, not so much quasi-judicial as the point that I think I put to Mr Zacaroli -- and he agreed -- that the administrators are at all times acting pursuant to statutory duties and functions and not in their own commercial self-interest.
MR TROWER: Yes, and of course we accept that. That's fundamental.
My Lord, unless I can assist any further.
MR JUSTICE DAVID RICHARDS: I don't think so. I think you've probably picked up the points that I ... (Pause)
MR TROWER: My Lord, there is actually one final point, which arose in part out of what Mr Zacaroli took you to when looking at 13.12. Perhaps if my Lord would just

turn that up again.
As my Lord pointed out, everyone in court is more than familiar with 13.12.1(b) and the issue here is just this: that 13.12.1(b) defines, as we all know, a debt in relation to the winding-up of a company and now in administration as including:
"... any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date."
My Lord will recall that in relation to the CRA we advanced the argument, so my Lord had it, as to how it was that the CRA was intended to work with the replacement of a new obligation for the old. It may be that my Lord is assisted by looking at those words and giving them a very broad meaning when considering how far it is that an agreement can go to replace an existing obligation with a "new obligation" while still retaining the element of provability, the question being: can it properly be said that the bundle of rights which one has at the end of the process constitutes or gives rise to liabilities by reason of an obligation incurred?
So if you can make the link between the new bundle of rights which you have and the old bundle of rights which have gone, that is as far as you can go while

still having a provable debt. That may be a helpful way of thinking about what the new obligation is all about.

I raise it with some hesitancy because we're not descending into the arena on this.

MR JUSTICE DAVID RICHARDS: Thank you very much indeed

That concludes the argument on those issues and then that leaves the Ex parte James issue, doesn't it?

MR TROWER: Yes. What we've agreed, subject to your Lordship, is that Mr Dicker should launch into that now, although I notice --

MR JUSTICE DAVID RICHARDS: It's time to take our break. I'll rise for five minutes.

(11.43 am)

(A short break)

(11.48 am)

MR JUSTICE DAVID RICHARDS: Mr Dicker.

Further submissions by MR DICKER

MR DICKER: My Lord, the question on 36A.

The question obviously only arises if we're wrong as a matter of construction, but in that event we submit the administrators should be directed not to enforce the releases, either on the basis of the principle in Ex parte James or in accordance with paragraph 74 of schedule B1.

I say that question 36 only arises if we're wrong as

a matter of construction, but in a sense it's relevant to the question of construction and I say that for this reason: if your Lordship were to conclude that it would be unfair for the administrators to enforce the releases in the circumstances, then in a sense the first response to that, we say, is to go back and check whether or not the conclusions one reached on construction are correct for the simple reason that you would not expect administrators, particularly these, to have acted in a way which did produce such consequences.

Can I be absolutely clear: we are not contending -- and the Senior Creditor Group does not contend -- the administrators knowingly and wilfully acted unfairly or that they intended to cause unfair harm. What we do say, however, is if Wentworth is correct as to the effect of the documents, it would be unfair for the administrators to be permitted to enforce the releases.

My Lord, this issue arises whether the effect of the agreements was to release part of one's claim to statutory interest, to currency conversion claims, or indeed to any other non-provable aspect of the claim advanced by the administrators, advanced by the creditor and agreed and admitted to proof by the administrators.

In other words, if the creditor goes to the administrators, advances a claim and if somehow during

the course of that process loses various parts of that claim which he wouldn't lose if he had proved in the ordinary way, that's the point at which Ex parte James in paragraph 74 step in.

Briefly so far as the law is concerned, can I show your Lordship, firstly, Re Nortel, which is the leading decision on Ex parte James now, then briefly four cases referred to in Lord Neuberger's judgment. Nortel is in authorities bundle 1B at tab 57.

The way the issue arose, as your Lordship will see at paragraph 115 on page 246 -- the argument was effectively that ... Well, your Lordship will see from 115:

"If I had taken a different view on the provable debt issue, an alternative argument to that just discussed was the court has the power to direct the administrator of a target company to accord to the potential liability under the FSD regime a higher ranking than it would be given under the 86 Act and Rules. In other words, the court could order the administrator to treat the potential FSD liability as a provable debt, even though the effect of the legislation is that it should rank lower."

The short answer to that submission was, of course, that you can't use Ex parte James to rewrite the

statute, but Lord Neuberger deals at some length with the point. At paragraph 122, he summarises the effect of the principle in Ex parte James, and if your Lordship would perhaps just read paragraph 122. (Pause)

Your Lordship will have noted at B the words that he uses or the phrase that he uses is simply:

"... where it would be unfair for a [in this case] trustee in bankruptcy to take full advantage of his legal rights. As such, the court will order him not to do so."

There are then four cases referred to by Lord Neuberger and I wanted to show your Lordship briefly each of them.

The first is Re Clark -- and this and the next three cases are all in bundle 1A.

Re Clark, bundle 1A, tab 15. My Lord, this essentially concerned services or goods which were provided to the bankrupt after a receiving order was made against him and payments made to the supplier, again obviously post-receiving order, and the issue was whether or not the payments could be recovered from the supplier. So just looking at the facts on 559:

"August 69 ... a bankruptcy petition was presented ... 7 November a receiving order was made against a bankrupt."

Dropping three lines:

"On 7 November, the bankrupt's bank account was overdrawn to the extent of £776-odd. On that date the respondents delivered to the bankrupt 3,800 gallons a petrol and received in exchange a cheque for £1,123. When the cheque was presented, the bankrupt's account was in credit, various sums having been credited to the account in the interval."

Essentially, that happened again. Then just above letter F:

"Thereafter, the Official Receiver, who had known nothing of those transactions, intervened and the bankrupt's account was closed."

At G:

"The trustee in bankruptcy sought a declaration of payments by the bankrupt to the respondents of [the two sums] which were respectively void against him as such a trustee. Under section 37.1 of the Bankruptcy Act (1914), they were made after the bankrupt had committed an act of bankruptcy to which the trustee's title related back and an order for repayment of the two sums in question."

And held:

"Since the trading by the respondents with the bankrupt after the date of the receiving order had

benefited the estate and cost the respondents a loss, it would be manifestly unfair to order repayment of the amount of the two cheques, which would increase the benefit to the estate and the loss to the respondents for which they would have no right to prove in the current bankruptcy. Accordingly, the court would apply the rule that where it would be unfair for a trustee in bankruptcy to take full advantage of his legal rights, the court would order him not to do so."

My Lord, the relevant passages I wanted to show your Lordship were firstly page 563, just above E, where Mr Justice Walton says, three lines above E:

"The sole but extremely difficult and important question which I have to answer is: ought the doctrine laid down in Ex parte James be applied in the present case so as to deny the trustee relief to which, according to the letter of the statute, he is plainly entitled. Stating the matter in very broad terms and indeed for the moment deliberately using for this purpose unemotive language, the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so."

And that's the passage quoted by Lord Neuberger in Nortel.

He then says:

"For the rule to operate, it is clear that certain conditions must be present."

My Lord, the first is between F and G:

"There must be some form of enrichment of the assets of the bankrupt by the person seeking to have the rule applied."

The second over the page, he says:

"Returning to the conditions for the application of the rule, it is, I think, clear that except in the most unusual cases, the claimant must not be in a position to submit an ordinary proof of debt."

He explains that between B and C by saying:

"I think the underlying reason is obviously that to give effect to the rule would conflict with the mandatory rateable division of the estate between all the bankrupt's creditors. The rule is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any."

Which was essentially the answer in Nortel: you can't use this as a way of rewriting what the statute requires.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Thirdly:

"The third and crucial test for the application of the rule is, I think, capable of being stated simply as follows [this is between E and F]. If in all the circumstances of the case an honest man who would be personally affected by the result would nevertheless be bound to admit, it is not fair, I should keep the money, my claim has no merits, then the rule applies so as to nullify the claim which he would otherwise have had."

And fourth:

"Finally, for completeness, I would observe that when the rule does apply, it applies only to the extent necessary."

On that case, if your Lordship just goes quickly to 567, at E, the last two sentences of that paragraph, Mr Justice Walton poses that question and he says:

"I turn to the facts of this particular case. The question as I feel it ought to be posed is simply: is it fair that trustees should recover the amount of these two cheques from Texaco."

And the answer is essentially no because the estate would be getting a windfall and the creditor would suffer loss which it's unfair for him to bear.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, that's the first. The second, TH Knitwear, your Lordship will find behind tab 21.

It is a slightly different factual situation, just looking at the facts on 275:

"The creditor had supplied goods and services to a company under a contract, which obliged the company to pay the creditor the basic price plus VAT. The creditor complied with its statutory obligation to account for the VAT element and paid the amount due to Customs & Excise. Then the company became insolvent and went into voluntary liquidation. The creditor limited its proof in the liquidation to the basic price of the goods and services and to recover the VAT element from the Commissioners."

Dropping two lines:

"Subsequently, the liquidator found there was a surplus over liabilities which is in part attributable to an amount representing the VAT element which had been refunded by the Commissioners to the creditor and for which the creditor could have proved in liquidation and the Commissioners sought to recover from the liquidator the amount representing the VAT element which they had thus refunded."

The answer in the case was the principle in Ex parte James did not apply, essentially for two reasons, just looking at the "held" at G:

"The Court of Appeal held the statutory scheme was

inconsistent with the existence of any right of the Commissioners to transfer to themselves the creditor's right of proof."

And secondly, in the second paragraph of the "held", the principle essentially did not apply where the court was dealing with a voluntary as opposed to a compulsory liquidator, because he wasn't, so the Court of Appeal said, an officer of the court.

My Lord, the argument that was advanced by the Commissioner was, first of all, at 283, at D, that it was subrogated to the rights of the creditor and obviously your Lordship is not concerned with that. Then, at 287, the alternative argument at G was that the principle in Ex parte James applied.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, then if your Lordship goes over the page in the judgment of Lord Justice Slade, so 288, and reads the first full paragraph, if your Lordship wouldn't mind. (Pause)

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then at D, Lord Justice Slade says:

"There are two reasons why the submission should not be accepted."

And your Lordship can see between D and E, he says:

"First, in my judgment, although Sir Nicolas

Browne-Wilkinson was prepared to assume the contrary in favour of the Commissioners without deciding the point, the liquidator in a voluntary winding-up is not an officer of the court within the principle."

The relevant passage I wanted to show your Lordship is on 289 at the bottom of the page.

MR JUSTICE DAVID RICHARDS: Yes, "In case this view be wrong ..."

MR DICKER: "In case this view be wrong, I should add that despite Mr Mummery's attractive presentation of the Commissioner's case, I am wholly unpersuaded this would be an appropriate case to apply the principle, even if it were capable of applying in the case of a voluntary liquidation."

In a passage in his judgment cited by Mr Mummery, Sir Nicolas Browne-Wilkinson said:

"In every case to which I have been referred, someone dealing directly either with the insolvent company or its liquidator has made a mistake, either of fact or law, by reason of which the company's assets available for distribution have been increased."

And he then says:

"I am not sure the principle is confined quite as narrowly as this."

And refers to in Re Tyler. But then he says between

C and D:

"However, on the authorities, I agree with Mr Price for the contributories that for the principle to apply there must be dishonourable behaviour or a threat of dishonourable behaviour on the part of the relevant court officer by taking an unfair advantage of someone."

And the answer and the reason why it didn't apply here is, if your Lordship goes down to G, he says in the second sentence:

"In the present case, however, there has been no criticism of the liquidator's past actions. In particular, he has not been criticised for, very sensibly, suggesting to creditors that in the first instance they should limit their proofs to the basic price of the goods or services supplied. The relevant question is whether it would or should affect his conscience if he were now to reject the Commissioners' claims."

The answer to that, if your Lordship just reads from H at the bottom of that page through to C on the next page.

MR JUSTICE DAVID RICHARDS: Yes. (Pause)

MR DICKER: So between B and C, the principle didn't apply because the consequences are simply the result of omissions in the relevant legislation and

Lord Justice Slade says he could see nothing which should or need affect the liquidator's conscience if he proceeds to distribute the assets.

So an emphasis obviously on the question of whether or not what has happened and what is said to be unfair has resulted from actions by the office-holder as opposed to simply him coming along later, saying, "I'm seeking to take the benefit of an agreement entered into between the debtor and its creditor, say, at some earlier stage".

My Lord, the third case is Re Wigzell, and for that your Lordship needs to go back to tab 9. This is a relatively common case of a trustee seeking to recover payments made into a bank account. Just picking up the facts, 835, five lines down:

"At the date of the receiving order, the bankrupt had encountered a bank. After the making of the receiving order and pending the hearing of the appeal, the bankrupt paid into the bank sums amounting to £165, monies which he had collected from his debtors and drew out of his account sums amounting to £199."

And over the page:

"The trustee in bankruptcy claimed a declaration of the sums paid into the bank after the date of the receiving order vested in him as trustee."

Again, Ex parte James did not apply in this case because, as it was held, there was nothing dishonest in the trustee enforcing the rights given to him by the bank, essentially to recover post-relation back dispositions of property.

The relevant passages start at 865. If your Lordship would go to the bottom of 865 and the judgment of Lord Justice Younger. The last paragraph at the bottom:

"But it is said the bank, although unable to bring themselves within the protection of the terms of the Act of Parliament, are entitled by a proper application of the principle first enunciated in Ex parte James to be relieved of the order which has been made against them.

"It is contrary, it is said, to natural justice or, to use a less high-sounding phrase, unconscionable on the part of the trustee to allow the trustee to recover this money from the bank in view of the circumstances in which the bank have already paid it away. Speaking for myself, I am not one of those prepared to be unduly critical of the principle laid down in Ex parte James when properly applied."

And he explains why. But then in the last paragraph on 866, essentially echoing, although this case was before, the comments made by Lord Justice Slade that

your Lordship saw a few moments ago. He says in the last paragraph:

"Now, the circumstances in which, with I think one exception, this, as I can see, useful jurisdiction has hitherto been exercised to be that the trustee in bankruptcy, either of his own motion or acting under the direction of the court and in each instance having in view the benefit of the general body of creditors, has entered upon a transaction which it is considered it would in the event be unconscionable for him to insist should be carried out strictly in accordance with the legal rights which the trustee under it possesses. Except in one case it has always been a feature that the transaction in question has in its origin been one initiated or approved in the interest of the general body of creditors."

So again, not a general principle of unfairness, but focusing on the involvement of the officer of the court in the transaction, which gives rise to what is said to be unfair. And that's repeated, if your Lordship now goes to 869, in the middle of the page. Your Lordship has it. There is a sentence in the middle of the line that reads:

"In my view, in considering the extent of this particular jurisdiction, it is quite vital to

distinguish between a trustee not insisting or the court not permitting him to insist on all the legal consequences of, on the one hand, a transaction initiated by himself or by the court in the interests of the general body of creditors and, on the other hand, a transaction initiated by the bankrupt.

"In the first case, the creditors are the constituents of the trustee throughout and as they are entitled to benefit by the transaction, so it does not seem to be wrong to say that they shall take it as it honourably is no more and no less. But in the second case the bankrupt has no constituents, that is to say the transaction is initiated by him -- presumably in his own interests alone -- and it is not obvious that a creditor with whom that transaction has been carried out and is complete, even one who in relation to it may have been tricked by the bankrupt, has any equity at all as against the other creditors of the same bankrupt who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt's assets."

So again, focus on the conduct or actions of the court officer.

My Lord, the final authority I should show your Lordship, because it's referred to, as I said, by

Lord Neuberger in Nortel, is In Re Lune Metal Products, which your Lordship has back in bundle 1B at tab 35. Just so your Lordship knows, the issue was rather different in that case. At 589, four lines down in the facts:

"Having realised the assets of the company, the administrators decided that rather than a company entering into a voluntary arrangement, it would be in the creditors' best interests if the administrators were to pay out the creditors early, paying the preferential creditors in full, the unsecured creditors the pari passu."

And they applied to the court pursuant to section 14.3 for the direction and they were authorised to make the proposed distribution.

So this is one of those cases before the changes permitting distributions where, to avoid the costs of the Insolvency Service's account, one made distributions early but then had to deal with preferential creditors.

The passage I should show your Lordship is at 597, paragraph 34. He says:

"I accept that section 14.3 of the Act does extend to giving the court what might be characterised as a residual inherent jurisdiction over the actions of an administrator, which may be invoked in the same sort of

circumstances as in relation to liquidators. The nature of the jurisdiction explained by Mr Justice Jacob in the Mark One case ..."

And then in that passage he cited cases to the effect that:

"A trustee in bankruptcy, also an officer the court, shall not retain money which had been paid to him purely under a mistake of law and a trustee in bankruptcy could not act manifestly unfairly to obtain an order for the repayment of two cheques which had been paid after the act of bankruptcy. Those were decisions whereby an officer of the court was, to quote Mr Justice Jacob, made to behave like a gentleman and not to stand upon his full legal rights when it was not fair to do so."

35:

"However, those cases are very much to the margin and we are not concerned so much with the extent of the powers of an officer of the court, but the way in which he should exercise those powers. In such cases, the court is sanctioning a course which, while it may not be lawfully required of one of its officers and could indeed otherwise be complained of by creditors who would be prejudiced by the action, it would nonetheless be an action which right-thinking people would consider appropriate."

So, firstly, the principle applies in administration as well and, secondly, the mere fact of that applying of the principle is necessarily to deprive other creditors of the benefit which they otherwise would have had is beside the point.

So that's all I was going to show your Lordship by way of authority. Just summarising the points which we say one gets from those authorities. Firstly, the principle applies when it would be unfair for the administrators to enforce their strict legal or technical rights. That is the word used by Lord Neuberger and that is the test that should be applied.

Secondly, the principle inevitably applies to produce a different result than would arise as a matter of law or equity. That indeed is the whole point of the principle. So it's no answer to say it involves a departure from parties' strict legal rights.

The third point, which your Lordship has seen from the cases, is that it is an important factor whether the unfairness resulted from something done by an officer of the court. It's not impossible for the principle to apply in other circumstances; indeed the first case your Lordship looked at involving the supply of petrol didn't in fact involve any actions, but it certainly

strengthens the application of the principle where one's dealing with a transaction which the officer has been involved in.

The fourth point is that the critical and in a sense most difficult issue is, of course, identifying when something should be regarded as unfair. It's obviously a slightly unusual issue for a court to have to decide, it being necessarily not a matter of law in the same sense as certain other issues are.

This is obviously a matter for your Lordship. I say this not just because your Lordship has to decide the question, but because the administrators are officers of the court. Strictly speaking, as your Lordship knows, it is in fact the court conducting the administration, albeit through its own officers.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So what is being done is something which directly engages, at least in that sense, the court itself. We say the question for your Lordship is therefore essentially whether or not it would be fair for the court, through its own officers, to enforce the transaction.

The fifth point is this: the principle, we say, has especial force where the court officers' actions related in some way to their duty to adjudicate on proofs of

debt. I'll come back to this point. We say it has especial force where their actions engaged, even if only indirectly, their quasi-judicial duty.

My Lord, I've made submissions in relation to the nature of the duty to adjudicate on claims. Your Lordship is, of course, aware that the administrators are also under, essentially, a logically anterior duty to ensure that they have correctly ascertained who are the creditors of the company. Can I just remind your Lordship of one decision in this respect? Austin Securities v Northgate, which is bundle 1A at tab 12. The case is essentially a want of prosecution case. It involved a plaintiff who unfortunately used a solicitor who became ill and didn't pursue the action.

As between the plaintiff and any ordinary defendant, that would have been sufficient to entitle the defendant to say, "I don't have to deal with this case, I should be able to strike it out for want of prosecution". The defendant wasn't, however, an ordinary defendant; it was a company in liquidation and the position was different because of the liquidator's duty effectively to ascertain claims, which should have required it to take a proactive role.

Just looking at the facts on 529:

"By writ of 5 February 1966, the plaintiffs claimed under the defendant company permission due under a contract made in or about November 1963 and an account. Shortly afterwards the plaintiff's solicitor had a stroke, he handed over his work, including the action, to another firm who let nine months pass with nothing done. The solicitor made a partial recovery, got the papers back, but remained in bad health and no further step was taken in the action before his death in 1968. Meanwhile, early in 1966, the defendants decided to re-organise their business into two separate companies. For this purpose a resolution for voluntary winding-up was passed and liquidators were appointed. Although the liquidators knew of the plaintiffs' claim in the action, having received an account in connection with it from the solicitors then acting for the defendants, they did not deal with it."

Then moving forward, 3 April 1968:

"The plaintiffs' new solicitors gave notice of intention to proceed. A statement of claim was delivered."

Then just below C:

"On 18 July, the defendants applied by summons for the stay of the action on the ground of the winding-up and/or for want of prosecution. Held, 1, the

liquidators by failing to deal with the plaintiffs' claim had not fulfilled their duty under section 302 of the Companies Act (1948) of suing the property of the company was applied in satisfaction of its liabilities pari passu and Pulsford v Devenish."

Your Lordship knows the origin of this.

If your Lordship then picks up --

MR JUSTICE DAVID RICHARDS: What I'm just trying to puzzle is why the claimants didn't just -- maybe this comes out -- but the plaintiffs, rather, could have just lodged a proof in the winding-up, couldn't they? That would have bypassed any point of want of prosecution. There wasn't a limitation issue, was there?

MR DICKER: There was a discussion about ...

MR JUSTICE DAVID RICHARDS: Anyway, it's just puzzling.

MR DICKER: If your Lordship goes to the held, 530, paragraph 2:

"Although the delay was inordinate and inexcusable, in view of the circumstances the defendants, by their liquidators' neglect, contributed to the delay. No prejudice to the defendants."

MR JUSTICE DAVID RICHARDS: There could still be a fair trial.

MR DICKER: There could still be a trial and there was evidence of waiver and the period of limitation had not

run, it was not a case for striking-out --

MR JUSTICE DAVID RICHARDS: Of course, the court had to decide the application before it --

MR DICKER: I don't know the answer to your Lordship's question of whether it ever got to this stage, but it did.

MR JUSTICE DAVID RICHARDS: And there we are, yes.

MR DICKER: There's a judgment of the Master of the Rolls. The passages I want to show your Lordship were at 532. If your Lordship would perhaps read from just above C on 532 to E. (Pause)

Then 533, just below C, a new paragraph, the Master of the Rolls says:

"The judge was not referred to the law about the duties of a liquidator as we have been and I think it makes all the difference to the case."

He goes on to say in that paragraph that there was delay, essentially, for which both sides are responsible. But the conclusion, 535:

"It would not be appropriate to strike out."

He says at A, line 2:

"It is perfectly clear -- and indeed Mr Bean was quite unable to submit to the contrary -- the liquidators have -- and I must regretfully use the adverb 'woefully' -- fallen down in their statutory

duty. They knew -- and they must certainly be taken to have known -- that there was at least a contingent liability to these plaintiffs.

"When one looks at the provisions of the Act and Rules, it is clear the liquidator has to advertise for claims. Furthermore, advertising is not sufficient where he knows of the existence of claims for, as was illustrated by a decision in Pulsford v Devenish. In such a case there is a duty to ascertain by direct enquiry whether the claim is being pressed."

And between E and F, the last sentence of that paragraph:

"In my judgment therefore it does not lie in the defendants' mouths to urge that fact, ie delay on the part of the plaintiff, against the plaintiffs who desire to pursue this claim."

So one starts with the two points: one, effectively it's not good enough for an officer, when dealing with the adjudication of claims, simply to leave creditors to advance their claims if they know creditors may have claims which are not being advanced. There are circumstances in which the duty of the office-holder in those circumstances is to ascertain whether the creditor does in fact want to advance a claim. And, secondly, when he comes to adjudicate on it, to do so in

a quasi-judicial manner.

My Lord, can I then turn to the relevant facts? Your Lordship has, I think, heard and seen much of this already, but just summarising the points in the context of this question. We emphasise the following: firstly, what happened here happened as a result of documents originally devised by the administrators for the benefit of creditors. So this is one of those cases which did directly involve the actions of the office-holders. This process was devised, originated and driven by them.

Secondly, we say the process was also one which engaged, even if only indirectly, their duties in respect of the adjudication of proofs. I need to explain what I mean by that. The CDDs were intended to provide an alternative to adjudicating claims in the ordinary way and the same can be said of the CRA to the extent that it too was concerned with ascertaining claims for the purposes of proof. My learned friend Mr Trower made the point to your Lordship that the quasi-judicial duty is not engaged where the administrators were simply returning trust assets and we agree with that. But to the extent that the CRA involved a process to ascertain claims for the purposes of proof, we're in the same territory as the CDDs.

My learned friend accepted that the LBIE

determination, in other words the decision on the creditor's claim, did engage the quasi-judicial duty. We say it goes slightly further than that. That duty is also indirectly relevant to the process which the liquidators devised. If office-holders are going to propose an alternative process to the adjudication of claims, an alternative to them exercising their quasi-judicial duty to ascertain the proper amount, then in our submission the compromise and the proposal is one that needs to treat creditors fairly and not unequally for no good reason. It can't be intended effectively to simply produce a haircut. Indeed the administrators stressed, as your Lordship has seen in the evidence, that that wasn't their intention.

Put another way, it's obviously open to an office-holder to say: it would be too expensive for us to go through the normal proof process, here is an easier and quicker alternative. But it is important, we say, that that alternative, at least broadly, reflects the underlying nature of the adjudication process and it doesn't introduce, save to the extent that speed or efficiency absolutely require it, unequal treatment of creditors and it doesn't require creditors to give up value which they don't need to give value. It certainly isn't an excuse for permitting office-holders to say,

right, at this stage we're no longer concerned with our quasi-judicial duties, we can behave as hardnosed as we want and extract whatever concessions we can from creditors. That would not be, in our submission, a proper alternative process.

As I say, we're not suggesting that that is what the administrators here did, quite the contrary; all the evidence suggests that it wasn't.

The next point is this: we say the way in which the process operated is important. Again, your Lordship has seen the material in relation to this before, but creditors were told they had to enter into CDDs as a condition for receiving dividends. They were told that the terms of the CDDs were non-negotiable, so essentially this process was presented to individual creditors effectively on a sort of take-it-or-leave-it basis. They were strongly encouraged to enter into such agreements. Indeed, as your Lordship's seen, the administrators told them the agreements were intended to be fair and in their best interests and not simply intended to result in a haircut.

They were given a strong incentive to enter into them. They were told, quite rightly, that if they didn't their claims would need to be determined in the usual way, after inevitably some delay, and they would

have appreciated that, if that was the case, they would lose time, value and money in the meantime, there being no expectation of a surplus.

They were not told that the process would result in them giving up rights, whether to statutory interest, currency conversion claims or other relevant non-provable claims, simply because they were participating in this speedier proof process as opposed to insisting on their claims being admitted in the ordinary way. Nor were they told that the process would result in creditors being treated differently depending on which agreement the creditor entered into.

Your Lordship may think one striking feature of my learned friend's submissions was that he provided no justification for or indeed explanation of the different effect of different types of CDDs, in particular, the difference between the effect of an agreed CDD, which didn't waive a currency conversion claim, and an admitted claims CDD which did.

As I understand his position, it's effectively simply, well, that's just the effect of the agreement which the creditor voluntarily chose to enter into. Some chose to enter into an agreed claims CDD and they therefore intended to preserve currency conversion claims. Some chose to enter into an admitted claims CDD

and they therefore chose to abandon currency conversion claims.

My Lord, we say that simply doesn't reflect what was happening here. Your Lordship has seen the evidence in relation to this. The agreed claims CDD was developed first to deal with a situation in which the administrators thought you might have a client money claim. The admitted claims CDD was used instead where the administrators thought you would not. In other words: creditor sitting there, he's asked to prove his claim, he says yes, he does so through the claims portal, the claim is considered and agreed. As your Lordship's seen, in both cases in the underlying currency, and at the end of that process, when it comes to formally recording the outcome of that simplified proof process, he is either given an agreed claims CDD or an admitted claims CDD to sign by the administrators, depending on whether the administrators thought he had a client money claim or not.

The suggestion that essentially the difference is to be explained by a difference in intention or wishes on the part of the creditor as opposed to being the result of the administrators' choice as to the various forms they're using, we say, is simply entirely wrong.

There was also no reason why creditors, in our

submission, should have second-guessed the administrators. There is no reason why they should have appreciated that these forms might have their different consequences. The starting point is no reason whatever for a creditor to think that an admitted claims CDD is going to do something so different from an agreed claims CDD. No reason to think that's an outcome which the administrators would have any interest in achieving. No reason for the creditor to think that he couldn't effectively rely on the administrators and their very experienced legal advisers to put forward a process which, save to the extent as otherwise required, broadly reflected their underlying entitlements. My Lord, certainly no reason for concluding creditors were equally experienced.

My learned friend Mr Zacaroli showed your Lordship a passage in the evidence which described the wide spectrum of types of creditors. As your Lordship will recall, some were banks, some were ordinary corporates, and there was a reference to a few private clients as well; none of them, I may say, insolvency practitioners and none of them, apparently, firms of English solicitors. Many, no doubt, weren't English at all. The idea that they should somehow have appreciated the consequences of the documentation when, assuming it had

the effect for which Wentworth contends, it's plain the administrators didn't, we say would also be entirely wrong.

And references which your Lordship sees throughout my learned friend's skeleton argument to concepts like freedom of contract or choice, things like that, we say are irrelevant in this context for the reason your Lordship gave. We're simply not dealing with a situation in which we have two parties, each seeking to maximise their own selfish interests to the extent the law permits.

So that's the process, essentially: not merely one involving administrators, but one driven by, one in respect of which the administrators encourage creditors to participate, and all of what goes with that.

The next factor is, we say, one also needs to take into account how the problem came about. Essentially, if Wentworth is right as a matter of construction, what is it that gave rise to that state of affairs? If we're wrong as a matter of construction -- and obviously we say we're not -- and the agreements do have the effect for which Wentworth contends, the only explanation would appear to be either inadvertence or oversight by the administrators or their legal advisers.

That wouldn't -- and again I should stress --

necessarily be a matter for criticism. The task which they faced was obviously extremely complicated and difficult to address. But if the documents do have the effect for which Wentworth contends, we say it is a relevant factor that the unfairness resulted from legal consequences of agreements which had those consequences because, on this hypothesis, either the administrators and their legal advisers didn't anticipate the possibility of a surplus and didn't cater for that or didn't appreciate the possibility of the existence of a currency conversion claim, either because they didn't read Re Lines Brothers or because, having read it, they decided that no such case existed.

None of those factors could possibly be laid, we say, fairly at the door of creditors. If there is a causal point to be made here, as I said, it's that this would have happened as a result, on this hypothesis, of some inadvertence or mistake on the part of the administrators or their legal advisers.

My Lord, again, just so there is no misunderstanding, we are not saying, obviously, that the administrators were inadvertent or made a mistake because we say the agreements did not have effect for which Wentworth contends.

There are various references in my learned friend's

skeleton to the non-reliance provisions in the various documents. Again, we say that if what the administrators have done is unfair, in other words if the documents do have the effect for which Wentworth contends, and if, as we say, that effect would be unfair, it's no answer for them to say that they got the creditor to sign an agreement saying that they were not relying on the administrators. We say it would be no answer to a contention that the outcome is unfair to say, well, it's the result of a document which contains a term in which you agreed not to rely on us. Nor, equally, can they say that you, the creditor, should have taken your own legal advice and worked out what the answer was.

My Lord, put another way, officers of the court cannot justify departures from the statutory scheme which are unfair simply by inserting provisions into an agreement saying it was up to creditors to identify the problem and object if they wanted to.

One other factor which we say is also relevant is the fact the agreements contained wide releases, not merely of LBIE but also of the administrators themselves, effectively giving creditors no other possible avenue of redress for what has happened.

There is an issue which your Lordship doesn't need

to debate, I think, at this hearing as to whether and in what circumstances it is appropriate for officers of the court to require releases to be given simply in respect of their doing their professional duty.

I'm not submitting they should not have obtained releases in this situation, but I am submitting that, having done so, it's another factor to take into account in considering whether it would be fair for the releases to be enforced if they have the effect for which Wentworth contends.

My Lord, we also say that the position of the administrators themselves on this application is important. They are not saying to your Lordship, yes, the agreements did have the effect for which Wentworth contends, and nor are they saying, yes, for the following reasons, it would be fair to allow us to enforce them. Indeed, every indication is to the contrary.

I say that because in relation to statutory interest, when the issue arose, the administrators' immediate reaction was to say, this wasn't what we intended, and when the problem persisted, we inserted preservation language to ensure it didn't subsist.

In relation to currency conversion claims, Mr Copley's evidence is to the effect he didn't intend

the currency conversion claims would be compromised. Indeed, as your Lordship knows, he ceased being willing to sign CDDs which didn't preserve currency conversion claims once it became clear it was being suggested such claims might be released. I don't know if your Lordship remembers that from the evidence.

MR JUSTICE DAVID RICHARDS: Yes, I do.

MR DICKER: My Lord, he also says in his evidence that, had he known about the existence of currency conversion claims, he would have sought to have them carved out, if it was necessary to do so, in order to preserve such claims. He says his preference would have been to not compromise them and we say that is an important indicator, certainly so far as Mr Copley is concerned, of what he would have regarded as the appropriate course.

It follows that the reason why we're debating this issue is not because the administrators are standing up in front of your Lordship and saying, yes, the agreements have this effect, and, yes, it would be fair to permit us to enforce them for the following reasons. It's because Wentworth are seeking to put arguments into the mouth of the administrators as to why nevertheless they should not be prevented from enforcing the releases.

The final general point in relation to this concerns the consequences if Wentworth was right as a matter of construction. We say creditors would have suffered an entirely unnecessary injustice so far as their claims in the event of a surplus were concerned. They would have given up claims potentially worth more than 1 billion and the subordinated creditors and shareholders would have received a windfall, a sum which they would not have otherwise received.

My Lord, indeed in relation to currency conversion claims, the consequences we say are particularly striking. If your Lordship could just turn up our skeleton argument at paragraph 222. We say the unfairness is compounded by the fact the estate would receive a double windfall and the detail of that is then set out in 222.

The essential point is this: as your Lordship knows, LBIE's assets were denominated in US dollars, not merely its claims. So the effect of the appreciation of US dollars against sterling was to increase the value of LBIE's estate. The effect of Wentworth's contention is essentially that that increase in value inures for the benefit of subordinated creditors and shareholders and that they don't have to bear essentially the equivalent burden of the appreciation in the value of US dollar

claims on the other side.

MR JUSTICE DAVID RICHARDS: I see the point in principle

(Pause)

MR DICKER: Your Lordship sees the conclusion in the last sentence:

"If creditors with claims denominated in US dollars have lost the right to be paid in US dollars, LBIE and its subordinated creditors and shareholders receive the benefit of an appreciation in the value of its dollar assets without having to account for the full amount of its dollar liabilities."

MR JUSTICE DAVID RICHARDS: Yes, I see.

MR DICKER: My Lord, there's then a further point, not about all CDDs, but about certain CDDs, and this essentially mirrors the submissions I made earlier about what I called the interim period. In other words, after the administrators appreciated that there might be a surplus in relation to statutory interest claims, firstly, and secondly after they appreciated that there might be currency conversion claims.

As your Lordship knows, there was a period after both of those events in which, in addition to all the factors I've been through, one has a situation in which CDDs are still being signed in relation to statutory interest and being signed by creditors having been told

by administrators that they don't think that the agreement resulted in creditors waiving any rights to statutory interest and, in relation to currency conversion claims, creditors signing CDDs because, at least initially, the administrators said they weren't prepared to amend them to ensure consistency of treatment amongst creditors.

My Lord, we do say particularly in that situation, on any basis, it would be unfair, again assuming that the agreements have the effect for which Wentworth contends, of the administrators to enforce CDDs, which, on this hypothesis, would result in creditors giving up claims statutory interest, and the CDDs were entered into following assurances by the administrators that that was not what they intended.

Of course, in our submission, one never gets anywhere near this because the administrators' assurance was exactly right: that wasn't their effect, but on this hypothesis we say that if creditors were bound, that would plainly be unfair and it would be wholly unfair for the court through its officers to enforce the releases in those circumstances.

My Lord, I don't know whether your Lordship is aware of the phrase -- Ex parte James is sometimes referred to, and indeed comment has been made to me outside this

arena in relation to this case that Ex parte James is the last refuge of the desperate. In many cases where a party simply says generically, "It's unfair", and cannot point to any conduct on the part of the court officer, it plainly has been used in that way.

We do most respectfully say that, in the context of this case, to ascribe the application of the principle with language like that is not giving it the degree of seriousness which it deserves.

So those are our submissions in relation to Ex parte James. I have some very brief submissions in relation to paragraph 74, which I may or may not just about be able to finish.

MR JUSTICE DAVID RICHARDS: Well, why don't you carry on with those?

MR DICKER: If your Lordship turns up paragraph 74 of schedule B1:

"A creditor or member of a company in administration may apply to the court claiming that: (a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant, whether alone or in common with some or all other members or creditors; or (b), the administrator proposes to act in a way which would unfairly harm the interests of the applicant, again whether alone or in common with some or all other

members of the creditors."

So one has two concepts: one is that of "unfairly to harm", that's the first; and the second is the idea that the administrator is acting or has acted, so one is entitled to look at what happened in the past and what would happen in the future.

So far as that latter point is concerned, we say both are potentially engaged in the sense that the administrators would have acted so as unfairly to harm the interests of creditors if they had devised and put out a process which had the consequences for which Wentworth intends. In other words, looking back and assessing what went on and the consequences of what went on during the course of the administration.

Alternatively, we say that the administrator would be acting so as unfairly to harm the interests if it were now to seek to enforce the releases.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, so far as the law is concerned, the one passage I wanted to show your Lordship is in fact from Re Nortel, which is 1B, tab 57. It's the paragraph before the paragraph I showed your Lordship earlier, paragraph 121. I show your Lordship this because it's not referred to, I think, in our skeleton, but Lord Neuberger says:

"Paragraph 74 entitles a creditor to apply to the court if he considers the administrator proposes to act in a way which would unfairly prejudice it. This cannot, in my view, apply to a case where the administrator is proposing to do that which the legislation requires him to do [in other words, the same answer to the underlying issue in Nortel]. It applies where the administrator is exercising a power or discretion, most obviously carrying on the company's business in a certain way or selling off an asset of the company or not performing an obligation such as paying-off creditors in the order mandated by the legislation."

In other words, it may be engaged by a departure from a distribution in accordance with the statutory waterfall.

My Lord, that's --

MR JUSTICE DAVID RICHARDS: With all due respect to Lord Neuberger, I'm not sure I fully understand the last example because if the administrator is not performing an obligation, then the creditor need only enforce the obligation.

MR DICKER: Which is why I read that as meaning effectively doing something otherwise than in accordance with his statutory obligations.

MR JUSTICE DAVID RICHARDS: That's right. So presumably therefore in breach of it.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: You don't need this paragraph to deal with that.

MR DICKER: Well, you may not need it in the sense there may be other remedies for it.

MR JUSTICE DAVID RICHARDS: Correct.

MR DICKER: But that doesn't mean that this isn't a possible avenue open to ... In other words, if the administrators --

MR JUSTICE DAVID RICHARDS: I see, yes. I should have thought the concept of unfairness is being used in distinction to unlawfulness.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: So there's an analogy, clearly, with unfairly prejudicial conduct in the company context, or indeed in the context of employment law.

The interesting thing about fairness is that in the last 30 or so years unfairness has become the source of substantive rights in a way which largely didn't exist before.

MR DICKER: My Lord, yes, and we say obviously paragraph 74 effectively is one localised --

MR JUSTICE DAVID RICHARDS: It is. It is interesting that

Lord Neuberger picks up on the use of the words "fairness" and "unfairness" in relation to Ex parte James. Admittedly, it was one of the earlier cases -- was it Mr Justice Walton? Anyway, one of the earlier cases --

MR DICKER: In Re Clark.

MR JUSTICE DAVID RICHARDS: -- had introduced the concept of fairness, but Lord Neuberger clearly picks that up.

MR DICKER: Yes, we've certainly moved away from descriptions of Ex parte James in terms of dishonesty, dishonourable conduct --

MR JUSTICE DAVID RICHARDS: It looks like it.

MR DICKER: My Lord, I have no idea why I said --

MR JUSTICE DAVID RICHARDS: Then we'll rise now, but just let me say this: that while we're mentioning this topic of unfairness, you quite rightly identified as a point of importance arising from the authorities what is unfairness and you made the point perfectly fairly that in the context of Ex parte James, which the Court of Appeal has said applies only to the officers of the court, they are exercising, in a sense, the powers of the court. But I would be assisted by a submission from you as to what is the test for unfairness. It is not always an easy question. But how do you express the test the court should apply to determine whether

something is unfair or not?
Thank you very much. 2.05.
(1.05 pm)
(The Short Adjournment)
(2.05 pm)
MR DICKER: Your Lordship asked before the short adjournment about the concept of fairness.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: I'm not sure to what extent I'm going to be able to provide useful assistance to your Lordship. The cases refer to the issue as being a difficult one. My learned friend Mr Trower described it over the break as the elephant you can recognise but less easily define.
In our submission, it's not hard to answer the question in this case: one simply looks at the relevant facts and asks whether in the light of those it would be fair and we say plainly not for all the reasons I've given.
In our respectful submission, it may not be that helpful to try and add a layer of analysis between the facts and effectively the conclusion on the facts.
My Lord, that said, can I perhaps add the following? Part of the difficulty, in our respectful submission, is it involves the court asking a question which is slightly different from the question it normally asks.

It's normally there to decide issues between two parties and in that context is effectively sitting as a separate party, if I can put it that way, applying principles of law, which may be well-established, slightly less established, but from that perspective.
The issue here is slightly different. It's essentially the question of the standard by which the court thinks it is appropriate for its own officers to act, or, put another way, by reference to the old cases, the standard by which the court thinks it is appropriate for it, through its own officers, to act.
My Lord, if one sees it in that way it's slightly difficult to make further submissions without becoming personal. But the question we say is therefore essentially: does the judge who has to decide the issue think the result is one which it would be appropriate for him or her as a judge to bring about through his or her own officers?
That's one way of looking at it, effectively asking the judge, having regard to his office as a judge, to consider whether it would be appropriate. The cases also have various references to gentlemen and honourable individuals and the other approach is essentially to have regard to those. They sound obviously slightly odd to those of us who spend all our lives dealing with

commercial men intent on pursuing their own interests, but the court, if I may respectfully say so, is expected still to have a sense of what those concepts involve and an ability to decide whether or not particular conduct falls within it or not.
MR JUSTICE DAVID RICHARDS: When the phrase is used in paragraph 74, unfairly harmful, that's slightly different from what the court --
MR DICKER: Your Lordship is quite right. I think the emphasis is slightly different there.
One final point in relation to fairness so far as Ex parte James is concerned, and it's really another way, I think, of putting the same point. This is not a situation in which you have two commercial parties or otherwise on opposite sides of a transaction. What you effectively have here is a group of creditors on one side and the court, through its officers, on the other.
So when one is talking about enforcing it, one is not talking about enforcing a bargain in the same way or raising the same issues as any bargain between commercial men, but subject to those points, as I said, I'm not sure I can take the submissions very much further. I'm afraid, ultimately, it's a question for your Lordship.
As we say, on the facts of this case, certainly if

one goes back to Re Clark and the petrol case, it's slightly difficult to understand on one level why that involved the conscience of the trustee at all in the sense that he wasn't directly involved. But despite that having come on to the scene, given the benefit received at the expense of the creditor, the court concluded it would be unfair to permit him to enforce it, even though he came on to the scene afterwards.
So far as paragraph 74 is concerned, your Lordship is quite right. In our respectful submission it's not quite the same issue as it is in relation to Ex parte James. I think it's easiest, in our submission, to analyse it in this way. The first question is: is there harm? Which is essentially an objective question. The second is: is it unfair?
In our submission, in a sense, that's easiest tested by reference to the statutory scheme in the sense that if what's being done is in accordance with the statutory scheme, it plainly can't be unfair because that is something which the legislature has dictated should happen. That's effectively Nortel.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So what one's looking for is some departure from the statutory scheme which is unfair, we say, because there isn't a sufficient justification for it. So if

one considers, say, the different effect according to Wentworth of the agreed claims CDD and the admitted claims CDD, is there harm? The answer is yes because creditors are giving up valuable rights, which we say as part of an ordinary proof process they wouldn't have needed to give up. Is it unfair in the sense of is it capable of justification? We say no. No good reason has been given for the arbitrary distinctions -- the arbitrary differences, in effect -- between those two types of CDD. As I said, the relevant one was simply presented to the creditor to sign.

The reason why one rather than the other was given depended on the irrelevant fact of whether or not they had a client money claim or accurately whether the administrators thought they had one or not. If one asks therefore is that differential treatment of creditors unfair, is that unequal treatment unfair, we would say yes because there was no good justification for it. Indeed, I've made the submission my learned friend didn't even attempt to provide one.

That's unequal treatment. We say the same approach can effectively be applied to unfairness in the sense of stripping value from creditors in respect of their proved claims. If one can say, well, the right way of looking at the CDDs is they were intended essentially to

provide a speedier proof process and it was unnecessary for rights in the event of a surplus to be stripped out as part of that process, then there was simply insufficient justification for removing those rights as part of the process which the administrators were trying to comply with. Nor is it justified by the underlying statutory scheme. Indeed, to the contrary, the statutory scheme would have produced a different result.

So my Lord, we agree with your Lordship there is this difference between Ex parte James and paragraph 74. It may be that the paragraph 74 test in that way may have a slightly more modern or at least ostensibly objective aspect to it than perhaps certainly the Ex parte James principle certainly appears at first sight to have.

We, as your Lordship knows, submit both are engaged here. Just four specific points in relation to paragraph 74. They're made in the skeleton and I don't think I need to develop them. I just want to make sure your Lordship has them clearly identified. They're these.

The first is unfair harm does not require misconduct on the part of the administrators. This isn't a blame game, if I may use that phrase.

Secondly, it is, as I've already submitted,

sufficient to show unequal or differential treatment which cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administrators or whatever they were doing.

Thirdly, a lack of commercial justification for the decision causing harm to creditors as a whole may be unfair -- again, this was my next point -- in the sense the harm is not one that we should be expected to suffer.

The fourth is it's not necessary to show that the administrators' decision was perverse or so unreasonable that no reasonable person would have done it. So one's not looking for perversity or irrationality.

So far as the facts are concerned, we've already been through them. We say there is harm here in the sense that I've described. It's unfair either because it results in creditors being treated unequally for no good reason or it's unfair in the sense that the process devised by the administrators resulted in them losing value in respect of the claim which they were seeking to prove without them being told that was the consequence and without that being a necessary consequence of what the administrators wanted to achieve. In a sense, that's the long and the short of it.

So we do say that if we're wrong on the question of construction, the administrators should be directed not to enforce the releases. As I say, directed not to enforce them so far as they remove value, whether that's in respect of statutory interest, currency conversion claims, or other non-provable claims which they would have in that situation had they proved in the ordinary way.

Unless I can help your Lordship further, those are our submissions.

MR JUSTICE DAVID RICHARDS: Thank you, Mr Dicker. Mr Zacaroli?

Further submissions by MR ZACAROLI

MR ZACAROLI: My Lord, the starting point here is that there is a series of valid and enforceable contracts at law. There is no question of them being induced by undue influence, no misrepresentation, no mistake justifying rescission. So none of the remedies available at law would undermine the agreements that have been made. That has to be the starting assumption. I know there are some issues left behind from 36B perhaps, but the starting point is that's the position.

Our case is really quite simple. Whatever the precise formulation of the rule in Ex parte James or indeed what unfair harm means in paragraph 74, it

undoubtedly does not extend to preventing the enforcement of an otherwise perfectly valid contract, carefully negotiated, where substantial benefit was obtained by creditors and where the release of the claims, which is now complained of, was part of the give and take of a commercial bargain, including a reciprocal release of claims against creditors and, critically, the early determination of claims, which was a big advantage to creditors.

All of which, my Lord, was done properly in accordance with the administrators' duties and in accordance with the purposes of administration. I have made those submissions before; I needn't repeat them.

To turn it on its head in a way, why should creditors who have achieved a substantial advantage or substantial advantages from entering into a CDD be entitled to renege on part of the price which they freely agreed to as part of that bargain, ie the release of unknown uncontemplated claims?

In opening his case on this point before the short adjournment, my learned friend said:

"If the creditor goes to the administrators, advances a claim, and if somehow during the course of that process loses various parts of that claim which he wouldn't lose if he had proved in the ordinary way,

that's the point at which Ex parte James and paragraph 74 step in."

If that were right, it would effectively destroy any real use of the administrators' statutory power of compromise because a compromise necessarily or very often necessarily will involve giving up rights which wouldn't have been given up in the ordinary proof process.

A creditor would always be able to say that a release given in return for the admittance of a claim to proof shouldn't be enforced if another claim discovered later would have been recognised through the proof process and that simply can't be right, irrespective, that is, of whether the other claim is provable or non-provable.

Turning just to the law, first of all, and the test in Ex parte James. The touchstone, in my submission, remains something which has been described in the past as "dishonourable conduct". It has not been watered down to something akin to unfairness, whatever that may mean, and just to foreshadow what I'll say about Lord Neuberger, it can't be suggested that Lord Neuberger in a single paragraph in the decision in Nortel, where the facts were clearly outside the principle, was intending to reformulate the principle in

what he said there. He was recording in shorthand how the principle has been stated in earlier cases.

Just a few references to the cases. Can we start with TH Knitwear, which my Lord has seen, but there's one paragraph I want to emphasise. Bundle 1A, tab 21. The case, as my Lord will remember, was about the Commissioners of Customs & Excise seeking to claim that it was unfair that they weren't being allowed to recover the VAT element.

My Lord was shown a passage at page 288 in the judgment of Lord Justice Slade beginning with "Mr Mummery helpfully took us through". And then my Lord was also shown a passage at the bottom page 289 beginning "in case this view be wrong".

The passage I wish to emphasise is the one just above E where he holds it doesn't apply to a voluntary winding-up. He says:

"The entire basis of the principle as I discern it from cases is that the court will not allow its own officer to behave in a dishonourable manner. There is no doubt much to be said in favour of the principle. However, where it is invoked, it is likely, save in the most obvious cases, to induce a less welcome element of uncertainty.

"As Mr Justice Salter commented in Re Wigzell, legal

rights can be determined with precision by authority, but the questions of ethical propriety have always been and will always be the subject of honest difference between honest men. The principle is itself anomalous. I would not for my part extend the anomaly and the inevitable uncertainty which it involves by holding that it applies to liquidators in a voluntary winding-up or indeed to ordinary trustees ..."

So that's how it's been described by Lord Justice Slade in 1988.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My Lord had reason to consider the principle in one of the T&N cases, which is at bundle 1B, tab 30. This was an application for directions by administrators of T&N. The question being whether they should permit various associated companies to serve notice, withdrawing from pension schemes on the basis that would or could leave the pension schemes with liabilities which would not be paid by the companies.

That was the background. My Lord dealt with the question of Ex parte James at paragraphs 16 through 18. Perhaps my Lord can remind himself of what he said at paragraphs 16 to 18.

MR JUSTICE DAVID RICHARDS: I will. (Pause)

It seems a long time ago. (Pause)

Yes.
MR ZACAROLI: Particularly my Lord was echoing the words of Lord Justice Slade:
"The principle is a difficult one to apply and is regarded as anomalous. Dishonourable conduct, taking unfair advantage is the touchstone."
My Lord, that's 2004. That was entirely correct, we would say, as at the date of that judgment and remains the position today. There has been no case applying the principle in Ex parte James since then which has in any way varied, altered the way in which the test should be applied.
One other reference is to the case of Re Wigzell, which has been referred to in both the cases we have looked at. That's at tab 9 of bundle 1A. My Lord, you were shown this this morning by my learned friend.
Again, a couple of passages that you weren't shown, first of all, in the judgment of Lord Justice Younger at page 866. You were asked to look at the top of that page --
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: -- and I'd just ask my Lord to read on to the sentence beginning, just above halfway:
"But I agree fully in thinking that as a matter of prudence the court is well advised to exercise this

power only in clear cases ..."
MR JUSTICE DAVID RICHARDS: Yes. (Pause)
MR ZACAROLI: To the end of the paragraph. (Pause)
MR JUSTICE DAVID RICHARDS: So the court should be slow to refrain from exercising it in a case in which good sense would be shocked?
MR ZACAROLI: Yes, so he's putting it in reverse there.
The other passages is in the judgment of Lord Justice Scrutton at page 858 to 859. Beginning at 858, at the paragraph break just below halfway, if my Lord can read that to the paragraph break on the next page, including the reference to the elephant.
MR JUSTICE DAVID RICHARDS: Yes, certainly. (Pause)
MR ZACAROLI: So emphasising the dangers of judges being asked to enter upon questions involving morality as opposed to law, but without any clearly discernable principles.
My Lord, as I said at the beginning, we would say however the test is defined, it's very difficult to see how it could be described as dishonourable by any high-minded or honourable person to hold someone to a bargain freely entered into for good consideration and for which that consideration has been achieved or received. It's the opposite in a sense. It's the dishonourable thing to break contracts or allow people

to get out of them. A contract freely entered into for proper consideration can't be dishonourable to require it's enforceable and that's our basic proposition on this point.
I'll deal next with a couple of points from the cases on unfair harm because our argument in terms of applying the law to the facts is really the same for both principles.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So turning to paragraph 74, the two essential requirements are that the relevant action, actual or threatened, would be causative of harm to the creditors' interests and, secondly, that harm would be unfair. My learned friend understandably declined the invitation to try and define what constitutes unfairness and essentially takes the opposite line to us that whatever it is, this case is it.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: Obviously, we take the completely opposite view to that and whatever it is that this case is, it is not it.
Two references in the cases. They don't elucidate the point terribly much, but they do provide some elucidation. First, the Four Private Investments Funds case at bundle 1B, tab 39.

My Lord, the context, which is not particularly important for the principles that are then set out in the passages I'm going to take my Lord to, but my Lord will see from the headnote it was an application for and on the administrators of a company disclosed by way of statement in writing of information in respect of certain securities held by the applicants.
So this was one of the cases in the early stages of this administration when creditors were seeking disclosure quickly to enable them to determine their own asset position, and the administrators were essentially saying, we can't deal with that now, we need to deal with this in a proper and sensible order. So that was the background.
Against that background, one of the arguments was the administrators were acting in a way which created unfair harm for the creditors, and Mr Justice Blackburne addresses that point at paragraph 34, where he states what I've already stated, the two things you have to show are -- well, the first thing is harm, paragraph 34, letter B, page 644, and then, 37:
"The second aspect is that the harm must be unfair. Harm alone is not enough. What is the ingredient implied by the need to show unfairness?"
Can my Lord read 38 and 39?

MR JUSTICE DAVID RICHARDS: Certainly. (Pause)
MR ZACAROLI: Although the context is different, there's an echo there of the point I make here, which is that the administrators were acting there in accordance with their statutory purposes by dealing with cases in the order they were. Here, the entry into the contracts in the first place was undoubtedly done in the course of the proper exercise of the administrators' powers to compromise claims with a view to speeding up distributions to creditors across the board or to as any many of them who were willing to partake in that process.
That's probably the only other reference. Let me just check one further matter before I put this bundle away. (Pause)
I think nothing else in the authorities takes the point much further. Certainly we say that where you're acting in accordance with the statutory scheme, as the administrators were here, then it cannot be unfair even if it does cause some harm. In a sense, that echoes precisely the point my learned friend made just after the short adjournment when he said it's okay for the office-holder to act in accordance with the statutory scheme. His point, of course, is they're not acting in accordance with the statutory scheme here because there

may be creditors who are not being able to assert claims, non-provable claims, as a result of the agreements. But that is to over-ignore the important step in the process which is that there has been an agreement reached with creditors for proper purposes in accordance with the statutory scheme and it's the consequence of the agreement that they now can't assert those claims, not the actions of the administrators. They chose to enter into the agreements; they didn't have to. In so doing it has had some consequences.
Which also leads to another point, dealing with a point my learned friend made about sufficient justification, that there must be sufficient justification for the actions the administrators have taken. Well, for a start they're acting in accordance with the statutory scheme, so that's sufficient justification, but actually there's more justification here, namely that there was a real benefit to be achieved by the estate as a whole, all creditors, and each creditor who entered into a CDD in terms of speed, certainty and finality. It would enable the administration to be brought to an end more quickly than otherwise. That is a perfectly good justification for entering into the documents in the form that they did.
My Lord, in my learned friend's skeleton at

paragraph 191, the argument is put in broad terms in this way. They say if, contrary to their argument as to construction, the agreements had the effect of releasing the claims, then the last two lines:
"... such an effect was an inadvertent consequence of a process initiated by and, until 2014, required by the administrators."
And I want to respond to that concept of inadvertent consequence. My submissions I'll take very shortly because they do echo what I've already said on construction on this point.
Assuming no civil law remedy to undo these agreements, we can start from the point that they are fully enforceable as a matter of law. It's not entirely clear to me, but I think the Senior Creditor Group's position is not that there was any dishonourable or unfairly harmful conduct in entering into the agreements. It doesn't appear to be put in that way, that there was something dishonourable about entering into the agreements.
What is said is it's dishonourable or unfairly harmful to enforce them.
MR JUSTICE DAVID RICHARDS: I think Mr Dicker kept open both limbs, although I think it's probably right that he put a little more emphasis on the second limb than on the

first, I think understandably.
MR DICKER: My Lord, your Lordship has it right, but just so we're clear, I referred your Lordship to both bits in paragraph 74 --
MR JUSTICE DAVID RICHARDS: You did. You did.
MR DICKER: -- "has acted or is proposing to act", and we said both are triggered: the first by getting creditors to enter into these agreements in the first place and the second by seeking to enforce the releases now.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, I think I understood it to be the other way or at least no emphasis was being placed on the first stage, because firstly they're not criticising the conduct of the administrators as such, they're not saying they've done anything wrongful, and it's slightly difficult to square that proposition with a submission that entering into these agreements was dishonourable conduct.
MR JUSTICE DAVID RICHARDS: It seems to me that limb B is where battle is more obviously joined.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: Because one thing is clear: the administrators didn't intend to deprive the creditors of these particular rights or didn't intend that they should release them. It is very difficult to see --

I mean, I can see no conceivable basis on which it would be said that by negotiating with the committees and then arriving at a standard form and tendering them to creditors for signature, that could be in any sense or on any ground stigmatised as dishonourable or really even unfair. I think it's more a question, in the light of, let us suppose -- if the true construction is, as you contend, would it now be unfair for the administrators to enforce the contracts in that respect --

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: I appreciate Mr Dicker has put his submissions on both limbs, but without giving too much away, it seems to me that limb B is the more obvious territory --

MR ZACAROLI: And to be fair to him it's limb B which he has focused on in his skeleton. That's why I think that's their case.

Our point is this: if it wasn't dishonourable to enter into the agreement then it can't be dishonourable to enforce it. If the agreement was a proper one to have entered into at the time it was entered into, then it can't be dishonourable now to require it to be enforced when creditors have had the advantage of entering into it.

And although, of course, I accept my Lord's comment that we can't suggest the administrators intended to release a currency conversion claim, that in our submission doesn't take one far enough because they didn't intend to release any particular non-contemplated or uncontemplated claim. What they did intend to do was to release any claim that was not in contemplation. And that's both ways: any claim by the creditor against the estate or any claim by the estate against the creditor.

So it's not an inadvertent consequence that it turns out that there was a claim that was not in contemplation which has been released. Again, I've made those points in --

MR JUSTICE DAVID RICHARDS: Inadvertent, is that the same thing as unintended, or is it different? That's not a question for you, I suppose, but are you reading it as being different?

MR ZACAROLI: I'm focusing on what it is that's inadvertent -- yes, it is inadvertent in the sense that they didn't have in mind the release of the currency conversion claim, but that's not the point. The point was they entered into an agreement with eyes open, both the creditor and the administrators did, eyes wide open to the fact that it would release any claim which wasn't in contemplation.

MR JUSTICE DAVID RICHARDS: What we do know -- because I think this is relevant to this argument -- is that we know that the administrators did not intend the agreement to have this consequence. We know that not because of their evidence, but because of what they subsequently did.

MR ZACAROLI: My Lord, no --

MR JUSTICE DAVID RICHARDS: They carved out these claims.

MR ZACAROLI: We don't know that, with respect, for two reasons. The first is -- well, again I'm taking issue with the statement they did not intend to carve out these claims. They intended to carve out --

MR JUSTICE DAVID RICHARDS: They did not knowingly intend.

MR ZACAROLI: Sorry.

MR JUSTICE DAVID RICHARDS: I mean, what we do know is that once they were alive to these claims, they carved them out.

MR ZACAROLI: Well, what we know --

MR JUSTICE DAVID RICHARDS: So I think one can deduce that if someone had directed their minds to these back at the start of the use of these forms, they would have carved them out then.

MR ZACAROLI: Let me deal with the facts first because I'm quibbling with the definition of "no intention to release these claims". They intended to release any

claim and therefore this claim falls within the class of claims they intended to release, so that's why I take issue with the statement they did not intend to release these claims. They did because they intended to release any claim.

MR JUSTICE DAVID RICHARDS: A man is taken to intend the consequences of his contract as properly construed.

MR ZACAROLI: My Lord, it's not so much that, it's that by intending to release anything, by definition you're intending to release everything which falls within that class.

MR JUSTICE DAVID RICHARDS: As construed.

MR ZACAROLI: Assuming I'm right on construction, of course.

Otherwise any creditor could come along and say, I've got this class of claim, or these creditor have a new class of claim -- the law's changed and now they can have claims of a completely different variety and it was intended that that claim would be released, in the same which it's intended that this claim, the currency conversion claim, is released because there was an intention to release all claims. It's a semantic point, perhaps.

MR JUSTICE DAVID RICHARDS: I think your intention is simply the intention to be deduced from applying the rules of construction to this contract --

MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: -- and then saying: that was the parties' intention.
MR ZACAROLI: I accept that and therefore I've got to be right on construction.
MR JUSTICE DAVID RICHARDS: But we know that parties are sometimes found bound by contracts with the consequences they did not intend. They can't rely on that for saying they're not bound by it, but we know that they didn't -- I mean, that's a fact of life.
MR ZACAROLI: That is, my Lord, but that might be the case --
MR JUSTICE DAVID RICHARDS: It's irrelevant to the construction of the contract.
MR ZACAROLI: Yes. But again, that's not the sort of difference between intentions that I am focusing on because it might be that the contract -- no one thought the contract had a particular meaning. No one thought the contract had a particular meaning, but it did as a matter of objective analysis, and therefore --
MR JUSTICE DAVID RICHARDS: What you saying is what I can take it the administrators actually intended was that everything should be released bar this --
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: -- but I think that's what I'm

querying. If you're right about that, why did they subsequently introduce the carve-outs?
MR ZACAROLI: Well, that is why I am going to come on to the facts. It is not the case when they saw it, they thought, oh gosh, we'd better amend the contract.
MR JUSTICE DAVID RICHARDS: But why didn't they?
MR ZACAROLI: Let's look at the evidence, my Lord.
MR JUSTICE DAVID RICHARDS: Thank you.
MR ZACAROLI: It's probably best found in Mr Lomas' tenth witness statement at bundle 2, tab 2. Paragraph 75 under the heading "Currency conversion claims", page 25 of the document.
It's paragraphs 75 and 76. (Pause)
So in effect the reason is because creditors were refusing to sign the documents, which the administrators first sought to get them to carry on doing, but creditors were refusing to do that without the carve-out language being incorporated.
One can speculate, but it's likely to be the case that whatever claim or class of claim might subsequently have been discovered, at the point that it's discovered, creditors would have been unwilling to enter into an agreement that then caused them to lose their claim they then knew about. There's nothing special about currency conversion claims therefore amongst the universe of

claims that have been released. The same would have happened whatever the claim was subsequently discovered to be.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: My Lord, the administrators, or the company of course, is bound by the terms of the contract as much as the creditor is. So if it had subsequently transpired that claims could have been asserted against a creditor or many creditors, classes of creditors, then the company, the estate in general, is barred from pursuing that claim because it's agreed to release it. You might say had it known about that claim at the time, it would not have released that claim. That's again the wrong question. The question is: is it not dishonourable to enter into the agreement in the first place? Clearly not. Having done so, the creditors haven't benefited, the estate hasn't benefited. Neither party could properly then renege on the agreement when what was at the time not contemplated became in contemplation.
Looking at this in terms of harm, we submit that it cannot be -- I think my learned friend suggested the relevant harm here is the giving up of a claim, the loss of the ability to pursue a claim against the company. My Lord, that harm, if it be harm at all, is simply the

consideration that is given by the creditor or part of the consideration given by the creditor for entering into the agreement in the first place. It can't be right that every piece of consideration which involves giving something away can be regarded as harm. It's actually something given up in return for something coming the other way -- in this case the certainty of getting its claim accepted early, early payment, the benefits that go with that -- and the release is the other way. So we would suggest there's actually no harm here of the relevant kind because the harm is simply something the creditors agreed to for valuable consideration.
My Lord, that in a nutshell is our argument on the two ways in which this point is put under issue 36A. I'm now going to turn to deal with some of the detail of the points my learned friend made this morning, but that's the crux of our arguments.
One point made this morning was reliance on the Austin Securities case.
MR JUSTICE DAVID RICHARDS: What can be said about the Austin Securities case was that the issue there was whether the court should exercise its discretion to strike out the proceedings for want of prosecution, which involves a balancing of factors. It's a rather

different exercise from Ex parte James.
MR ZACAROLI: Yes. We needn't go to it, I think. It doesn't help. The only other point to make about it is perhaps the less analytical point that of course the conduct there was a complete failure to engage with creditors. The conduct here is the administrators going out of their way to engage with creditors early to enable quicker distributions to be made to them than would otherwise happen. So it's the opposite in terms of the facts.
Reference was made again to the administrators' supposed quasi-judicial functions. My Lord put to me, today or yesterday, the point about how it's really about them being subject to statutory duties, and I accepted that point. Characterising them as a quasi-judicial function doesn't really add anything to the fact that they have statutory duties, including the duty to protect the interests of all creditors against inflated claims being made against the company.
The power to compromise is given to enable the administrators to reach agreement with creditors where they don't agree with the quantum of the claim being advanced, but are prepared to do a deal to save time and costs for everyone. That's actually what they were doing.

I quibbled with the suggestion that anything is added to that concept of them having statutory duties by describing the administrators as in essence equal to the court, the court itself through its office of doing various things. My Lord, that's not how administration works in my submission. The administrators are appointed. They are an officer of the court, but the court doesn't conduct the administration.
MR JUSTICE DAVID RICHARDS: No, but I think that that's the -- that does definitely find ... Perhaps Mr Dicker is echoing what Lord Justice Slade, for example, said in the TH Knitwear case.
MR ZACAROLI: The difference is in a liquidation, of course, traditionally the court did itself carrying out the functions of a liquidator --
MR JUSTICE DAVID RICHARDS: I know, but it stems from the liquidator in a compulsory liquidation being an officer of the court. For good or ill, schedule B1 states that an administrator is an officer of the court, notwithstanding -- you are quite right -- the very different functions that an administration and administrators are meant to perform.
MR ZACAROLI: Yes. It's a small point. I'm not suggesting that he's not an officer of the court. Of course he is. But it doesn't add anything to say that it's the court

itself that might be said to be acting dishonourably.
MR JUSTICE DAVID RICHARDS: I'm not sure. I think that Lord Justice Slade possibly did think that was significant.
MR ZACAROLI: Well, it adds nothing in my submission to the question of what constitutes dishonourable conduct or --
MR JUSTICE DAVID RICHARDS: That was the reason why, I think, he said that the Ex parte James principle should be confined to officers of the court and not extended, for example, to personal representatives or trustees of ordinary trusts.
MR ZACAROLI: I accept that.
MR JUSTICE DAVID RICHARDS: Okay.
MR ZACAROLI: But there is that difference between -- the court's involvement in administration is far less than its involvement in a liquidation, so it doesn't really add very much that they're an officer of the court as giving the foundation for the rule in Ex parte James.
My Lord, my learned friend said at some point this morning that the creditors, in practice, they had to enter into the CDDs, they weren't given any real choice because the disadvantages were laid out for them so clearly because if they didn't they could wait many years for distributions to be made to them.
My Lord, we turn that point on its head. The

factual situation in which the parties found themselves was that distributing under normal processes would take many years, involve great cost and potential litigation. So against that background the administrators were offering creditors a real advantage, to have a quicker, perhaps dirtier determination, but in order to achieve that benefit they had to enter into a bargain with the terms and conditions we looked at at great length in the last four days.
Some creditors chose not to and take their chances and preserve any and all claims they may have. They of course did not get the benefit that those creditors who signed up to CDDs did get.
Then a further point made relates to the differential outcome between different forms of CDD. My Lord, here we say this is not an example of administrators treating creditors differently. The creditors are being treated, when it comes to enforcement, in precisely the same way amongst each other, namely they're all being held to the bargain which they entered into.
The difference in consequence arises from the fact that the creditors entered into different agreements. It so happens that the -- whether one calls it a change or a clarification in the law which has subsequently

happened -- affects those who entered into one type of CDD but not another. But that's the happenstance in a way, that some of them are affected by it but others aren't. But a different change in the law, a different claim which arises might have affected creditors in entirely different ways, so the classes would have been split differently.

It doesn't matter how you divide up the classes, the difference in treatment is caused by the different agreements they entered into, not by anything the administrators are seeking to do now.

And one compares the creditor A who wanted a speedier resolution of his claims and so entered into the CDDs. It's suffering a disadvantage because it entered into an agreement. It's wrong to compare that creditor with someone who didn't enter into a CDD at all because they took their chances; a point I made a moment ago. There's differential treatment there, but that's because one agreed and one didn't and therefore one released claims and one didn't.

Then it's suggested that the situation here has been created by an oversight on the part of the administrators and/or their legal advisers because it was -- I don't use the word s"their fault" in any pejorative way because my learned friend didn't, but it

was down to them to know whether the law was as it was said to be in Re Lines Brothers or not.

Again, I've made submissions on this topic in relation to issue 34, but I reiterate: these are not agreements being thrust on widows and orphans. Legal advice was available to and viewed by many creditors, as the evidence shows, no doubt law firms on a par with the calibre of Linklaters. My Lord can't assume and can't decide issue 36A on the assumption that we're dealing here with people who did not have access to lawyers of the same calibre. Perhaps some didn't, but we know many did and this is an issue being determined as a matter of generality. If that's an important point, that the creditor did not have access to lawyers, then my Lord simply can't determine that as a matter of generality and it has to be a case by case analysis. We would say it's irrelevant anyway, but insofar as it's thought to be relevant, it can't form my Lord's reasoning on this issue being treated as a matter of generality.

Reliance was placed on Mr Copley's expressed views as to what he might have done in different circumstances. Can we look at his evidence on this? Bundle 2, tab 8, and in particular, paragraph 21. Perhaps my Lord can remind himself of paragraph 21 and then paragraph 26. (Pause)

21 then 25 and 26.

MR JUSTICE DAVID RICHARDS: Right. (Pause) Yes.

MR ZACAROLI: My Lord, two particular points to pick up on. First of all, the point about the intention to release in paragraph 25. He explains what he meant by that phrase: because he wasn't thinking about currency conversion claims, there was no specific intention to release them. That echoes a point that I've been making this afternoon to my Lord, that there is an intention to release generally. What he means by "no intention to release these claims" is he hadn't thought about these claims and therefore hadn't appreciated they would fall within the class of claims released.

Then paragraph 26. Clearly there was some form of disagreement amongst the administrators as to what the appropriate steps were here. Mr Copley does not speak for all the administrators, clearly. He's one of them, but what was put out by the administrators was certainly not what he had proposed putting out.

For completeness, perhaps my Lord could read on to 27 and 28 because that does complete the story from his perspective. (Pause)

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: Just so that my Lord doesn't get the

impression that what's said here was being said universally to all creditors, the evidence from Mr Ryan at tab 9, just two paragraphs in Mr Ryan's statement at tab 9 of the bundle, paragraphs 16 and 17, indicate that at least he wasn't being told the same thing as Mr Copley had been saying to some other creditors. Paragraphs 16 and 17. (Pause)

We know what the administrators as a body's reaction was to the emergence of currency conversion claims. That was first of all to try and tell creditors they must still sign the same formal agreement, but then bow to the pressure that creditors wouldn't otherwise enter into agreements at all and so agree to variations. What Mr Copley may or may not have said about what he would have done had he known matters differently back then has no relevance at all to this question. Largely for the reasons I've given, which is whatever the administrators may now think of what would have happened had they known about currency conversion claims is no different to what they might have thought about any other claim that would have arisen that wasn't contemplated at the time.

This leads on to a further point my learned friend made about those CDDs entered into in that, if I can call it, twilight period between the issue having arisen and the variation language being incorporated. He

elided his submissions here to deal with both statutory interest and currency conversion claims. It has never been our case that statutory interest has been waived by any CDD and I would accept that if the administrators are telling creditors at the time that there is no express preservation language for statutory interest, don't worry, statutory interest is clearly not being released, then that undoubtedly would affect the structure of the agreements. But that is not the case when it comes to currency conversion claims because you do not have any evidence -- certainly not any general evidence -- that creditors were being told once [inaudible] had raised the possibility of currency conversion claims, oh, don't worry because they're already waived.

In fact, the opposite is true. During that period, making the assumption that a creditor who enters into a CDD is aware of the possibility of currency conversion claims, they are then entering into a CDD having been told by the administrators, this may or may not waive that claim, take your own advice. So they're entering into it with their eyes open. They have a choice to do so, they don't have to enter into it, but if they do they know they're potentially waiving a currency conversion claim and therefore for those creditors

actually the answer is opposite to what my learned friend suggested. For those creditors there can be no question of that release or waiver having been unfairly obtained. They agreed to it with the knowledge it might be waiving the claim.

My Lord, I have just two points left, if I may carry on beyond the break time. I shall finish shortly.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My learned friend made a point about the fact that the estate, the insolvency estate, benefited to some extent from delaying before converting dollars into sterling. That, although superficially attractive point, we say, must be irrelevant. If you assume for a moment that we're right that the conduct of the administrators in holding creditors to their bargain is not dishonourable without that element, in my submission it's impossible to see how the presence of that fact, which means that creditors generally have benefited from there being more assets available, how that fact can render what was otherwise not dishonourable suddenly dishonourable. It's irrelevant to it.

Finally, very briefly, to deal with the point about -- and this is a point made more in their skeleton than today, but the point that there's some dishonourable conduct or unfair conduct here because the

only persons to benefit will be the shareholders, the members. This again repeats a submission I made in relation to 34, that at the time the contracts are entered into, it could not be known whether the shareholders would benefit.

Take the case where it depends upon assets and liabilities. Take the case where there is an insufficiency of assets now to pay all non-provable claims. It remains the case that the shareholders will get nothing.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: There is, of course, also the sub-debt to take into account. Yes, it's contractually subordinated, but they're still creditors entitled to the benefit of the asset realisations during the administration.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: My Lord, with that, those are my submissions in answer.

MR JUSTICE DAVID RICHARDS: Thank you very much.

We'll take a break now and I will rise for five minutes.

(3.18 pm)

(A short break)

(3.23 pm)

MR JUSTICE DAVID RICHARDS: Am I going to hear from

Mr Trower on this?

MR TROWER: Not unless your Lordship has any questions from me, no. I'm very happy to address your Lordship on any points you would like assistance on, but I wasn't proposing to say anything.

MR JUSTICE DAVID RICHARDS: So the administrators take no position on this?

MR TROWER: We take no position on this for this reason: having looked at the position papers and skeleton arguments, we took the view that all the arguments were properly being advanced and that it wasn't appropriate in the circumstances for us to take a position.

MR JUSTICE DAVID RICHARDS: Right, thank you very much.

Mr Dicker.

Further reply by MR DICKER

MR DICKER: My Lord, I have seven points by way of reply. Your Lordship will no doubt remind me when I get to point 8!

The first point is this. One needs to start by deciding what world we are living in. My learned friend Mr Zacaroli's submissions proceeded on the basis that we're essentially in a commercial world, these are contracts freely entered into, and, as he put it:

"It cannot be dishonourable to enforce a contract freely entered into."

We say that is plainly wrong for the simple reason it is necessarily to limit parties to their strict legal or equitable rights. The whole point of Ex parte James is that in certain circumstances it produces a result different from that which would result from the application of such rights.

My Lord, the second point is an example of this, essentially derived from Ex parte James itself. Ex parte James involved a payment made by a mistake of law at a time when the mistake of law didn't entitle you to recover from the recipient. The trustee was regarded as not being in the position of an ordinary commercial party and treated as knowing of the law and it was regarded as dishonourable, unfair for it to retain the money in those circumstances.

We say the result would plainly be exactly the same if the payment had been made pursuant to a contract entered into between the third party and the trustee, which contained or was premised on a mistake of law. The trustee would be no more entitled in that situation to say it's a contract freely entered into between the two of us and we may both have proceeded on the basis of an error of law, and if it turns out it has been to my disadvantage, hard luck.

So the first point is we're simply not in the world

that my learned friend would wish us to be in.

The third point concerns the comments by Lord Justice Scrutton in Wigzell that your Lordship was referred to. It is plainly a difficult test to apply, but it is one that Lord Justice Scrutton went on to apply in that case with the result your Lordship has seen, and the reason why it needs to be applied, however difficult it may be, is because otherwise the court would effectively be accepting that its officers were entitled to behave like any other commercial party with the consequences that that would have on them and indirectly on the court itself.

For that reason, anomalous the principle may or may not be, but to avoid the consequences of that, it exists and needs to be applied.

The fourth point. Your Lordship was taken to your Lordship's judgment in T&N. The short point in relation to that is we say there's nothing inconsistent in your Lordship's judgment and the subsequent expression of the law by Lord Neuberger in Nortel. Your Lordship picks up both the phrase dishonourable and also the concept of taking unfair advantage.

My Lord, the fifth point is this. My learned friend effectively sought to apply his commercial world to the

compromises in this case. He described those essentially as an agreement like any other, freely entered into and binding therefore on the parties. That can't be a sufficient reason for the non-application of the principle. Take an example where you've got an office-holder, inexperienced or with inadequate legal advice, who proposes a compromise to creditors that everyone gets 10p in the pound, and he fails to take into account that some of those creditors are preferential creditors entitled to be paid in full first.

One may hope that amongst those preferential creditors there were some that would appreciate that this isn't what the statute provided for and would ensure that didn't happen. But if for whatever reason that didn't occur, because they weren't aware themselves and the compromise was entered into, in our submission it would not subsequently lie in the office-holder's mouth, let alone through him or other creditors, to say, this was the bargain you freely entered into. It would have been a compromise premised on an implicit mistake of law, not otherwise justifiable, and not something to which those who were prejudiced should be held to be bound.

My Lord, the sixth point, references to limb A and

limb B, I think it was called, and your Lordship is absolutely right: our primary focus is on what was referred to as limb B. In other words: would it be fair for the administrators now to be permitted to enforce the releases if the agreements have the effect for which Wentworth contends? We do also say that if Wentworth was right, then unfairness would also have existed at the earlier stage. We plainly don't say that in the sense of saying that the administrators would consciously have acted dishonourably. Far from it. One only has to imagine that to realise how unlikely that was.

What we do say is if the effect of the process which the administrators went through was objectively to result in the consequences for which Wentworth contends, then whether or not the administrators appreciated it, objectively they have engaged in a process which would be characterised as unfair.

One could take an extreme example. Imagine the administrators had done everything they did consciously intending to achieve the results for which Wentworth contends. In other words, they had said to themselves, what we would like to achieve is to have an agreed CDD which preserves currency claims for these creditors and have an admitted CDD which gets rid of currency claims

for these other creditors and we will allocate the forms out as between creditors depending simply on whether we think they have a client money claim or not.

If one essentially was to construe the administrators' actions as if they were consciously intending to achieve all the results which Wentworth says objectively contracts produce, we do say at an earlier stage objectively that conduct would have been unfair.

MR JUSTICE DAVID RICHARDS: Well, the unfairness there would have been in inducing creditors to enter into these contracts with those results known or intended by the administrators without disclosing it.

MR DICKER: Yes, absolutely.

MR JUSTICE DAVID RICHARDS: That's not our case.

MR DICKER: No -- well --

MR JUSTICE DAVID RICHARDS: So the question is whether in this case they acted unfairly in putting the contracts to creditors.

MR DICKER: And our short submission is that unfairness doesn't require subjective unfairness on the part of the administrators. This isn't a hearing which requires one to cross-examine the administrators. It is sufficient if the court concludes that what they have done, taking into account all the circumstances, was unfair.

MR JUSTICE DAVID RICHARDS: But what would the consequence of that be? What remedy would the court give if that were unfairly harmful or found to have been unfairly harmful?

MR DICKER: In a sense at that point we come back to your Lordship's point, which is that the remedy is, of course, exactly the same: to enforce the releases.

What I wanted to avoid was the suggestion that -- and I think my learned friend sought to take advantage of it -- essentially everything that happened, even objectively, was totally unfair. His submission was, well, if that's the case, how on earth can it be unfair to enforce it now? To which our response was, well, that's not quite right. Undoubtedly, nothing was done that was unfair knowingly and wilfully. Objectively, if Wentworth is right as a matter of construction, we say not so.

But your Lordship's absolutely right, on a practical level the issue that your Lordship now has to decide is whether or not the administrators should be permitted to enforce the releases and, so far as that issue is concerned, ultimately the question turns on where we are now in the light of everything that's happened for whatever reason.

The seventh, final point concerns the reasons for

the preservation language in relation to currency conversion claims. Your Lordship was shown both Mr Lomas' tenth witness statement and also Mr Copley's statement. As your Lordship will recall, it was Mr Copley who said in paragraph 14 of his statement that he was the administrator with primary responsibility for Project Canada and the consensual approach.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: It may just be worth reminding your Lordship of that. In 14, it's bundle 2, tab 8, paragraph 14. He says he became a partner in 2009 and from June 2010 was charged with managing the development and implementation of Project Canada, reporting directly to Mr Lomas:

"I was appointed as a joint administrator of LBIE, 2 November 2011. From that date until December 2013 I had primary joint administrator responsibility for inter alia the agreement of creditors' claims, including Project Canada."

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, we do emphasise, so far as Mr Copley is concerned, paragraph 28, to which my learned friend took you, which we say is the best indication that your Lordship is effectively being provided with as to the administrators' views, where he says:

"Had I known, which I did not, about the existence

of such claims at the time the release clause was drafted, I would have sought to have carved them out from the effect of the release clause if it was necessary to do so in order to preserve them. The reason for my making such a statement was that had I known at the time the CDDs were drafted that a currency conversion claim would be available as a non-provable claim in the event there was a surplus, then I believe my own preference at that time would have been to carve them out."

My Lord, in our respectful submission, it really is not very far from the mistake of law situation, which led to the original decision in Ex parte James itself. Mr Copley is saying, I didn't know the currency conversion claims existed and if I had I would have carved them out".

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, the final point, point 8, is that your Lordship was shown -- was referred to the witness statements of Mr Ryan and Mr Goldschmid at tabs 9 and 10. I won't take your Lordship through them. They're the witness statements essentially served on behalf of my learned friend's clients.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, what your Lordship may find striking

when you read them is that although they discuss comments made by Mr Copley, either were or were not made, the one thing you won't find in there is an echo of my learned friend's stance: in other words, this is a contract freely entered into, we knew full well what was going to occur. Effectively saying, as far as we're concerned, there was nothing unfair, and even if everyone else is entitled to avoid the effect of the releases, not us, because the same points don't occur to us.

My Lord, unless I can help your Lordship any further.

MR JUSTICE DAVID RICHARDS: I don't think so. Can you just give me one moment? (Pause)

No. Thank you very much, Mr Dicker.

MR ZACAROLI: My Lord, may I just correct one very small point? I wouldn't have taken my Lord to Mr Goldschmid's statement had my learned friend not mentioned it.

But paragraphs 17 and 18, I don't rely upon them other than to rebut the point that there's nothing in these statements about the perception of Mr Goldschmid about when entering into the agreements. At paragraphs 17 and 18 he says:

"It was my general expectation and understanding that there was to be a release of all of

a signatory's/creditor's rights against LBIE."

So those paragraphs that -- it does indeed pre-echo, as it were, one of the points I've been making.

MR JUSTICE DAVID RICHARDS: Thank you very much.

Mr Trower?

Discussion

MR TROWER: My Lord, I think that concludes, subject to any further questions your Lordship has, the argument in relation to issues 34, 35, 36A and 38. We've parked issue 9 for the reasons that I --

MR JUSTICE DAVID RICHARDS: Yes.

MR TROWER: -- mentioned at the beginning.

The only other point I had is that your Lordship mentioned the point of written submissions in relation to the Court of Appeal judgment, which we obviously haven't had a chance to think about, and whether there's anything that we could helpfully say or usefully say in the light of the position we took.

I don't know whether your Lordship had a sort of --

MR JUSTICE DAVID RICHARDS: Well, I must say I hadn't really anticipated that there would be anything in that judgment which would particularly assist in relation to Waterfall II(a), but Mr Dicker made the point that his position was supported by what was said. I don't know whether Mr Dicker just wants quickly to make that point

now by reference to the judgment. I don't know whether Mr Zacaroli takes the position that the Court of Appeal judgment is, as it were, neutral so far as the Waterfall II(a) issues are concerned.

MR ZACAROLI: My Lord, it is simply an issue we haven't yet had a chance to bottom out, given what we've been doing this week. I doubt there will be anything that -- from our review so far, we don't think there is anything, but if Mr Dicker wants to make a submission, I'll obviously need to respond to that.

MR JUSTICE DAVID RICHARDS: Of course.

Mr Dicker, I can't even remember actually the point to which it went, but standing now, can you identify anything in the Court of Appeal judgment that you'd say is of assistance or supports your position in relation to Waterfall II(a)?

MR DICKER: Standing now, I confess I'm not in a position to develop submissions, but there are points --

MR JUSTICE DAVID RICHARDS: I wouldn't be interested in straws in the wind; I'd only be interested in something that seemed to provide some substantial addition to the submissions already made.

MR DICKER: Yes. We say nothing in, I think, the majority of the Court of Appeal is inconsistent with the submissions we were making.

MR JUSTICE DAVID RICHARDS: Nothing inconsistent?

MR DICKER: No. There are elements, particularly the possibility of, for example, Bower v Marris being a non-provable claim, given the approach taken by Lord Justice Briggs to the nature of the statutory scheme and the need for judges to effectively add and supplement to the statutory scheme in various respects.

My Lord, I know, as it were, I introduced this.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: I'm slightly concerned that we don't turn this effectively into a further round.

MR JUSTICE DAVID RICHARDS: So am I. I would absolutely share that. I was only raising it because I wondered whether you had something rather specific in mind.

MR DICKER: No, and I wonder -- I don't have instructions on this, but, my Lord, can I suggest that, to avoid satellite litigation and burdening your Lordship further with further material, I think we would be content for your Lordship, as it were, to read the judgment and no doubt draw the conclusions which, if I were making submissions, I would be inviting your Lordship to draw.

MR JUSTICE DAVID RICHARDS: I certainly wouldn't begin to construct the submissions you might make to me, Mr Dicker. But no, that's fine.

Thank you all very much. In view of the lateness of

the hour, I will resist the temptation to give judgment straightaway. I will therefore reserve judgment.

(3.45 pm)

(The hearing concluded)

I N D E X