

<p>1 Thursday, 21 May 2015</p> <p>2 (10.30 am)</p> <p>3 Reply by MR ZACAROLI (continued)</p> <p>4 MR JUSTICE DAVID RICHARDS: Mr Zacaroli.</p> <p>5 MR ZACAROLI: My Lord, I'm turning now to deal with the</p> <p>6 CDDs, having finished with the CRA.</p> <p>7 First of all, a point about the CDD's purpose. The</p> <p>8 purpose was not merely a quicker and more final process</p> <p>9 for proving claims, as it is put by the Senior Creditor</p> <p>10 Group. That underplays, we say, a critical element of</p> <p>11 the CDD process: namely that it involved a compromise of</p> <p>12 rights between the company and the creditors whereby,</p> <p>13 for example, the company itself gave up rights against</p> <p>14 the creditor. That forms no part of a normal proof</p> <p>15 process. It was intended to be a compromise of all</p> <p>16 rights, so as to achieve certainty and finality. The</p> <p>17 purpose of that is to end the possibility of further</p> <p>18 claims being advanced either way between the company and</p> <p>19 its creditor.</p> <p>20 My Lord, one should be careful not to underestimate</p> <p>21 the benefit to creditors of this estate in those</p> <p>22 matters, finality, certainty. Because, for example,</p> <p>23 my Lord knows there has been an active trade throughout</p> <p>24 this administration in the debt and crystallising the</p> <p>25 amount that is in fact owed to the creditor undoubtedly</p> <p style="text-align: center;">Page 1</p>	<p>1 beginning under F:</p> <p>2 "But the primary source for understanding what the</p> <p>3 parties meant is their language interpreted in</p> <p>4 accordance with the conventional usage:</p> <p>5 "We do not easily accept that people have made</p> <p>6 linguistic mistakes particularly in formal documents."</p> <p>7 And he goes on to say:</p> <p>8 "I was certainly not encouraging a trawl through</p> <p>9 background which could not have made a reasonable person</p> <p>10 think the parties must have departed from conventional</p> <p>11 usage."</p> <p>12 So emphasising a point I made in opening that, yes,</p> <p>13 it's an iterative process, but a very important element</p> <p>14 of the iterative process is the language the parties</p> <p>15 have chosen to use.</p> <p>16 My Lord, so far as the detail of my learned friend's</p> <p>17 arguments on the CDDs are concerned, can I take first</p> <p>18 the question of interest, non-provable claims to</p> <p>19 interest because that's a matter which covers all of the</p> <p>20 different forms of CDDs without variations. It's</p> <p>21 a blanket point.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR ZACAROLI: In essence, my learned friend's only argumen</p> <p>24 on non-provable claims to interest was to repeat the</p> <p>25 Bower v Marris point that he made in relation to the</p> <p style="text-align: center;">Page 3</p>
<p>1 helps the creditor in realising that debt, either by</p> <p>2 selling in the market or otherwise.</p> <p>3 These were not thrown-together contracts in any</p> <p>4 speedy or hasty way; these were carefully negotiated</p> <p>5 with creditors, as Mr Lomas' evidence shows, who tended</p> <p>6 to congregate behind a relatively small number of law</p> <p>7 firms, who would suggest amendments from time to time,</p> <p>8 which would be again negotiated. These were carefully</p> <p>9 negotiated documents throughout and the language the</p> <p>10 parties chose to use therefore must be given full</p> <p>11 respect.</p> <p>12 It is in that context that one has to construe the</p> <p>13 language of the documents, the width of the release and</p> <p>14 the extent to which what they say in the document is now</p> <p>15 the claim is intended to be the only claim.</p> <p>16 One very quick reference to one authority. It is to</p> <p>17 BCCI v Ali. It's a paragraph my learned friend took you</p> <p>18 to in the speech of Lord Hoffmann, but it's just the</p> <p>19 last five lines of that paragraph. My Lord may well</p> <p>20 have read it, but it wasn't pointed out expressly.</p> <p>21 Bundle 1A, tab 27, at paragraph 39. This is where</p> <p>22 his Lordship is explaining his commitments in the ICS v</p> <p>23 Bromwich case about the reference to the background</p> <p>24 facts. My Lord was shown particularly the beginning of</p> <p>25 that paragraph. I will show my Lord the sentence</p> <p style="text-align: center;">Page 2</p>	<p>1 CRA. There was no other argument than that presented to</p> <p>2 my Lord. In other words, that the right to</p> <p>3 appropriation somehow remains.</p> <p>4 I made the point in relation to the CRA that the</p> <p>5 Bower v Marris right to appropriate is wholly dependent</p> <p>6 upon there being a continuing right to interest ticking</p> <p>7 away in the background during the insolvency process.</p> <p>8 That simply is not the case under the CRA, nor is it the</p> <p>9 case under these documents.</p> <p>10 The argument, we submit, fails to engage with the</p> <p>11 wording of the contracts in any material way and it's at</p> <p>12 this point worth turning up, by way of example, the CDD</p> <p>13 at tab 1A, the agreed claims CDD we've been looking at.</p> <p>14 At page 7 of the document, clause 2.1 -- a familiar</p> <p>15 clause by now -- three points about it. First of all,</p> <p>16 these aren't surprising points but to repeat them, the</p> <p>17 claim is fixed at the agreed claim amount, which is the</p> <p>18 entire claim against the company. Secondly, the clause</p> <p>19 in 2.1.1 undoubtedly releases all claims arising or</p> <p>20 rights and obligations arising under the creditor</p> <p>21 agreement as well as not under the creditor agreement.</p> <p>22 Thirdly, that includes expressly all claims for interest</p> <p>23 which arise, whether or not under the creditor</p> <p>24 agreement. So the express language is very clear: any</p> <p>25 claim for interest under the underlying contract has</p> <p style="text-align: center;">Page 4</p>

<p>1 been released.</p> <p>2 It's incumbent on anyone seeking to argue that</p> <p>3 a particular type of claim for interest has not been</p> <p>4 released to explain as a matter of construction how that</p> <p>5 will work. My Lord, we say that the Senior Creditor</p> <p>6 Group simply have failed to discharge that burden. The</p> <p>7 Bower v Marris point I've mentioned doesn't get there.</p> <p>8 They actually don't even appear to contend that the</p> <p>9 other potential non-provable claims to interest, such as</p> <p>10 compounding continuing after the debt has been proved as</p> <p>11 paid, they don't even contend there's any construction</p> <p>12 argument which can exclude that right of interest.</p> <p>13 My Lord, the only other point mentioned in this</p> <p>14 context was that you wouldn't expect creditors to</p> <p>15 abandon their Bower v Marris rights particularly because</p> <p>16 part of the context of agreeing the claim was for client</p> <p>17 money purposes, ie you fix your claim for both a claim</p> <p>18 against the estate and for client money purposes.</p> <p>19 That point actually goes nowhere and indeed it</p> <p>20 supports our case because under the client money rules</p> <p>21 there is no right to interest accruing after the PPE,</p> <p>22 the primary problem event.</p> <p>23 As my Lord will remember, we've dealt with this</p> <p>24 briefly in our reply skeleton at paragraph 12, but</p> <p>25 my Lord will no doubt remember from MF Global that the</p> <p style="text-align: center;">Page 5</p>	<p>1 that was chosen. So that leaves the possibility that an</p> <p>2 underlying currency was in dollars and yet the agreed</p> <p>3 claim amount is in sterling. It's only in those</p> <p>4 circumstances we run the case on release of currency</p> <p>5 conversion.</p> <p>6 So much of my learned friend's address to my Lord on</p> <p>7 the agreed claims CDD did not meet our point. My</p> <p>8 learned friend was dealing more with the fact that</p> <p>9 there's no release of a currency conversion claim by</p> <p>10 reason of the later conversion under clause 3 for the</p> <p>11 purposes of the claim then being admitted. We're</p> <p>12 concerned with the conversion as he called it at</p> <p>13 stage 1, that is stage 1 identifying the agreed claim</p> <p>14 amount. He said, I think at one point, that there is no</p> <p>15 question of conversion at that stage. Of course, the</p> <p>16 only circumstances in which we're interested in this CDD</p> <p>17 is where there has in fact been a conversion at that</p> <p>18 stage.</p> <p>19 The one thing one can say about that conversion is,</p> <p>20 very clearly, it's not for the purpose of enabling the</p> <p>21 claim to be an admitted claim. Unlike the admitted</p> <p>22 claims CDD where we accept that the purpose, or one of</p> <p>23 the purposes, there is to enable the claim to be</p> <p>24 admitted and therefore it's converted to sterling before</p> <p>25 you enter into the CDD, that's not the case in relation</p> <p style="text-align: center;">Page 7</p>
<p>1 client money entitlement is fixed as at the PPE. And</p> <p>2 of course, the hindsight judgment was all about whether</p> <p>3 that could be changed in any way, and it can't; it's</p> <p>4 fixed as at that date.</p> <p>5 Once the client money entitlement has been paid out</p> <p>6 of the client money pool -- again I can go to the rule</p> <p>7 if necessary, but my Lord probably remembers it -- 7.7,</p> <p>8 as then existed, requires that the surplus goes back to</p> <p>9 the firm. There is no provision for interest to be</p> <p>10 added to the client money entitlement. So the point by</p> <p>11 reference to the client money rules takes the case</p> <p>12 nowhere.</p> <p>13 Turning then, my Lord, to the more substantive topic</p> <p>14 perhaps of currency conversion claims and the CDDs.</p> <p>15 We'll start, if I may, with the CDD at tab 1A, the</p> <p>16 agreed claims CDD. To remind my Lord of our case here,</p> <p>17 we only run an argument in relation to currency</p> <p>18 conversion in those cases where, for example, as in the</p> <p>19 one at tab 4, the agreed claim amount is denominated in</p> <p>20 sterling and the underlying currency of entitlement</p> <p>21 included a claim in, for example, dollars.</p> <p>22 Generally, the agreed claim amount was in the same</p> <p>23 currency as the underlying entitlement, but where there</p> <p>24 were -- as there would have been in many cases -- mixed</p> <p>25 currency entitlements, it was the predominant currency</p> <p style="text-align: center;">Page 6</p>	<p>1 to the agreed claims CDD. The reason for conversion</p> <p>2 into a single currency under the agreed claims CDD is</p> <p>3 simply to identify the currency that's most predominant</p> <p>4 under the underlying contracts.</p> <p>5 The version of this CDD which appears at tab 4 does</p> <p>6 have, as I think I mentioned at the outset, a few</p> <p>7 differences. There is one difference which is relevant</p> <p>8 to this point, so if my Lord turns to tab 4, page 9 of</p> <p>9 the document there, clause 3.2.1, which is part of the</p> <p>10 provision dealing with the later conversion of the</p> <p>11 agreed claim amount into sterling for the purposes of it</p> <p>12 being accepted as an admitted claim. This clause,</p> <p>13 3.2.1, includes words in parentheses at the end of the</p> <p>14 second line:</p> <p>15 "[It] will be converted (to the extent not already</p> <p>16 denominated in pounds sterling)."</p> <p>17 Those words happen to be missing from the version at</p> <p>18 3.2.1 in the version at tab 1A, but they reinforce the</p> <p>19 point that in some cases it won't be necessary to</p> <p>20 convert because the conversion's already happened, but</p> <p>21 the conversion that happened at the outset is not for</p> <p>22 the purposes of complying with rule 2.86 or for the</p> <p>23 purposes of enabling it to be an admitted claim.</p> <p>24 Against that background, my learned friend's core</p> <p>25 argument that one has to read "agreed claim amount", as</p> <p style="text-align: center;">Page 8</p>

<p>1 it were, although it's stated to be in sterling, as 2 somehow referring to the underlying contractual 3 entitlement, some [inaudible] parentheses, once 4 converted into sterling pursuant to rule 2.86, simply 5 cannot work in this context, ie the agreed claim amount 6 in the agreed claims CDDs. That argument doesn't have 7 any purchase.</p> <p>8 Therefore the only argument that can be run on the 9 agreed claims CDD is that the form of the release 10 wording is not as wide as it appears to be, but is 11 limited in a way which prevents or excludes the right of 12 the creditor to continue to claim in its underlying 13 currency.</p> <p>14 I'm going to deal with that alternative argument, 15 which is: can the scope of the release clause be 16 narrowed in any way? I'm going to deal with that point 17 in one go, as it were, when we look at the admitted 18 claims CDD. But that's the only argument, we submit, 19 that can work in relation to the on the agreed claims 20 CDD on this point.</p> <p>21 MR JUSTICE DAVID RICHARDS: The point you previously made 22 that it simply can't work to say that, as it were, the 23 underlying contractual entitlement is preserved; can you 24 just tell me why you say that?</p> <p>25 MR ZACAROLI: Yes. The reason is because, as I understand</p> <p style="text-align: center;">Page 9</p>	<p>1 That's why, as I understand him, the fact the admitted 2 claim is excluded from the release allows one to reach 3 the conclusion that the admitted claim includes the 4 underlying right to be paid in dollars.</p> <p>5 His secondary argument is that the scope of the 6 release in 2.3, in this case, is to be read down so as 7 to exclude from that release the ability to be paid in 8 dollars or the right to be paid in dollars.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR ZACAROLI: The first point we make here is in the same 11 way as under the agreed claims CDD, the conversion of 12 the original currency amount into sterling does not take 13 place pursuant to the admitted claims CDD. There is no 14 part of the admitted claims CDD which requires any 15 conversion to take place. It's something which has 16 already happened as part of the background to this deal, 17 this compromise being made.</p> <p>18 The most that can be said is that the reason why -- 19 and this appears from the background context, in 20 particular the fourth progress report I took my Lord to 21 earlier -- the claim would be converted to sterling in 22 each case was because that was necessary in order for it 23 to be admitted as a claim qualifying for proof in 24 a liquidation or administration. So it's a reason why 25 there has been a conversion prior to the entry into this</p> <p style="text-align: center;">Page 11</p>
<p>1 my learned friend's argument, the premise for that 2 argument is that the reason the, let's say, dollar 3 amount is converted into sterling to be put into the 4 agreement as the agreed claim amount is because that 5 mirrors the process which would have to happen in 6 a proof process, ie converting it pursuant to rule 2.86.</p> <p>7 As I understood his argument, that's the reason my Lord 8 should construe the reference to "agreed claim" and 9 "agreed claim amount" as incorporating the underlying 10 contractual entitlement as converted pursuant to 11 rule 2.86.</p> <p>12 That argument doesn't work because the reason the 13 foreign currency claim is converted into sterling under 14 the agreed claims CDD at stage 1 is not because that's 15 what's required by rule 2.86, it's for an independent 16 purpose.</p> <p>17 MR JUSTICE DAVID RICHARDS: I see.</p> <p>18 MR ZACAROLI: My Lord, then turning to the admitted claims 19 CDD. Turning to tab 7 for this purpose, as I say, 20 I understand my learned friend to have two ways of 21 putting the point. The first, his primary way, is that 22 when one looks at the reference to agreed claim amount 23 and admitted claim, one is having to interpret that as 24 meaning the underlying dollar entitlement converted 25 solely for the purposes of being an admitted claim.</p> <p style="text-align: center;">Page 10</p>	<p>1 agreement, not under the agreement.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR ZACAROLI: As I noted at the outset this morning, 4 it isn't the only purpose of this agreement to replicate 5 a proof, acceptance or rejection process. A very 6 important purpose is to reach a compromise, to reach 7 a point of finality in the relationship between the 8 company and its creditor and that aspect should not be 9 underplayed. The recital to the agreement states just 10 that. Recital B states in terms:</p> <p>11 "In consideration of the claim of the amount, the 12 claim being fixed at the agreed claim amount, the 13 company and the creditor wish to release and discharge 14 each other from any claim howsoever arising."</p> <p>15 Against that background, we say, it's very important 16 to identify what is the question of construction as 17 a matter of construction of the contract. What is the 18 appropriate question? We say the question here is: did 19 the parties intend, by clause 2, to fix the sole and 20 entire claim, their sole and entire claim against the 21 company, in an amount denominated in sterling and to 22 release all other claims under the creditor agreement? 23 That's the critical question. Or is there to be an 24 exception to that intention of fixing the claim at that 25 amount? Is it in some way to be cut down in some way?</p> <p style="text-align: center;">Page 12</p>

<p>1 We say the answer is manifestly yes to that question 2 when you look at the clear wording. It's very difficult 3 to escape from that conclusion given the wording that: 4 "The entire claim shall be fixed at the agreed claim 5 amount." 6 And there's nothing more. Clause 2.2: 7 "The admitted claim shall be fixed at the agreed 8 claim amount and shall constitute the creditor's entire 9 claim against the company." 10 And that is supported by the fact that the 11 conversion that has taken place was necessary for the 12 reason of it being admitted to proof because that was 13 the reason why it was converted to sterling. Nothing 14 in that fact derogates from the proposition that, having 15 converted it, they are now agreeing that that shall be 16 their only claim. 17 MR JUSTICE DAVID RICHARDS: Right. 18 MR ZACAROLI: So far as the question, "Did the parties 19 intend to release all other rights or obligations which 20 might have arisen under the creditor agreement?", then 21 again the answer is clearly yes because that's what 22 clause 2.3 tells us in the clearest terms. It includes 23 the release not only of all claims, et cetera, but all 24 rights and obligations on the fifth line and including 25 those arising under the creditor agreement. So any</p> <p style="text-align: center;">Page 13</p>	<p>1 subsequently transpires as existing. In each case you 2 can't test the scope or the meaning of the release 3 language by reference to that later occurring or later 4 transpiring claim. 5 I don't understand my learned friend's case to be 6 that any other of the rights and obligations under the 7 underlying creditor agreement have not been released and 8 so no other right is excluded from the breadth of this 9 release clause. So the case depends upon establishing 10 a reason, looking at those words in their context, to 11 conclude that the parties intended to single out from 12 the release one and only one right, namely the right to 13 be paid in dollars. In other words, the right to be 14 paid in dollars, although the parties have agreed to fix 15 the claim in sterling somehow remains in the background 16 with a sort of spectral presence to be reasserted later 17 on. We say the terms of the release clause cannot be 18 limited in that way. 19 I think I'm right in saying my learned friend did 20 not really advance a case for limiting the width of the 21 release clause beyond its widest terms other than by 22 reference to the tree roots examples or the flood 23 example. My Lord put to him whether there was 24 a reasoned basis for a dividing line. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 15</p>
<p>1 right to payment which would have existed under the 2 creditor agreement has been released by this clause. 3 It's a necessary and obvious consequence of 4 releasing all your rights to payment under the creditor 5 agreement that you can't reassert those rights later. 6 That would destroy the intention of achieving finality 7 and certainty in the relationship. But the attempt to 8 mount a currency conversion claim is, on a proper 9 analysis, nothing more than an attempt to reassert 10 a right to payment under the underlying creditor 11 agreement. 12 If I can contrast the process I've just been through 13 of identifying what the correct question here is with an 14 inappropriate question of construction or a question 15 that's irrelevant to construction, then that is: did the 16 parties intend to release the currency conversion claim? 17 That's not a relevant question. Again, I'm repeating 18 myself very briefly, but that's partly or perhaps mainly 19 because the parties did not have in mind that specific 20 claim at the time they entered into the agreement. What 21 they had in mind was the possibility of a whole number 22 of claims that they hadn't thought about and agreed to 23 release all of this. 24 So the question is as irrelevant as asking whether 25 the parties intended to release any other claim which</p> <p style="text-align: center;">Page 14</p>	<p>1 MR ZACAROLI: He doesn't advance a positive case about that 2 He doesn't, for example, advance a positive case that 3 there is a dividing line between provable and 4 non-provable claims. That wouldn't work for the various 5 reasons that I've been through about how the clause 6 clearly contemplates releasing claims that are not 7 provable. Nor does he or can he advance a case that 8 there's some distinction between claims as to where they 9 might rank against the insolvency estate. There's no 10 basis for that in the agreement. 11 The agreement works by defining the claims released 12 in three ways by reference to subject matter so, for 13 example: claims arising out of the creditor agreement or 14 not; secondly, by juridical basis, and every type of 15 juridical basis is covered; and, thirdly, temporally, 16 claims here or hereafter arising. He doesn't in any way 17 seek to distinguish between claims on the basis of which 18 part of the waterfall they might come under. 19 The language chosen, the third line of 2.3: 20 "Forever discharged a whole variety of claims." 21 Is inconsistent with it being released temporarily 22 as opposed to forever. 23 MR JUSTICE DAVID RICHARDS: I was just wanting to look 24 at the language in the rules about provable debts, which 25 everyone here has trawled over many times.</p> <p style="text-align: center;">Page 16</p>

<p>1 MR ZACAROLI: 12.3? 2 MR JUSTICE DAVID RICHARDS: It's all now 12A, isn't it? 3 MR ZACAROLI: Is my Lord looking at the most recent version 4 of The Red Book? 5 MR JUSTICE DAVID RICHARDS: I am. 6 MR ZACAROLI: I'm looking at the 2008 version. 7 MR JUSTICE DAVID RICHARDS: Well, fair enough. 8 MR ZACAROLI: My Lord, if you'd like to see the version 9 that's relevant to the administration, we do have 10 a spare copy. 11 MR JUSTICE DAVID RICHARDS: Yes, okay. (Handed). Thank you 12 very much. 13 MR ZACAROLI: 12.3. I think it is 13.12 my Lord might be 14 looking for. 15 MR JUSTICE DAVID RICHARDS: I think it might be 13.12. Let 16 me just see. Yes. So just focusing on the words: 17 "... whether in existence now or coming into 18 existence at some time in the future ..." 19 That qualifies ... I'm just trying to see ... 20 MR ZACAROLI: The governing rule is rule 13.12.1, I would 21 submit. 22 MR JUSTICE DAVID RICHARDS: Yes. Sorry, yes, absolutely. 23 I'm just ... So (a) and then (b). (b): 24 "Any debt or liability to which the company may 25 become subject after that date by reason of any</p> <p style="text-align: center;">Page 17</p>	<p>1 dividends in an administration or liquidation. Part of 2 the purpose. But we say that simply provides no good 3 reason, no sufficient reason for inferring that the 4 parties intended by the language they had used in 5 clause 2 to fixing the amount in sterling meant anything 6 other than that, ie fixing in sterling, for all 7 purposes. 8 The agreement was intended to achieve finality. 9 They've chosen a sterling-denominated sum and said 10 nothing else. 11 MR JUSTICE DAVID RICHARDS: Can I just interrupt you, sorry? 12 Part of the purpose was to enable it to be admitted for 13 proof. What other purpose was there? 14 MR ZACAROLI: Sorry, I put that badly. Part of the purpose 15 of the CDD included the fact that the sum had been -- 16 MR JUSTICE DAVID RICHARDS: Was there any other purpose in 17 expressing the sums in sterling? 18 MR ZACAROLI: There's none in the evidence that I could 19 point you to. 20 MR JUSTICE DAVID RICHARDS: Nor in the context which -- 21 MR ZACAROLI: No, I can't suggest that. One doesn't know 22 whether a particular creditor wanted its claim in 23 sterling -- 24 MR JUSTICE DAVID RICHARDS: But they had to be in sterling, 25 didn't they?</p> <p style="text-align: center;">Page 19</p>
<p>1 obligation incurred before that date." 2 The words in 2.3: 3 "... whether in existence now or coming into 4 existence at some time in the future." 5 Qualifies -- it's quite difficult to: 6 "... demands action, causes of action, liabilities, 7 rights and obligations, including those which arise 8 hereafter upon a change in the relevant law." 9 So you would say the words: 10 "... whether in existence now or coming into 11 existence at some time in the future ..." 12 Qualifies the words: 13 "... rights and obligations as well as the rights, 14 causes of action and liabilities"?" 15 MR ZACAROLI: Yes. 16 MR JUSTICE DAVID RICHARDS: So clearly, a liability may 17 arise after the commencement of the administration. 18 MR ZACAROLI: And might be provable. 19 MR JUSTICE DAVID RICHARDS: And might be provable. 20 MR ZACAROLI: That's true, but not an obligation. 21 MR JUSTICE DAVID RICHARDS: Not an obligation, yes. Yes 22 thank you. 23 MR ZACAROLI: My Lord, that really leaves this point, which 24 is that part of the context for fixing the agreed claim 25 amount in sterling was to enable that sum to qualify for</p> <p style="text-align: center;">Page 18</p>	<p>1 MR ZACAROLI: Yes, the administrators converted into 2 sterling as a matter of course. 3 MR JUSTICE DAVID RICHARDS: The admitted debt, whatever it's 4 called, the admitted claim amount had to be an amount in 5 sterling, didn't it? 6 MR ZACAROLI: That's correct. 7 MR JUSTICE DAVID RICHARDS: And the purpose of that was to 8 enable it to be admitted to proof, hence the use of the 9 word "admitted" I suppose. 10 MR ZACAROLI: Yes. So the question is whether the fact that 11 part of the purpose of the agreement as a whole included 12 that, then is that sufficient to lead to the inference 13 that the parties intended by the words of compromise, 14 which is what clause 2 is all about, intended that 15 compromise to be other than limiting the claim to 16 a sterling amount. We submit that the explanation as to 17 why that conversion had taken place is not a sufficient 18 reason to disregard or give any other interpretation 19 than the clear meaning of the words. 20 MR JUSTICE DAVID RICHARDS: Yes, I follow. 21 MR ZACAROLI: As I say, this reflects my opening comments 22 this morning about the breadth of the purpose of the CDD 23 being to achieve finality and certainty for all 24 purposes. The idea being -- 25 MR JUSTICE DAVID RICHARDS: And mutuality.</p> <p style="text-align: center;">Page 20</p>

<p>1 MR ZACAROLI: And mutuality.</p> <p>2 MR JUSTICE DAVID RICHARDS: This is, I'm afraid, repetition.</p> <p>3 but just very quickly remind me of the submission you</p> <p>4 make as to why, despite the breadth of 2.2 and 2.3, it</p> <p>5 does not exclude the admitted claimant's right to</p> <p>6 receive statutory interest.</p> <p>7 MR ZACAROLI: That's because the reference to "admitted</p> <p>8 claim" in 2.3, the opening words, "Save only for the</p> <p>9 admitted claim", takes you back to the definition of</p> <p>10 admitted claim at page 2, which is:</p> <p>11 "A claim which qualifies for dividends from the</p> <p>12 estate of the company, available to its unsecured</p> <p>13 creditors, pursuant to the Insolvency Rules and the</p> <p>14 Insolvency Act."</p> <p>15 And part of the broadly stated dividends to which</p> <p>16 the creditor is entitled under the Act and the rules is</p> <p>17 interest on that admitted claim. So it's an attribute</p> <p>18 of the admitted claim that it necessarily qualifies for</p> <p>19 dividends under the statute.</p> <p>20 On a completely strict and literal reading I would</p> <p>21 accept that the reference to including within the</p> <p>22 release all claims for interest could be read as broadly</p> <p>23 as excluding a right to statutory interest, but we</p> <p>24 accept that in the context where the admitted claim is</p> <p>25 intended to be one which qualifies for dividends under</p> <p style="text-align: center;">Page 21</p>	<p>1 that Mr Dicker said yesterday that a submission he made</p> <p>2 in Waterfall II(a) found support in the Court of</p> <p>3 Appeal's judgment, perhaps at a later stage in this</p> <p>4 hearing you'd just give consideration as to whether any</p> <p>5 of you wish to submit anything briefly in writing by</p> <p>6 reference to the Court of Appeal judgments which you say</p> <p>7 supports your submissions or defeats another party's</p> <p>8 submissions in Waterfall II(a). It would be totally</p> <p>9 bizarre for me to ignore that judgment.</p> <p>10 MR ZACAROLI: Of course, my Lord.</p> <p>11 MR JUSTICE DAVID RICHARDS: Because if you could add that,</p> <p>12 as it were, to the agenda at some point.</p> <p>13 MR ZACAROLI: We can.</p> <p>14 So that was the debate in the Court of Appeal as to</p> <p>15 the meaning of rule 2.86. In a sense my Lord is faced</p> <p>16 with a similar debate, but here as to the construction</p> <p>17 of this compromise agreement --</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ZACAROLI: -- was it intended that the statement of the</p> <p>20 right to be paid in sterling as your sole surviving</p> <p>21 claim was a permanent matter or only temporary? That's</p> <p>22 going back to my point about the dollar claim being some</p> <p>23 spectral claim in the background.</p> <p>24 We submit that really, taking into account those</p> <p>25 considerations which can properly be taken into</p> <p style="text-align: center;">Page 23</p>
<p>1 the insolvency legislation, that can't have been what</p> <p>2 the parties intended.</p> <p>3 MR JUSTICE DAVID RICHARDS: And there is a distinction which</p> <p>4 you make between statutory interest, the root of which</p> <p>5 is the Insolvency Rules --</p> <p>6 MR ZACAROLI: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: -- and a currency conversion</p> <p>8 claim, which is based on the survival of a contractual</p> <p>9 right, which you say has been released.</p> <p>10 MR ZACAROLI: Indeed. It's based on a remission to the</p> <p>11 underlying contractual rights, the pre-existing</p> <p>12 contractual rights; that's the distinction.</p> <p>13 My Lord, the point in this case is in some ways, but</p> <p>14 I don't want to draw the analogy too closely, one can</p> <p>15 compare it with the debate or the difference of opinion</p> <p>16 which took place in the Court of Appeal in</p> <p>17 Waterfall I in relation to rule 2.86 because the</p> <p>18 difference of opinion really comes down to this: that</p> <p>19 Lord Justice Lewison considered that rule 2.86 converted</p> <p>20 the claim for all purposes permanently, whereas</p> <p>21 Lord Justice Briggs and Lord Justice Moore-Bick took the</p> <p>22 opposite view that said it was a temporary conversion</p> <p>23 not intended to take away the creditor's rights.</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes. Can I just mention now,</p> <p>25 given that we have the Court of Appeal judgment, and</p> <p style="text-align: center;">Page 22</p>	<p>1 account -- so excluding questions with the benefit of</p> <p>2 hindsight now we know the claim and what claimants</p> <p>3 exist -- taking into account what can be taken into</p> <p>4 account, there is really only one answer: the bargain</p> <p>5 was struck so as to achieve finality mutually so that</p> <p>6 all rights under the creditor agreement are released,</p> <p>7 the intention being the parties can't thereafter return</p> <p>8 to them for any purpose.</p> <p>9 So in short, the mere fact the conversion to</p> <p>10 sterling had been necessary, had taken place for</p> <p>11 a purpose, which was to enable it then to be</p> <p>12 incorporated in the proof process subsequently, is</p> <p>13 simply not enough to displace the clear intention</p> <p>14 expressed in the agreement in the words the parties had</p> <p>15 chosen to fix the claim for all purposes in a sterling</p> <p>16 amount.</p> <p>17 My Lord, unless I can assist with any further</p> <p>18 questions, those are my reply submissions.</p> <p>19 MR JUSTICE DAVID RICHARDS: I don't think so.</p> <p>20 MR ZACAROLI: There is one point I meant to pick up on that</p> <p>21 my Lord asked me about yesterday, the statement of</p> <p>22 facts.</p> <p>23 I spoke correctly in that we do accept that the</p> <p>24 statements that do appear in the statement of facts are</p> <p>25 agreed and admissible for my Lord to rely upon for the</p> <p style="text-align: center;">Page 24</p>

<p>1 purposes of the question of construction.</p> <p>2 The reservation is intended to pick up the fact that</p> <p>3 the cross-reference to the relevant paragraphs in the</p> <p>4 evidence is not accepted, so they're not to be</p> <p>5 incorporated by reference into the statement.</p> <p>6 MR JUSTICE DAVID RICHARDS: It's only the statement of fact</p> <p>7 which you accept rather than the rest of those</p> <p>8 paragraphs, the rest of the contents of the paragraphs?</p> <p>9 MR ZACAROLI: It may be that the way it's put in the</p> <p>10 paragraph may not be quite the right way, but one looks</p> <p>11 to the statement of facts to see --</p> <p>12 MR JUSTICE DAVID RICHARDS: That is helpful to know that,</p> <p>13 Mr Zacaroli. Can I just jog back to see whether there's</p> <p>14 anything. (Pause)</p> <p>15 Thank you very much indeed.</p> <p>16 Mr Trower?</p> <p>17 Reply by MR TROWER</p> <p>18 MR TROWER: My Lord, I just have, I think, five topics to</p> <p>19 very briefly cover.</p> <p>20 The first one related to a question my Lord asked</p> <p>21 yesterday in relation to foreign exchange movements for</p> <p>22 the period of the administration.</p> <p>23 MR JUSTICE DAVID RICHARDS: Oh yes.</p> <p>24 MR TROWER: Can I just hand up something which has been</p> <p>25 prepared overnight?</p> <p style="text-align: center;">Page 25</p>	<p>1 This is done entirely for convenience.</p> <p>2 MR JUSTICE DAVID RICHARDS: So if you had a claim of £100 --</p> <p>3 MR TROWER: No, if your original contractual right was</p> <p>4 \$179.37, your admitted claim would be £100.</p> <p>5 MR JUSTICE DAVID RICHARDS: I'm with you. I understand,</p> <p>6 that's helpful.</p> <p>7 MR TROWER: That's done for convenience using that figure.</p> <p>8 Then you can see for the four distributions what you</p> <p>9 would have got by way of sterling at each of the</p> <p>10 dividend dates.</p> <p>11 At each of those dates the US dollar exchange rate</p> <p>12 is given so that you can see what that sterling amount</p> <p>13 would have bought you in dollars as at that relevant</p> <p>14 exchange rate.</p> <p>15 Your Lordship then sees on this example there's</p> <p>16 \$158, which is the total amounts that you would have</p> <p>17 been able to buy had you bought dollars with sterling on</p> <p>18 each of the dividend dates. That you then compare with</p> <p>19 the contractual right at the beginning, which shows you</p> <p>20 effectively the currency conversion claim.</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes. And I can see with the</p> <p>22 euros, although the point there is that it's only got</p> <p>23 above the line since the last distribution ...</p> <p>24 MR TROWER: Yes. So that's hopefully, obviously, very</p> <p>25 simplified.</p> <p style="text-align: center;">Page 27</p>
<p>1 MR JUSTICE DAVID RICHARDS: I'm very grateful, thank you.</p> <p>2 (Handed)</p> <p>3 MR TROWER: The convenient place, I think, to put it is in</p> <p>4 volume 9 behind tab 30.</p> <p>5 There are three pages that I will take your Lordship</p> <p>6 briefly through. The first is a simple graph with</p> <p>7 US dollars and euros, and that shows you in terms of</p> <p>8 a graph what £1 sterling would buy in the form of</p> <p>9 dollars and euros for the duration of the</p> <p>10 administration.</p> <p>11 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>12 MR TROWER: Then we have exactly the same information, what</p> <p>13 \$1 million buys, in tabular form for every quarter on</p> <p>14 the next page.</p> <p>15 Then the final page is an illustration which is done</p> <p>16 for convenience in this way in relation to people who</p> <p>17 had proofs originally denominated in respect of</p> <p>18 contractual rights originally denominated in dollars and</p> <p>19 originally denominated in euros. What has been done is,</p> <p>20 looking at the US dollar one by way of illustration, the</p> <p>21 contractual right is expressed as 179.37 US dollars and</p> <p>22 the reason that's done is because that reflects directly</p> <p>23 the exchange rate at the commencement of the</p> <p>24 administration. So we can see that the admitted claim</p> <p>25 on that basis would be £100.</p> <p style="text-align: center;">Page 26</p>	<p>1 MR JUSTICE DAVID RICHARDS: Very helpful. Is there a figure</p> <p>2 in the evidence as to -- this is very difficult to ...</p> <p>3 Well, just the total value of the US dollar foreign</p> <p>4 currency claims?</p> <p>5 MR TROWER: I think there may be somewhere. We'll look.</p> <p>6 MR JUSTICE DAVID RICHARDS: I appreciate it then breaks down</p> <p>7 because a lot of people's claims may not have been, on</p> <p>8 Mr Zacaroli's submissions, released, but a lot will have</p> <p>9 been. It's just to have a global figure giving some</p> <p>10 sense of it.</p> <p>11 MR TROWER: I have a feeling we may not have it in the</p> <p>12 evidence for this tranche, but I'm pretty sure it's</p> <p>13 somewhere. We'll look it out for my Lord.</p> <p>14 MR JUSTICE DAVID RICHARDS: Thank you very much.</p> <p>15 MR TROWER: So that's the first topic.</p> <p>16 The second point is also foreign exchange related</p> <p>17 and is simply this: the question arose, I think during</p> <p>18 Mr Dicker's submissions, as to whether it is possible to</p> <p>19 contract out of rule 2.86. My Lord asked that question</p> <p>20 and Mr Dicker said probably and only in the context of</p> <p>21 a scheme or CVA by which everyone is bound.</p> <p>22 We would agree with that sort of idea because,</p> <p>23 obviously, otherwise some groups of creditors will be</p> <p>24 affected differently from others. In a normal case</p> <p>25 where you don't have a surplus, you wouldn't -- the</p> <p style="text-align: center;">Page 28</p>

<p>1 effect of contracting out with one category of creditors 2 will affect other people in a way that's inconsistent 3 with that which the statute contemplates. 4 But the reason just for raising this in reply is so 5 my Lord understands what the position was under the CRA. 6 Under the CRA any conversion from euros, yen or any 7 other foreign currency -- or indeed sterling for that 8 matter -- to US dollars, which was done under 9 clause 24.1 for the purposes of quantifying the 10 close-out amount is effected as at the administration 11 date. I can just show my Lord how that works if we go 12 to volume 3, page 464. 13 We need to start at 24.1, which is page 361. So 14 just to remind my Lord, 24.1: 15 "All close-out amounts shall be denominated in 16 US dollars. To the extent that a close-out amount is 17 denominated in a currency other than US dollars, the 18 company shall convert such a close-out amount into 19 US dollars using the spot rate as of the relevant FX 20 conversion time." 21 And that is defined as the administration date if 22 you go to page 464. 23 So when there is the subsequent conversion from that 24 US dollars amount to sterling for proof purposes under 25 rule 2.86, there should be exactly the same result as if</p> <p style="text-align: center;">Page 29</p>	<p>1 was that the condition is only satisfied on the 2 occurrence of certain events, any one of which must 3 occur before 30 June 2010, which was six months after 4 the effective date, or was capable of extension. 5 They're all events which would lead to a scheme of 6 arrangement not being proceeded with. None of those 7 events or circumstances occurred and therefore the 8 condition was, as matters turned out, never satisfied. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: The purpose of looking at the NTA offeree 11 position was to show that the draftsman did contemplate 12 that the CRA might prove to be an appropriate mechanism 13 for resolving non-trust claims, but it doesn't go any 14 further than that. 15 Just to deal with a point that, I think, was raised 16 by Mr Dicker or mentioned in passing, no NTA signatory 17 had its claim actually ascertained under the terms of 18 the NTA, although many of them will have subsequently 19 entered into a CDD and have had their claims determined 20 under the consensual approach. 21 My Lord, the next point, fourth point, relates to 22 the references to interest in 2.88 in the CRA. There 23 are a number of submissions made to my Lord on the two 24 different references to rule 2.88. One is at 25 paragraph 20.4.7 on page 352 and the other is at 25.1 on</p> <p style="text-align: center;">Page 31</p>
<p>1 the conversion had been from the original foreign 2 currency to sterling as required by rule 2.86 in the 3 first place because all the conversions, whether euro, 4 dollars, sterling, or euros straight into sterling are 5 done on the same day. 6 MR JUSTICE DAVID RICHARDS: Yes. It's possible it wouldn't 7 be quite the same because the rate is a spot rate, which 8 is defined as the rate for purchasing -- 9 MR TROWER: Yes. 10 MR JUSTICE DAVID RICHARDS: -- the target currency. So 11 I don't -- 12 MR TROWER: It may not be absolutely identical, but it's 13 about as close as one can get. 14 MR JUSTICE DAVID RICHARDS: Yes, I follow that. 15 MR TROWER: And my Lord, if I can then move on to the third 16 point before my Lord puts away -- actually, most of my 17 points are on the CRA, so if my Lord could keep the CRA 18 open. I think we got there during the course of the 19 submissions but, just for confirmation, it relates to 20 the NTA condition, my third point. 21 MR JUSTICE DAVID RICHARDS: Oh yes, yes. 22 MR TROWER: And that, as my Lord knows, is on page 480, 23 paragraph 9 of schedule 1 to the CRA. The position 24 which we got to -- and I'm sorry that I was probably 25 slightly unclear in my opening in relation to this --</p> <p style="text-align: center;">Page 30</p>	<p>1 page 362. 2 These clauses and these references are doing two 3 very different jobs. 20.4.7 is concerned with what 4 happens to interest in the determining as part of the 5 determination process of the close-out amount. It 6 appears in the overriding valuation provision, so it's 7 part of the close-out determination process. So what 8 the draftsman of 20.4.7 are concerned to do is to 9 exclude interest on a liability from the calculation of 10 the close-out amount, save to the extent that -- and 11 that's the words at the end of that clause -- it would 12 accrue under rule 2.88. 13 It's not entirely clear why this was done, but it 14 may have been because there was a question in the 15 draftsman's mind as to whether -- and if my Lord turns 16 up rule 2.88 -- interest borne on a debt proved in the 17 administration for the purposes of rule 1, 2.88.1, would 18 or would not catch interest accruing on any unpaid 19 liability of the company for the purposes of 20.4.7. 20 So in other words, it may have been uncertain, so 21 far as the draftsman was concerned, as to how 2.88.1 22 operated when you're seeking to quantify the amount of 23 the close-out amount as the provable debt, what actually 24 could and what could not be included. So what we 25 suggest is the most likely explanation for those words</p> <p style="text-align: center;">Page 32</p>

<p>1 there, given that they're within the demonstration</p> <p>2 provision, is that he used the proviso to ensure that</p> <p>3 20.4.7 reflected what would happen on a calculation and</p> <p>4 determination in the context of the application of the</p> <p>5 rules rather than what the contract may have</p> <p>6 specifically required.</p> <p>7 MR JUSTICE DAVID RICHARDS: Well, that I understand.</p> <p>8 MR TROWER: It probably doesn't go much further than that.</p> <p>9 MR JUSTICE DAVID RICHARDS: As I would understand it --</p> <p>10 well, you could have had a termination before 15 --</p> <p>11 MR TROWER: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: -- September 2008, but the loss</p> <p>13 hasn't been calculated --</p> <p>14 MR TROWER: Yes.</p> <p>15 MR JUSTICE DAVID RICHARDS: -- in which case there would be</p> <p>16 capable of proof both the loss and interest under the</p> <p>17 contract up to the relevant date up to 15 September.</p> <p>18 MR TROWER: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: That's unaffected by 20.4.7.</p> <p>20 MR TROWER: Yes.</p> <p>21 MR JUSTICE DAVID RICHARDS: What 20.4.7 says is that no</p> <p>22 interest shall accrue on any unpaid liability from the</p> <p>23 administration date.</p> <p>24 MR TROWER: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: Then you have the saving words</p> <p style="text-align: center;">Page 33</p>	<p>1 misunderstood what was being said -- there was</p> <p>2 a suggestion that maybe the two didn't hang together</p> <p>3 very well. What's going on in 25.1 is that that last</p> <p>4 sentence is dealing with interest entitlements on the</p> <p>5 net financial claim, which itself is the product of the</p> <p>6 close-out amount, so it's the next stage in the process.</p> <p>7 In other words, that's dealing with interest accruing on</p> <p>8 any net financial claim --</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR TROWER: -- which is the result of the calculation that</p> <p>11 one's seen going on in 20.4.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes. Let me just remind myself</p> <p>13 (Pause):</p> <p>14 "... which shall constitute an ascertained unsecured</p> <p>15 claim in the winding-up. For the avoidance of doubt, no</p> <p>16 interest shall accrue save to the extent provided."</p> <p>17 Well, that means that no post-administration</p> <p>18 interest will accrue at any rate until you reach</p> <p>19 a surplus.</p> <p>20 MR TROWER: Yes. Put in simple terms, 25.1 is dealing with</p> <p>21 the second part of rule 2.88 --</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: -- statutory interest and it looks as if in</p> <p>24 20.4.7 the draftsman was concerned about the impact of</p> <p>25 the exclusionary element of rule 2.88 at the earlier</p> <p style="text-align: center;">Page 35</p>
<p>1 suggesting that interest will nonetheless accrue.</p> <p>2 MR TROWER: Well, might:</p> <p>3 "... save to the extent that interest would accrue."</p> <p>4 So what it's doing, we think, what the draftsman</p> <p>5 might have had in mind -- and I think I have to accept</p> <p>6 on any view that it's not very clear what it's doing --</p> <p>7 was the draftsman was simply saying was, well, we're not</p> <p>8 going to get into what may be a complex question here.</p> <p>9 MR JUSTICE DAVID RICHARDS: Can I interrupt you? Under</p> <p>10 2.88, apart from 2.88.7, so what we've called statutory</p> <p>11 interest, can any post-administration interest be</p> <p>12 provable?</p> <p>13 MR TROWER: No. But the question is -- I think it may be</p> <p>14 a question of characterisation, which was the debate at</p> <p>15 one stage, as to whether, when you're quantifying the</p> <p>16 close-out amount, how you characterise the elements that</p> <p>17 go into quantifying the close-out amount for the</p> <p>18 purposes of the rule. But in a sense this doesn't</p> <p>19 matter too much because the important point is that this</p> <p>20 is part of the determination of the close-out amount,</p> <p>21 it's not part of -- whereas what's going on in 25.1 is</p> <p>22 different. That's the substance of the point I wanted</p> <p>23 to draw to my Lord's attention.</p> <p>24 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>25 MR TROWER: Because I think at one stage -- and I might have</p> <p style="text-align: center;">Page 34</p>	<p>1 stage of calculating the amount of debt.</p> <p>2 MR JUSTICE DAVID RICHARDS: The concern I had in relation to</p> <p>3 this was -- I mean, as I understand it, what goes into</p> <p>4 the net contractual position are the close-out amounts</p> <p>5 going both ways, of course.</p> <p>6 MR TROWER: Yes.</p> <p>7 MR JUSTICE DAVID RICHARDS: But if those close-out amounts</p> <p>8 result in what's called a positive number, then that is</p> <p>9 the net amount due from the company to the signatory --</p> <p>10 MR TROWER: Yes.</p> <p>11 MR JUSTICE DAVID RICHARDS: -- and is said to be provable.</p> <p>12 MR TROWER: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: But the close-out amount</p> <p>14 includes an element of non-provable interest by virtue</p> <p>15 of 20.4.7.</p> <p>16 MR TROWER: Yes. Well, it may well not include an element</p> <p>17 of ... It may well not include an element of</p> <p>18 non-provable interest. What it can't do, on the face of</p> <p>19 it, is -- once you've got a close-out amount, you've got</p> <p>20 a close-out amount, whatever it may be. 20.4.7 is</p> <p>21 dealing with the determination process.</p> <p>22 MR JUSTICE DAVID RICHARDS: What is an unpaid liability of</p> <p>23 the company? What's the definition of "liability"?</p> <p>24 This only matters to this extent. It may be that my</p> <p>25 concern is misplaced here, but it suggested to my mind</p> <p style="text-align: center;">Page 36</p>

<p>1 that the drafting here was really directed to arriving 2 at net financial positions for the purposes of the trust 3 claims. 4 MR TROWER: Yes. 5 MR JUSTICE DAVID RICHARDS: There's no reason in determining 6 trust claims or determining liabilities for the purposes 7 of determining trust claims why you shouldn't include an 8 element of post-administration interest because it's not 9 directed to creating a provable debt. 10 MR TROWER: No, that's ... What it's directed towards is 11 ensuring that all the liabilities -- I mean, at the end 12 of the day what it's directed towards is nothing more 13 than ensuring that all the liabilities which the 14 signatory may have to the company are fully discharged 15 before the trust property is delivered out. 16 MR JUSTICE DAVID RICHARDS: Quite so. 17 MR TROWER: Absolutely. 18 MR JUSTICE DAVID RICHARDS: But in determining it one gives 19 him credit for some post-administration interest. 20 MR TROWER: Yes. 21 MR JUSTICE DAVID RICHARDS: There's absolutely nothing wrong 22 with that. It may be that there was a sort of -- that 23 was then used for the secondary purpose of determining 24 what would be a provable amount. 25 MR TROWER: There's no doubt on the evidence that the</p> <p style="text-align: center;">Page 37</p>	<p>1 For the purposes of determining the close-out amount, is 2 there added to the \$1 million interest 3 post-administration interest under 2.88.7 and 8? 4 MR TROWER: Yes. I understand that that is the question. 5 That sends you straight back to 2.88.1 to ask oneself 6 the question as to whether or not 2.88.1 permits 7 interest to be included. 8 MR JUSTICE DAVID RICHARDS: "Where a debt proved in the 9 administration bears interest, that interest is provable 10 as part of the debt except insofar as it is provable in 11 respect of any period after the administration (in which 12 case it is not)." 13 That's not what it says. 14 You're saying all it's intended to do is to say, 15 well, interest isn't added post-administration. 16 MR TROWER: Yes. My slight difficulty with this is I don't 17 actually make a positive submission in relation to how 18 this actually works. The important point is really no 19 more complicated than this: that all my Lord, for the 20 purposes of this construction argument, can probably get 21 from this is that it appears to relate to part of the 22 determination of the figure point rather than the 23 running of interest subsequent to the determination of 24 the figure -- 25 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p style="text-align: center;">Page 39</p>
<p>1 starting point in relation to this was undoubtedly 2 limited to the trust claim. 3 MR JUSTICE DAVID RICHARDS: Exactly, that was the scheme. 4 MR TROWER: The scheme and you go through that process. 5 There's no doubt about that. But what also seems to 6 have happened is that as the process went on -- and one 7 does see this from both the progress reports and the 8 evidence -- it became apparent that the processes that 9 were gone through under this document were, at the very 10 least, of assistance in procuring the proving of claims. 11 MR JUSTICE DAVID RICHARDS: I see that. 12 MR TROWER: But my Lord is certainly entitled to take into 13 account, when construing the document, how it started 14 and how it developed when considering exactly how far 15 the construction points go -- 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR TROWER: -- because that's the reality of the genesis and 18 development of the document. 19 MR JUSTICE DAVID RICHARDS: Just going back then to 20.4.7 20 if we could just take the straightforward case of an 21 automatic termination of a contract by virtue of the 22 insolvency. So you have to, under the terms of the 23 contract, determine loss as at 15 September 2008. 24 MR TROWER: Yes. 25 MR JUSTICE DAVID RICHARDS: So you arrive at \$1 million.</p> <p style="text-align: center;">Page 38</p>	<p>1 MR TROWER: -- and that was the underlying point. 2 MR JUSTICE DAVID RICHARDS: Thank you, Mr Trower. Thank you 3 very much. 4 MR TROWER: I've just been handed a note in relation to my 5 first point. 6 MR JUSTICE DAVID RICHARDS: Yes, a global figure. 7 MR TROWER: The best we've got is in Mr Lomas' ninth witness 8 statement, paragraph 70 where he says: 9 "The total value of currency conversion claims could 10 be in excess of 1.3 billion." 11 MR JUSTICE DAVID RICHARDS: Right. 12 MR TROWER: Mr Dicker has handed me something else, which 13 Mr Bayfield had also handed me, which I rejected for 14 some reason; I've no idea why. Volume 6, "Surplus 15 entitlement proposal". It's page 23 and fortunately the 16 figure is fairly similar, it's 1.29. 17 MR JUSTICE DAVID RICHARDS: Right, thank you very much. 18 Good, well, I'm grateful for that. 19 MR TROWER: And it has a breakdown now too. 20 MR JUSTICE DAVID RICHARDS: Thank you very much. 21 MR TROWER: My Lord, my final point relates to some 22 submissions that were made in relation to the 23 quasi-judicial duties of the administrator, which 24 I think I ought to address briefly. They were largely 25 made by Mr Dicker, and Mr Zacaroli briefly touched on</p> <p style="text-align: center;">Page 40</p>

<p>1 them in his reply.</p> <p>2 One may need to distinguish between the way it was</p> <p>3 put in parts of Mr Dicker's skeleton argument and the</p> <p>4 way he put it when he addressed my Lord, just for this</p> <p>5 reason: in his skeleton -- and he didn't repeat it in</p> <p>6 quite these terms in his oral argument -- he suggested</p> <p>7 that the quasi-judicial duties extended to the joint</p> <p>8 administrators' role in returning trust assets and</p> <p>9 identifying claims as well as in dealing with proofs of</p> <p>10 debt.</p> <p>11 MR JUSTICE DAVID RICHARDS: Right.</p> <p>12 MR TROWER: We do suggest that goes a little too far.</p> <p>13 Of course we accept that the joint administrators</p> <p>14 act as officers of the court in everything they do. But</p> <p>15 in exercising their power of compromise, for example,</p> <p>16 they are not required to exercise quasi-judicially, and</p> <p>17 indeed it would be inconsistent with the whole concept</p> <p>18 of compromise were they to do so.</p> <p>19 Furthermore, in the present case, the participants</p> <p>20 in the CDD process -- and I think in this stage of the</p> <p>21 argument it arose in this context -- had agreed it was</p> <p>22 to be different from a normal process of proof. So</p> <p>23 while there is, of course, a quasi-judicial element</p> <p>24 in the decision that they make, it is rather limited and</p> <p>25 qualified in a case like the present one because the</p> <p style="text-align: center;">Page 41</p>	<p>1 for a rather different reason. The joint</p> <p>2 administrators' duty was to manage the affairs and</p> <p>3 business of LBIE as trustee -- LBIE as trustee -- in</p> <p>4 accordance with their statutory functions. They had no</p> <p>5 freestanding duty as trustees. What they're doing is</p> <p>6 they're managing the affairs of a trustee --</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR TROWER: -- and it's quite important one keeps that in</p> <p>9 mind when one's thinking about quasi-judicial concepts</p> <p>10 as well and the actual role they're fulfilling as an</p> <p>11 officer of the court.</p> <p>12 MR JUSTICE DAVID RICHARDS: I think the point really is,</p> <p>13 I would think, not so much quasi-judicial as the point</p> <p>14 that I think I put to Mr Zacaroli -- and he agreed --</p> <p>15 that the administrators are at all times acting pursuant</p> <p>16 to statutory duties and functions and not in their own</p> <p>17 commercial self-interest.</p> <p>18 MR TROWER: Yes, and of course we accept that. That's</p> <p>19 fundamental.</p> <p>20 My Lord, unless I can assist any further.</p> <p>21 MR JUSTICE DAVID RICHARDS: I don't think so. I think</p> <p>22 you've probably picked up the points that I ... (Pause)</p> <p>23 MR TROWER: My Lord, there is actually one final point,</p> <p>24 which arose in part out of what Mr Zacaroli took you to</p> <p>25 when looking at 13.12. Perhaps if my Lord would just</p> <p style="text-align: center;">Page 43</p>
<p>1 parameters of what the joint administrators were</p> <p>2 required to do were restricted to the issue of a LBIE</p> <p>3 determination in accordance with the relevant</p> <p>4 methodology and the creditor always had the right to</p> <p>5 reject the LBIE determination and pursue its usual</p> <p>6 rights to prove through the normal proof process, if it</p> <p>7 chose to do so, when of course the normal principles</p> <p>8 applied.</p> <p>9 I don't go so far as to say -- of course I don't --</p> <p>10 that there isn't a quasi-judicial element that arises</p> <p>11 at the time the decision is actually made.</p> <p>12 MR JUSTICE DAVID RICHARDS: Decision on?</p> <p>13 MR TROWER: On the proof. Because that's what we're doing.</p> <p>14 But when one looks at the authorities the position is</p> <p>15 clear. One can see, even within the proof process,</p> <p>16 there's a little sort of transition that goes on because</p> <p>17 you act quasi-judicially when you're making the decision</p> <p>18 itself and then you then move into an adversarial role</p> <p>19 when there is any appeal.</p> <p>20 Just as a sort of adjunct to this point, we do take</p> <p>21 issue with the idea that the joint administrators are</p> <p>22 required to return trust assets in a quasi-judicial</p> <p>23 manner, which is the way it was put in Mr Dicker's</p> <p>24 skeleton in paragraph 14. As I say, I don't think he</p> <p>25 repeated that in his oral submissions, but it's wrong</p> <p style="text-align: center;">Page 42</p>	<p>1 turn that up again.</p> <p>2 As my Lord pointed out, everyone in court is more</p> <p>3 than familiar with 13.12.1(b) and the issue here is just</p> <p>4 this: that 13.12.1(b) defines, as we all know, a debt</p> <p>5 in relation to the winding-up of a company and now in</p> <p>6 administration as including:</p> <p>7 "... any debt or liability to which the company may</p> <p>8 become subject after that date by reason of any</p> <p>9 obligation incurred before that date."</p> <p>10 My Lord will recall that in relation to the CRA we</p> <p>11 advanced the argument, so my Lord had it, as to how it</p> <p>12 was that the CRA was intended to work with the</p> <p>13 replacement of a new obligation for the old. It may be</p> <p>14 that my Lord is assisted by looking at those words and</p> <p>15 giving them a very broad meaning when considering how</p> <p>16 far it is that an agreement can go to replace an</p> <p>17 existing obligation with a "new obligation" while still</p> <p>18 retaining the element of provability, the question</p> <p>19 being: can it properly be said that the bundle of rights</p> <p>20 which one has at the end of the process constitutes or</p> <p>21 gives rise to liabilities by reason of an obligation</p> <p>22 incurred?</p> <p>23 So if you can make the link between the new bundle</p> <p>24 of rights which you have and the old bundle of rights</p> <p>25 which have gone, that is as far as you can go while</p> <p style="text-align: center;">Page 44</p>

<p>1 still having a provable debt. That may be a helpful way 2 of thinking about what the new obligation is all about. 3 I raise it with some hesitancy because we're not 4 descending into the arena on this. 5 MR JUSTICE DAVID RICHARDS: Thank you very much indeed 6 That concludes the argument on those issues and then 7 that leaves the Ex parte James issue, doesn't it? 8 MR TROWER: Yes. What we've agreed, subject to 9 your Lordship, is that Mr Dicker should launch into that 10 now, although I notice -- 11 MR JUSTICE DAVID RICHARDS: It's time to take our break. 12 I'll rise for five minutes. 13 (11.43 am) 14 (A short break) 15 (11.48 am) 16 MR JUSTICE DAVID RICHARDS: Mr Dicker. 17 Further submissions by MR DICKER 18 MR DICKER: My Lord, the question on 36A. 19 The question obviously only arises if we're wrong as 20 a matter of construction, but in that event we submit 21 the administrators should be directed not to enforce the 22 releases, either on the basis of the principle in 23 Ex parte James or in accordance with paragraph 74 of 24 schedule B1. 25 I say that question 36 only arises if we're wrong as</p> <p style="text-align: center;">Page 45</p>	<p>1 the course of that process loses various parts of that 2 claim which he wouldn't lose if he had proved in the 3 ordinary way, that's the point at which Ex parte James 4 in paragraph 74 step in. 5 Briefly so far as the law is concerned, can I show 6 your Lordship, firstly, Re Nortel, which is the leading 7 decision on Ex parte James now, then briefly four cases 8 referred to in Lord Neuberger's judgment. Nortel is in 9 authorities bundle 1B at tab 57. 10 The way the issue arose, as your Lordship will see 11 at paragraph 115 on page 246 -- the argument was 12 effectively that ... Well, your Lordship will see from 13 115: 14 "If I had taken a different view on the provable 15 debt issue, an alternative argument to that just 16 discussed was the court has the power to direct the 17 administrator of a target company to accord to the 18 potential liability under the FSD regime a higher 19 ranking than it would be given under the 86 Act and 20 Rules. In other words, the court could order the 21 administrator to treat the potential FSD liability as 22 a provable debt, even though the effect of the 23 legislation is that it should rank lower." 24 The short answer to that submission was, of course, 25 that you can't use Ex parte James to rewrite the</p> <p style="text-align: center;">Page 47</p>
<p>1 a matter of construction, but in a sense it's relevant 2 to the question of construction and I say that for this 3 reason: if your Lordship were to conclude that it would 4 be unfair for the administrators to enforce the releases 5 in the circumstances, then in a sense the first response 6 to that, we say, is to go back and check whether or not 7 the conclusions one reached on construction are correct 8 for the simple reason that you would not expect 9 administrators, particularly these, to have acted in 10 a way which did produce such consequences. 11 Can I be absolutely clear: we are not contending -- 12 and the Senior Creditor Group does not contend -- the 13 administrators knowingly and wilfully acted unfairly or 14 that they intended to cause unfair harm. What we do 15 say, however, is if Wentworth is correct as to the 16 effect of the documents, it would be unfair for the 17 administrators to be permitted to enforce the releases. 18 My Lord, this issue arises whether the effect of the 19 agreements was to release part of one's claim to 20 statutory interest, to currency conversion claims, or 21 indeed to any other non-provable aspect of the claim 22 advanced by the administrators, advanced by the creditor 23 and agreed and admitted to proof by the administrators. 24 In other words, if the creditor goes to the 25 administrators, advances a claim and if somehow during</p> <p style="text-align: center;">Page 46</p>	<p>1 statute, but Lord Neuberger deals at some length with 2 the point. At paragraph 122, he summarises the effect 3 of the principle in Ex parte James, and if your Lordship 4 would perhaps just read paragraph 122. (Pause) 5 Your Lordship will have noted at B the words that he 6 uses or the phrase that he uses is simply: 7 "... where it would be unfair for a [in this case] 8 trustee in bankruptcy to take full advantage of his 9 legal rights. As such, the court will order him not to 10 do so." 11 There are then four cases referred to by 12 Lord Neuberger and I wanted to show your Lordship 13 briefly each of them. 14 The first is Re Clark -- and this and the next three 15 cases are all in bundle 1A. 16 Re Clark, bundle 1A, tab 15. My Lord, this 17 essentially concerned services or goods which were 18 provided to the bankrupt after a receiving order was 19 made against him and payments made to the supplier, 20 again obviously post-receiving order, and the issue was 21 whether or not the payments could be recovered from the 22 supplier. So just looking at the facts on 559: 23 "August 69 ... a bankruptcy petition was presented 24 ... 7 November a receiving order was made against 25 a bankrupt."</p> <p style="text-align: center;">Page 48</p>

<p>1 Dropping three lines: 2 "On 7 November, the bankrupt's bank account was 3 overdrawn to the extent of £776-odd. On that date the 4 respondents delivered to the bankrupt 3,800 gallons 5 a petrol and received in exchange a cheque for £1,123. 6 When the cheque was presented, the bankrupt's account 7 was in credit, various sums having been credited to the 8 account in the interval." 9 Essentially, that happened again. Then just above 10 letter F: 11 "Thereafter, the Official Receiver, who had known 12 nothing of those transactions, intervened and the 13 bankrupt's account was closed." 14 At G: 15 "The trustee in bankruptcy sought a declaration of 16 payments by the bankrupt to the respondents of [the two 17 sums] which were respectively void against him as such a 18 trustee. Under section 37.1 of the Bankruptcy Act 19 (1914), they were made after the bankrupt had committed 20 an act of bankruptcy to which the trustee's title 21 related back and an order for repayment of the two sums 22 in question." 23 And held: 24 "Since the trading by the respondents with the 25 bankrupt after the date of the receiving order had</p> <p style="text-align: center;">Page 49</p>	<p>1 He then says: 2 "For the rule to operate, it is clear that certain 3 conditions must be present." 4 My Lord, the first is between F and G: 5 "There must be some form of enrichment of the assets 6 of the bankrupt by the person seeking to have the rule 7 applied." 8 The second over the page, he says: 9 "Returning to the conditions for the application of 10 the rule, it is, I think, clear that except in the most 11 unusual cases, the claimant must not be in a position to 12 submit an ordinary proof of debt." 13 He explains that between B and C by saying: 14 "I think the underlying reason is obviously that to 15 give effect to the rule would conflict with the 16 mandatory rateable division of the estate between all 17 the bankrupt's creditors. The rule is not to be used 18 merely to confer a preference on an otherwise unsecured 19 creditor, but to provide relief for a person who would 20 otherwise be without any." 21 Which was essentially the answer in Nortel: you 22 can't use this as a way of rewriting what the statute 23 requires. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: Thirdly:</p> <p style="text-align: center;">Page 51</p>
<p>1 benefited the estate and cost the respondents a loss, 2 it would be manifestly unfair to order repayment of the 3 amount of the two cheques, which would increase the 4 benefit to the estate and the loss to the respondents 5 for which they would have no right to prove in the 6 current bankruptcy. Accordingly, the court would apply 7 the rule that where it would be unfair for a trustee in 8 bankruptcy to take full advantage of his legal rights, 9 the court would order him not to do so." 10 My Lord, the relevant passages I wanted to show 11 your Lordship were firstly page 563, just above E, where 12 Mr Justice Walton says, three lines above E: 13 "The sole but extremely difficult and important 14 question which I have to answer is: ought the doctrine 15 laid down in Ex parte James be applied in the present 16 case so as to deny the trustee relief to which, 17 according to the letter of the statute, he is plainly 18 entitled. Stating the matter in very broad terms and 19 indeed for the moment deliberately using for this 20 purpose unemotive language, the rule provides that where 21 it would be unfair for a trustee to take full advantage 22 of his legal rights as such, the court will order him 23 not to do so." 24 And that's the passage quoted by Lord Neuberger in 25 Nortel.</p> <p style="text-align: center;">Page 50</p>	<p>1 "The third and crucial test for the application of 2 the rule is, I think, capable of being stated simply as 3 follows [this is between E and F]. If in all the 4 circumstances of the case an honest man who would be 5 personally affected by the result would nevertheless be 6 bound to admit, it is not fair, I should keep the money, 7 my claim has no merits, then the rule applies so as to 8 nullify the claim which he would otherwise have had." 9 And fourth: 10 "Finally, for completeness, I would observe that 11 when the rule does apply, it applies only to the extent 12 necessary." 13 On that case, if your Lordship just goes quickly to 14 567, at E, the last two sentences of that paragraph, 15 Mr Justice Walton poses that question and he says: 16 "I turn to the facts of this particular case. The 17 question as I feel it ought to be posed is simply: is it 18 fair that trustees should recover the amount of these 19 two cheques from Texaco." 20 And the answer is essentially no because the estate 21 would be getting a windfall and the creditor would 22 suffer loss which it's unfair for him to bear. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: My Lord, that's the first. The second, 25 TH Knitwear, your Lordship will find behind tab 21.</p> <p style="text-align: center;">Page 52</p>

<p>1 It is a slightly different factual situation, just 2 looking at the facts on 275: 3 "The creditor had supplied goods and services to 4 a company under a contract, which obliged the company to 5 pay the creditor the basic price plus VAT. The creditor 6 complied with its statutory obligation to account for 7 the VAT element and paid the amount due to Customs & 8 Excise. Then the company became insolvent and went into 9 voluntary liquidation. The creditor limited its proof 10 in the liquidation to the basic price of the goods and 11 services and to recover the VAT element from the 12 Commissioners." 13 Dropping two lines: 14 "Subsequently, the liquidator found there was 15 a surplus over liabilities which is in part attributable 16 to an amount representing the VAT element which had been 17 refunded by the Commissioners to the creditor and for 18 which the creditor could have proved in liquidation and 19 the Commissioners sought to recover from the liquidator 20 the amount representing the VAT element which they had 21 thus refunded." 22 The answer in the case was the principle in 23 Ex parte James did not apply, essentially for two 24 reasons, just looking at the "held" at G: 25 "The Court of Appeal held the statutory scheme was Page 53</p>	<p>1 Browne-Wilkinson was prepared to assume the contrary in 2 favour of the Commissioners without deciding the point, 3 the liquidator in a voluntary winding-up is not an 4 officer of the court within the principle." 5 The relevant passage I wanted to show your Lordship 6 is on 289 at the bottom of the page. 7 MR JUSTICE DAVID RICHARDS: Yes, "In case this view be wrong 8 ..." 9 MR DICKER: "In case this view be wrong, I should add that 10 despite Mr Mummery's attractive presentation of the 11 Commissioner's case, I am wholly unpersuaded this would 12 be an appropriate case to apply the principle, even if 13 it were capable of applying in the case of a voluntary 14 liquidation." 15 In a passage in his judgment cited by Mr Mummery, 16 Sir Nicolas Browne-Wilkinson said: 17 "In every case to which I have been referred, 18 someone dealing directly either with the insolvent 19 company or its liquidator has made a mistake, either of 20 fact or law, by reason of which the company's assets 21 available for distribution have been increased." 22 And he then says: 23 "I am not sure the principle is confined quite as 24 narrowly as this." 25 And refers to in Re Tyler. But then he says between Page 55</p>
<p>1 inconsistent with the existence of any right of the 2 Commissioners to transfer to themselves the creditor's 3 right of proof." 4 And secondly, in the second paragraph of the "held", 5 the principle essentially did not apply where the court 6 was dealing with a voluntary as opposed to a compulsory 7 liquidator, because he wasn't, so the Court of Appeal 8 said, an officer of the court. 9 My Lord, the argument that was advanced by the 10 Commissioner was, first of all, at 283, at D, that it 11 was subrogated to the rights of the creditor and 12 obviously your Lordship is not concerned with that. 13 Then, at 287, the alternative argument at G was that the 14 principle in Ex parte James applied. 15 MR JUSTICE DAVID RICHARDS: Yes. 16 MR DICKER: My Lord, then if your Lordship goes over the 17 page in the judgment of Lord Justice Slade, so 288, and 18 reads the first full paragraph, if your Lordship 19 wouldn't mind. (Pause) 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR DICKER: Then at D, Lord Justice Slade says: 22 "There are two reasons why the submission should not 23 be accepted." 24 And your Lordship can see between D and E, he says: 25 "First, in my judgment, although Sir Nicolas Page 54</p>	<p>1 C and D: 2 "However, on the authorities, I agree with Mr Price 3 for the contributories that for the principle to apply 4 there must be dishonourable behaviour or a threat of 5 dishonourable behaviour on the part of the relevant 6 court officer by taking an unfair advantage of someone." 7 And the answer and the reason why it didn't apply 8 here is, if your Lordship goes down to G, he says in the 9 second sentence: 10 "In the present case, however, there has been no 11 criticism of the liquidator's past actions. In 12 particular, he has not been criticised for, very 13 sensibly, suggesting to creditors that in the first 14 instance they should limit their proofs to the basic 15 price of the goods or services supplied. The relevant 16 question is whether it would or should affect his 17 conscience if he were now to reject the Commissioners' 18 claims." 19 The answer to that, if your Lordship just reads from 20 H at the bottom of that page through to C on the next 21 page. 22 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 23 MR DICKER: So between B and C, the principle didn't apply 24 because the consequences are simply the result of 25 omissions in the relevant legislation and Page 56</p>

<p>1 Lord Justice Slade says he could see nothing which 2 should or need affect the liquidator's conscience if he 3 proceeds to distribute the assets. 4 So an emphasis obviously on the question of whether 5 or not what has happened and what is said to be unfair 6 has resulted from actions by the office-holder as 7 opposed to simply him coming along later, saying, "I'm 8 seeking to take the benefit of an agreement entered into 9 between the debtor and its creditor, say, at some 10 earlier stage". 11 My Lord, the third case is Re Wigzell, and for that 12 your Lordship needs to go back to tab 9. This is 13 a relatively common case of a trustee seeking to recover 14 payments made into a bank account. Just picking up the 15 facts, 835, five lines down: 16 "At the date of the receiving order, the bankrupt 17 had encountered a bank. After the making of 18 the receiving order and pending the hearing of the 19 appeal, the bankrupt paid into the bank sums amounting 20 to £165, monies which he had collected from his debtors 21 and drew out of his account sums amounting to £199." 22 And over the page: 23 "The trustee in bankruptcy claimed a declaration of 24 the sums paid into the bank after the date of the 25 receiving order vested in him as trustee." Page 57</p>	<p>1 your Lordship saw a few moments ago. He says in the 2 last paragraph: 3 "Now, the circumstances in which, with I think one 4 exception, this, as I can see, useful jurisdiction has 5 hitherto been exercised to be that the trustee in 6 bankruptcy, either of his own motion or acting under the 7 direction of the court and in each instance having in 8 view the benefit of the general body of creditors, has 9 entered upon a transaction which it is considered 10 it would in the event be unconscionable for him to 11 insist should be carried out strictly in accordance with 12 the legal rights which the trustee under it possesses. 13 Except in one case it has always been a feature that the 14 transaction in question has in its origin been one 15 initiated or approved in the interest of the general 16 body of creditors." 17 So again, not a general principle of unfairness, but 18 focusing on the involvement of the officer of the court 19 in the transaction, which gives rise to what is said to 20 be unfair. And that's repeated, if your Lordship now 21 goes to 869, in the middle of the page. Your Lordship 22 has it. There is a sentence in the middle of the line 23 that reads: 24 "In my view, in considering the extent of this 25 particular jurisdiction, it is quite vital to Page 59</p>
<p>1 Again, Ex parte James did not apply in this case 2 because, as it was held, there was nothing dishonest in 3 the trustee enforcing the rights given to him by the 4 bank, essentially to recover post-relationship back 5 dispositions of property. 6 The relevant passages start at 865. If 7 your Lordship would go to the bottom of 865 and the 8 judgment of Lord Justice Younger. The last paragraph 9 at the bottom: 10 "But it is said the bank, although unable to bring 11 themselves within the protection of the terms of the Act 12 of Parliament, are entitled by a proper application of 13 the principle first enunciated in Ex parte James to be 14 relieved of the order which has been made against them. 15 "It is contrary, it is said, to natural justice or, 16 to use a less high-sounding phrase, unconscionable on 17 the part of the trustee to allow the trustee to recover 18 this money from the bank in view of the circumstances in 19 which the bank have already paid it away. Speaking for 20 myself, I am not one of those prepared to be unduly 21 critical of the principle laid down in Ex parte James 22 when properly applied." 23 And he explains why. But then in the last paragraph 24 on 866, essentially echoing, although this case was 25 before, the comments made by Lord Justice Slade that Page 58</p>	<p>1 distinguish between a trustee not insisting or the court 2 not permitting him to insist on all the legal 3 consequences of, on the one hand, a transaction 4 initiated by himself or by the court in the interests of 5 the general body of creditors and, on the other hand, 6 a transaction initiated by the bankrupt. 7 "In the first case, the creditors are the 8 constituents of the trustee throughout and as they are 9 entitled to benefit by the transaction, so it does not 10 seem to be wrong to say that they shall take it as it 11 honourably is no more and no less. But in the second 12 case the bankrupt has no constituents, that is to say 13 the transaction is initiated by him -- presumably in his 14 own interests alone -- and it is not obvious that a 15 creditor with whom that transaction has been carried out 16 and is complete, even one who in relation to it may have 17 been tricked by the bankrupt, has any equity at all as 18 against the other creditors of the same bankrupt who may 19 all have been equally tricked, merely because in his 20 case the proceeds of the transaction can be traced 21 amongst the bankrupt's assets." 22 So again, focus on the conduct or actions of the 23 court officer. 24 My Lord, the final authority I should show 25 your Lordship, because it's referred to, as I said, by Page 60</p>

<p>1 Lord Neuberger in Nortel, is In Re Lune Metal Products, 2 which your Lordship has back in bundle 1B at tab 35. 3 Just so your Lordship knows, the issue was rather 4 different in that case. At 589, four lines down in the 5 facts: 6 "Having realised the assets of the company, the 7 administrators decided that rather than a company 8 entering into a voluntary arrangement, it would be in 9 the creditors' best interests if the administrators were 10 to pay out the creditors early, paying the preferential 11 creditors in full, the unsecured creditors the <i>pari</i> 12 <i>passu</i>." 13 And they applied to the court pursuant to 14 section 14.3 for the direction and they were authorised 15 to make the proposed distribution. 16 So this is one of those cases before the changes 17 permitting distributions where, to avoid the costs of 18 the Insolvency Service's account, one made distributions 19 early but then had to deal with preferential creditors. 20 The passage I should show your Lordship is at 597, 21 paragraph 34. He says: 22 "I accept that section 14.3 of the Act does extend 23 to giving the court what might be characterised as 24 a residual inherent jurisdiction over the actions of an 25 administrator, which may be invoked in the same sort of</p> <p style="text-align: center;">Page 61</p>	<p>1 So, firstly, the principle applies in administration 2 as well and, secondly, the mere fact of that applying of 3 the principle is necessarily to deprive other creditors 4 of the benefit which they otherwise would have had is 5 beside the point. 6 So that's all I was going to show your Lordship by 7 way of authority. Just summarising the points which we 8 say one gets from those authorities. Firstly, the 9 principle applies when it would be unfair for the 10 administrators to enforce their strict legal or 11 technical rights. That is the word used by 12 Lord Neuberger and that is the test that should be 13 applied. 14 Secondly, the principle inevitably applies to 15 produce a different result than would arise as a matter 16 of law or equity. That indeed is the whole point of the 17 principle. So it's no answer to say it involves 18 a departure from parties' strict legal rights. 19 The third point, which your Lordship has seen from 20 the cases, is that it is an important factor whether the 21 unfairness resulted from something done by an officer of 22 the court. It's not impossible for the principle to 23 apply in other circumstances; indeed the first case 24 your Lordship looked at involving the supply of petrol 25 didn't in fact involve any actions, but it certainly</p> <p style="text-align: center;">Page 63</p>
<p>1 circumstances as in relation to liquidators. The nature 2 of the jurisdiction explained by Mr Justice Jacob in the 3 Mark One case ..." 4 And then in that passage he cited cases to the 5 effect that: 6 "A trustee in bankruptcy, also an officer the court, 7 shall not retain money which had been paid to him purely 8 under a mistake of law and a trustee in bankruptcy could 9 not act manifestly unfairly to obtain an order for the 10 repayment of two cheques which had been paid after the 11 act of bankruptcy. Those were decisions whereby an 12 officer of the court was, to quote Mr Justice Jacob, 13 made to behave like a gentleman and not to stand upon 14 his full legal rights when it was not fair to do so." 15 35: 16 "However, those cases are very much to the margin 17 and we are not concerned so much with the extent of the 18 powers of an officer of the court, but the way in which 19 he should exercise those powers. In such cases, the 20 court is sanctioning a course which, while it may not be 21 lawfully required of one of its officers and could 22 indeed otherwise be complained of by creditors who would 23 be prejudiced by the action, it would nonetheless be an 24 action which right-thinking people would consider 25 appropriate."</p> <p style="text-align: center;">Page 62</p>	<p>1 strengthens the application of the principle where one's 2 dealing with a transaction which the officer has been 3 involved in. 4 The fourth point is that the critical and in a sense 5 most difficult issue is, of course, identifying when 6 something should be regarded as unfair. It's obviously 7 a slightly unusual issue for a court to have to decide, 8 it being necessarily not a matter of law in the same 9 sense as certain other issues are. 10 This is obviously a matter for your Lordship. I say 11 this not just because your Lordship has to decide the 12 question, but because the administrators are officers of 13 the court. Strictly speaking, as your Lordship knows, 14 it is in fact the court conducting the administration, 15 albeit through its own officers. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR DICKER: So what is being done is something which 18 directly engages, at least in that sense, the court 19 itself. We say the question for your Lordship is 20 therefore essentially whether or not it would be fair 21 for the court, through its own officers, to enforce the 22 transaction. 23 The fifth point is this: the principle, we say, has 24 especial force where the court officers' actions related 25 in some way to their duty to adjudicate on proofs of</p> <p style="text-align: center;">Page 64</p>

<p>1 debt. I'll come back to this point. We say it has 2 especial force where their actions engaged, even if only 3 indirectly, their quasi-judicial duty. 4 My Lord, I've made submissions in relation to the 5 nature of the duty to adjudicate on claims. 6 Your Lordship is, of course, aware that the 7 administrators are also under, essentially, a logically 8 anterior duty to ensure that they have correctly 9 ascertained who are the creditors of the company. Can 10 I just remind your Lordship of one decision in this 11 respect? Austin Securities v Northgate, which is 12 bundle 1A at tab 12. The case is essentially a want of 13 prosecution case. It involved a plaintiff who 14 unfortunately used a solicitor who became ill and didn't 15 pursue the action. 16 As between the plaintiff and any ordinary defendant, 17 that would have been sufficient to entitle the defendant 18 to say, "I don't have to deal with this case, I should 19 be able to strike it out for want of prosecution". The 20 defendant wasn't, however, an ordinary defendant; it was 21 a company in liquidation and the position was different 22 because of the liquidator's duty effectively to 23 ascertain claims, which should have required it to take 24 a proactive role. 25 Just looking at the facts on 529: Page 65</p>	<p>1 liquidators by failing to deal with the plaintiffs' 2 claim had not fulfilled their duty under section 302 of 3 the Companies Act (1948) of suing the property of the 4 company was applied in satisfaction of its liabilities 5 pari passu and Pulsford v Devenish." 6 Your Lordship knows the origin of this. 7 If your Lordship then picks up -- 8 MR JUSTICE DAVID RICHARDS: What I'm just trying to puzzle 9 is why the claimants didn't just -- maybe this comes 10 out -- but the plaintiffs, rather, could have just 11 lodged a proof in the winding-up, couldn't they? That 12 would have bypassed any point of want of prosecution. 13 There wasn't a limitation issue, was there? 14 MR DICKER: There was a discussion about ... 15 MR JUSTICE DAVID RICHARDS: Anyway, it's just puzzling. 16 MR DICKER: If your Lordship goes to the held, 530, 17 paragraph 2: 18 "Although the delay was inordinate and inexcusable, 19 in view of the circumstances the defendants, by their 20 liquidators' neglect, contributed to the delay. No 21 prejudice to the defendants." 22 MR JUSTICE DAVID RICHARDS: There could still be a fair 23 trial. 24 MR DICKER: There could still be a trial and there was 25 evidence of waiver and the period of limitation had not Page 67</p>
<p>1 "By writ of 5 February 1966, the plaintiffs claimed 2 under the defendant company permission due under a 3 contract made in or about November 1963 and an account. 4 Shortly afterwards the plaintiff's solicitor had 5 a stroke, he handed over his work, including the action, 6 to another firm who let nine months pass with nothing 7 done. The solicitor made a partial recovery, got the 8 papers back, but remained in bad health and no further 9 step was taken in the action before his death in 1968. 10 Meanwhile, early in 1966, the defendants decided to 11 re-organise their business into two separate companies. 12 For this purpose a resolution for voluntary winding-up 13 was passed and liquidators were appointed. Although the 14 liquidators knew of the plaintiffs' claim in the action, 15 having received an account in connection with it from 16 the solicitors then acting for the defendants, they did 17 not deal with it." 18 Then moving forward, 3 April 1968: 19 "The plaintiffs' new solicitors gave notice of 20 intention to proceed. A statement of claim was 21 delivered." 22 Then just below C: 23 "On 18 July, the defendants applied by summons for 24 the stay of the action on the ground of the winding-up 25 and/or for want of prosecution. Held, 1, the Page 66</p>	<p>1 run, it was not a case for striking-out -- 2 MR JUSTICE DAVID RICHARDS: Of course, the court had to 3 decide the application before it -- 4 MR DICKER: I don't know the answer to your Lordship's 5 question of whether it ever got to this stage, but it 6 did. 7 MR JUSTICE DAVID RICHARDS: And there we are, yes. 8 MR DICKER: There's a judgment of the Master of the Rolls. 9 The passages I want to show your Lordship were at 532. 10 If your Lordship would perhaps read from just above C on 11 532 to E. (Pause) 12 Then 533, just below C, a new paragraph, the Master 13 of the Rolls says: 14 "The judge was not referred to the law about the 15 duties of a liquidator as we have been and I think it 16 makes all the difference to the case." 17 He goes on to say in that paragraph that there was 18 delay, essentially, for which both sides are 19 responsible. But the conclusion, 535: 20 "It would not be appropriate to strike out." 21 He says at A, line 2: 22 "It is perfectly clear -- and indeed Mr Bean was 23 quite unable to submit to the contrary -- the 24 liquidators have -- and I must regretfully use the 25 adverb 'woefully' -- fallen down in their statutory Page 68</p>

<p>1 duty. They knew -- and they must certainly be taken to 2 have known -- that there was at least a contingent 3 liability to these plaintiffs.</p> <p>4 "When one looks at the provisions of the Act and 5 Rules, it is clear the liquidator has to advertise for 6 claims. Furthermore, advertising is not sufficient 7 where he knows of the existence of claims for, as was 8 illustrated by a decision in Pulsford v Devenish. In 9 such a case there is a duty to ascertain by direct 10 enquiry whether the claim is being pressed."</p> <p>11 And between E and F, the last sentence of that 12 paragraph:</p> <p>13 "In my judgment therefore it does not lie in the 14 defendants' mouths to urge that fact, ie delay on the 15 part of the plaintiff, against the plaintiffs who desire 16 to pursue this claim."</p> <p>17 So one starts with the two points: one, effectively 18 it's not good enough for an officer, when dealing with 19 the adjudication of claims, simply to leave creditors to 20 advance their claims if they know creditors may have 21 claims which are not being advanced. There are 22 circumstances in which the duty of the office-holder in 23 those circumstances is to ascertain whether the creditor 24 does in fact want to advance a claim. And, secondly, 25 when he comes to adjudicate on it, to do so in</p> <p style="text-align: center;">Page 69</p>	<p>1 determination, in other words the decision on the 2 creditor's claim, did engage the quasi-judicial duty. 3 We say it goes slightly further than that. That duty is 4 also indirectly relevant to the process which the 5 liquidators devised. If office-holders are going to 6 propose an alternative process to the adjudication of 7 claims, an alternative to them exercising their 8 quasi-judicial duty to ascertain the proper amount, then 9 in our submission the compromise and the proposal is one 10 that needs to treat creditors fairly and not unequally 11 for no good reason. It can't be intended effectively to 12 simply produce a haircut. Indeed the administrators 13 stressed, as your Lordship has seen in the evidence, 14 that that wasn't their intention.</p> <p>15 Put another way, it's obviously open to an 16 office-holder to say: it would be too expensive for us 17 to go through the normal proof process, here is an 18 easier and quicker alternative. But it is important, we 19 say, that that alternative, at least broadly, reflects 20 the underlying nature of the adjudication process and it 21 doesn't introduce, save to the extent that speed or 22 efficiency absolutely require it, unequal treatment of 23 creditors and it doesn't require creditors to give up 24 value which they don't need to give value. It certainly 25 isn't an excuse for permitting office-holders to say,</p> <p style="text-align: center;">Page 71</p>
<p>1 a quasi-judicial manner.</p> <p>2 My Lord, can I then turn to the relevant facts? 3 Your Lordship has, I think, heard and seen much of this 4 already, but just summarising the points in the context 5 of this question. We emphasise the following: firstly, 6 what happened here happened as a result of documents 7 originally devised by the administrators for the benefit 8 of creditors. So this is one of those cases which did 9 directly involve the actions of the office-holders. 10 This process was devised, originated and driven by them.</p> <p>11 Secondly, we say the process was also one which 12 engaged, even if only indirectly, their duties in 13 respect of the adjudication of proofs. I need to 14 explain what I mean by that. The CDDs were intended to 15 provide an alternative to adjudicating claims in the 16 ordinary way and the same can be said of the CRA to the 17 extent that it too was concerned with ascertaining 18 claims for the purposes of proof. My learned friend 19 Mr Trower made the point to your Lordship that the 20 quasi-judicial duty is not engaged where the 21 administrators were simply returning trust assets and we 22 agree with that. But to the extent that the CRA 23 involved a process to ascertain claims for the purposes 24 of proof, we're in the same territory as the CDDs. 25 My learned friend accepted that the LBIE</p> <p style="text-align: center;">Page 70</p>	<p>1 right, at this stage we're no longer concerned with our 2 quasi-judicial duties, we can behave as hardnosed as we 3 want and extract whatever concessions we can from 4 creditors. That would not be, in our submission, 5 a proper alternative process.</p> <p>6 As I say, we're not suggesting that that is what the 7 administrators here did, quite the contrary; all the 8 evidence suggests that it wasn't.</p> <p>9 The next point is this: we say the way in which the 10 process operated is important. Again, your Lordship has 11 seen the material in relation to this before, but 12 creditors were told they had to enter into CDDs as 13 a condition for receiving dividends. They were told 14 that the terms of the CDDs were non-negotiable, so 15 essentially this process was presented to individual 16 creditors effectively on a sort of take-it-or-leave-it 17 basis. They were strongly encouraged to enter into such 18 agreements. Indeed, as your Lordship's seen, the 19 administrators told them the agreements were intended to 20 be fair and in their best interests and not simply 21 intended to result in a haircut.</p> <p>22 They were given a strong incentive to enter into 23 them. They were told, quite rightly, that if they 24 didn't their claims would need to be determined in the 25 usual way, after inevitably some delay, and they would</p> <p style="text-align: center;">Page 72</p>

<p>1 have appreciated that, if that was the case, they would 2 lose time, value and money in the meantime, there being 3 no expectation of a surplus.</p> <p>4 They were not told that the process would result in 5 them giving up rights, whether to statutory interest, 6 currency conversion claims or other relevant 7 non-provable claims, simply because they were 8 participating in this speedier proof process as opposed 9 to insisting on their claims being admitted in the 10 ordinary way. Nor were they told that the process would 11 result in creditors being treated differently depending 12 on which agreement the creditor entered into.</p> <p>13 Your Lordship may think one striking feature of my 14 learned friend's submissions was that he provided no 15 justification for or indeed explanation of the different 16 effect of different types of CDDs, in particular, the 17 difference between the effect of an agreed CDD, which 18 didn't waive a currency conversion claim, and an 19 admitted claims CDD which did.</p> <p>20 As I understand his position, it's effectively 21 simply, well, that's just the effect of the agreement 22 which the creditor voluntarily chose to enter into. 23 Some chose to enter into an agreed claims CDD and they 24 therefore intended to preserve currency conversion 25 claims. Some chose to enter into an admitted claims CDD</p> <p style="text-align: center;">Page 73</p>	<p>1 submission, should have second-guessed the 2 administrators. There is no reason why they should have 3 appreciated that these forms might have their different 4 consequences. The starting point is no reason whatever 5 for a creditor to think that an admitted claims CDD is 6 going to do something so different from an agreed claims 7 CDD. No reason to think that's an outcome which the 8 administrators would have any interest in achieving. No 9 reason for the creditor to think that he couldn't 10 effectively rely on the administrators and their very 11 experienced legal advisers to put forward a process 12 which, save to the extent as otherwise required, broadly 13 reflected their underlying entitlements. My Lord, 14 certainly no reason for concluding creditors were 15 equally experienced.</p> <p>16 My learned friend Mr Zacaroli showed your Lordship 17 a passage in the evidence which described the wide 18 spectrum of types of creditors. As your Lordship will 19 recall, some were banks, some were ordinary corporates, 20 and there was a reference to a few private clients as 21 well; none of them, I may say, insolvency practitioners 22 and none of them, apparently, firms of English 23 solicitors. Many, no doubt, weren't English at all. 24 The idea that they should somehow have appreciated the 25 consequences of the documentation when, assuming it had</p> <p style="text-align: center;">Page 75</p>
<p>1 and they therefore chose to abandon currency conversion 2 claims.</p> <p>3 My Lord, we say that simply doesn't reflect what was 4 happening here. Your Lordship has seen the evidence 5 in relation to this. The agreed claims CDD was 6 developed first to deal with a situation in which the 7 administrators thought you might have a client money 8 claim. The admitted claims CDD was used instead where 9 the administrators thought you would not. In other 10 words: creditor sitting there, he's asked to prove his 11 claim, he says yes, he does so through the claims 12 portal, the claim is considered and agreed. As 13 your Lordship's seen, in both cases in the underlying 14 currency, and at the end of that process, when it comes 15 to formally recording the outcome of that simplified 16 proof process, he is either given an agreed claims CDD 17 or an admitted claims CDD to sign by the administrators, 18 depending on whether the administrators thought he had 19 a client money claim or not.</p> <p>20 The suggestion that essentially the difference is to 21 be explained by a difference in intention or wishes on 22 the part of the creditor as opposed to being the result 23 of the administrators' choice as to the various forms 24 they're using, we say, is simply entirely wrong.</p> <p>25 There was also no reason why creditors, in our</p> <p style="text-align: center;">Page 74</p>	<p>1 the effect for which Wentworth contends, it's plain the 2 administrators didn't, we say would also be entirely 3 wrong.</p> <p>4 And references which your Lordship sees throughout 5 my learned friend's skeleton argument to concepts like 6 freedom of contract or choice, things like that, we say 7 are irrelevant in this context for the reason 8 your Lordship gave. We're simply not dealing with 9 a situation in which we have two parties, each seeking 10 to maximise their own selfish interests to the extent 11 the law permits.</p> <p>12 So that's the process, essentially: not merely one 13 involving administrators, but one driven by, one in 14 respect of which the administrators encourage creditors 15 to participate, and all of what goes with that.</p> <p>16 The next factor is, we say, one also needs to take 17 into account how the problem came about. Essentially, 18 if Wentworth is right as a matter of construction, what 19 is it that gave rise to that state of affairs? If we're 20 wrong as a matter of construction -- and obviously we 21 say we're not -- and the agreements do have the effect 22 for which Wentworth contends, the only explanation would 23 appear to be either inadvertence or oversight by the 24 administrators or their legal advisers.</p> <p>25 That wouldn't -- and again I should stress --</p> <p style="text-align: center;">Page 76</p>

<p>1 necessarily be a matter for criticism. The task which 2 they faced was obviously extremely complicated and 3 difficult to address. But if the documents do have the 4 effect for which Wentworth contends, we say it is 5 a relevant factor that the unfairness resulted from 6 legal consequences of agreements which had those 7 consequences because, on this hypothesis, either the 8 administrators and their legal advisers didn't 9 anticipate the possibility of a surplus and didn't cater 10 for that or didn't appreciate the possibility of the 11 existence of a currency conversion claim, either because 12 they didn't read Re Lines Brothers or because, having 13 read it, they decided that no such case existed.</p> <p>14 None of those factors could possibly be laid, we 15 say, fairly at the door of creditors. If there is 16 a causal point to be made here, as I said, it's that 17 this would have happened as a result, on this 18 hypothesis, of some inadvertence or mistake on the part 19 of the administrators or their legal advisers.</p> <p>20 My Lord, again, just so there is no 21 misunderstanding, we are not saying, obviously, that the 22 administrators were inadvertent or made a mistake 23 because we say the agreements did not have effect for 24 which Wentworth contends.</p> <p>25 There are various references in my learned friend's Page 77</p>	<p>1 to debate, I think, at this hearing as to whether and in 2 what circumstances it is appropriate for officers of the 3 court to require releases to be given simply in respect 4 of their doing their professional duty.</p> <p>5 I'm not submitting they should not have obtained 6 releases in this situation, but I am submitting that, 7 having done so, it's another factor to take into account 8 in considering whether it would be fair for the releases 9 to be enforced if they have the effect for which 10 Wentworth contends.</p> <p>11 My Lord, we also say that the position of the 12 administrators themselves on this application is 13 important. They are not saying to your Lordship, yes, 14 the agreements did have the effect for which Wentworth 15 contends, and nor are they saying, yes, for the 16 following reasons, it would be fair to allow us to 17 enforce them. Indeed, every indication is to the 18 contrary.</p> <p>19 I say that because in relation to statutory 20 interest, when the issue arose, the administrators' 21 immediate reaction was to say, this wasn't what we 22 intended, and when the problem persisted, we inserted 23 preservation language to ensure it didn't subsist.</p> <p>24 In relation to currency conversion claims, 25 Mr Copley's evidence is to the effect he didn't intend Page 79</p>
<p>1 skeleton to the non-reliance provisions in the various 2 documents. Again, we say that if what the 3 administrators have done is unfair, in other words if 4 the documents do have the effect for which Wentworth 5 contends, and if, as we say, that effect would be 6 unfair, it's no answer for them to say that they got the 7 creditor to sign an agreement saying that they were not 8 relying on the administrators. We say it would be no 9 answer to a contention that the outcome is unfair to 10 say, well, it's the result of a document which contains 11 a term in which you agreed not to rely on us. Nor, 12 equally, can they say that you, the creditor, should 13 have taken your own legal advice and worked out what the 14 answer was.</p> <p>15 My Lord, put another way, officers of the court 16 cannot justify departures from the statutory scheme 17 which are unfair simply by inserting provisions into an 18 agreement saying it was up to creditors to identify the 19 problem and object if they wanted to.</p> <p>20 One other factor which we say is also relevant is 21 the fact the agreements contained wide releases, not 22 merely of LBIE but also of the administrators 23 themselves, effectively giving creditors no other 24 possible avenue of redress for what has happened.</p> <p>25 There is an issue which your Lordship doesn't need Page 78</p>	<p>1 the currency conversion claims would be compromised. 2 Indeed, as your Lordship knows, he ceased being willing 3 to sign CDDs which didn't preserve currency conversion 4 claims once it became clear it was being suggested such 5 claims might be released. I don't know if your Lordship 6 remembers that from the evidence.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes, I do.</p> <p>8 MR DICKER: My Lord, he also says in his evidence that, had 9 he known about the existence of currency conversion 10 claims, he would have sought to have them carved out, if 11 it was necessary to do so, in order to preserve such 12 claims. He says his preference would have been to not 13 compromise them and we say that is an important 14 indicator, certainly so far as Mr Copley is concerned, 15 of what he would have regarded as the appropriate 16 course.</p> <p>17 It follows that the reason why we're debating this 18 issue is not because the administrators are standing up 19 in front of your Lordship and saying, yes, the 20 agreements have this effect, and, yes, it would be fair 21 to permit us to enforce them for the following reasons. 22 It's because Wentworth are seeking to put arguments into 23 the mouth of the administrators as to why nevertheless 24 they should not be prevented from enforcing the 25 releases. Page 80</p>

<p>1 The final general point in relation to this concerns 2 the consequences if Wentworth was right as a matter of 3 construction. We say creditors would have suffered an 4 entirely unnecessary injustice so far as their claims 5 in the event of a surplus were concerned. They would 6 have given up claims potentially worth more than 7 1 billion and the subordinated creditors and 8 shareholders would have received a windfall, a sum which 9 they would not have otherwise received.</p> <p>10 My Lord, indeed in relation to currency conversion 11 claims, the consequences we say are particularly 12 striking. If your Lordship could just turn up our 13 skeleton argument at paragraph 222. We say the 14 unfairness is compounded by the fact the estate would 15 receive a double windfall and the detail of that is then 16 set out in 222.</p> <p>17 The essential point is this: as your Lordship knows, 18 LBIE's assets were denominated in US dollars, not merely 19 its claims. So the effect of the appreciation of 20 US dollars against sterling was to increase the value of 21 LBIE's estate. The effect of Wentworth's contention is 22 essentially that that increase in value inures for the 23 benefit of subordinated creditors and shareholders and 24 that they don't have to bear essentially the equivalent 25 burden of the appreciation in the value of US dollar</p> <p style="text-align: center;">Page 81</p>	<p>1 by administrators that they don't think that the 2 agreement resulted in creditors waiving any rights to 3 statutory interest and, in relation to currency 4 conversion claims, creditors signing CDDs because, at 5 least initially, the administrators said they weren't 6 prepared to amend them to ensure consistency of 7 treatment amongst creditors.</p> <p>8 My Lord, we do say particularly in that situation, 9 on any basis, it would be unfair, again assuming that 10 the agreements have the effect for which Wentworth 11 contends, of the administrators to enforce CDDs, which, 12 on this hypothesis, would result in creditors giving up 13 claims statutory interest, and the CDDs were entered 14 into following assurances by the administrators that 15 that was not what they intended.</p> <p>16 Of course, in our submission, one never gets 17 anywhere near this because the administrators' assurance 18 was exactly right: that wasn't their effect, but on this 19 hypothesis we say that if creditors were bound, that 20 would plainly be unfair and it would be wholly unfair 21 for the court through its officers to enforce the 22 releases in those circumstances.</p> <p>23 My Lord, I don't know whether your Lordship is aware 24 of the phrase -- Ex parte James is sometimes referred 25 to, and indeed comment has been made to me outside this</p> <p style="text-align: center;">Page 83</p>
<p>1 claims on the other side.</p> <p>2 MR JUSTICE DAVID RICHARDS: I see the point in principle. 3 (Pause)</p> <p>4 MR DICKER: Your Lordship sees the conclusion in the last 5 sentence:</p> <p>6 "If creditors with claims denominated in US dollars 7 have lost the right to be paid in US dollars, LBIE and 8 its subordinated creditors and shareholders receive the 9 benefit of an appreciation in the value of its dollar 10 assets without having to account for the full amount of 11 its dollar liabilities."</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>13 MR DICKER: My Lord, there's then a further point, not about 14 all CDDs, but about certain CDDs, and this essentially 15 mirrors the submissions I made earlier about what 16 I called the interim period. In other words, after the 17 administrators appreciated that there might be a surplus 18 in relation to statutory interest claims, firstly, and 19 secondly after they appreciated that there might be 20 currency conversion claims.</p> <p>21 As your Lordship knows, there was a period after 22 both of those events in which, in addition to all the 23 factors I've been through, one has a situation in which 24 CDDs are still being signed in relation to statutory 25 interest and being signed by creditors having been told</p> <p style="text-align: center;">Page 82</p>	<p>1 arena in relation to this case that Ex parte James is 2 the last refuge of the desperate. In many cases where 3 a party simply says generically, "It's unfair", and 4 cannot point to any conduct on the part of the court 5 officer, it plainly has been used in that way.</p> <p>6 We do most respectfully say that, in the context of 7 this case, to ascribe the application of the principle 8 with language like that is not giving it the degree of 9 seriousness which it deserves.</p> <p>10 So those are our submissions in relation to 11 Ex parte James. I have some very brief submissions 12 in relation to paragraph 74, which I may or may not just 13 about be able to finish.</p> <p>14 MR JUSTICE DAVID RICHARDS: Well, why don't you carry on 15 with those?</p> <p>16 MR DICKER: If your Lordship turns up paragraph 74 of 17 schedule B1:</p> <p>18 "A creditor or member of a company in administration 19 may apply to the court claiming that: (a) the 20 administrator is acting or has acted so as unfairly to 21 harm the interests of the applicant, whether alone or in 22 common with some or all other members or creditors; 23 or (b), the administrator proposes to act in a way which 24 would unfairly harm the interests of the applicant, 25 again whether alone or in common with some or all other</p> <p style="text-align: center;">Page 84</p>

<p>1 members of the creditors."</p> <p>2 So one has two concepts: one is that of "unfairly to</p> <p>3 harm", that's the first; and the second is the idea that</p> <p>4 the administrator is acting or has acted, so one is</p> <p>5 entitled to look at what happened in the past and what</p> <p>6 would happen in the future.</p> <p>7 So far as that latter point is concerned, we say</p> <p>8 both are potentially engaged in the sense that the</p> <p>9 administrators would have acted so as unfairly to harm</p> <p>10 the interests of creditors if they had devised and put</p> <p>11 out a process which had the consequences for which</p> <p>12 Wentworth intends. In other words, looking back and</p> <p>13 assessing what went on and the consequences of what went</p> <p>14 on during the course of the administration.</p> <p>15 Alternatively, we say that the administrator would</p> <p>16 be acting so as unfairly to harm the interests if it</p> <p>17 were now to seek to enforce the releases.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR DICKER: My Lord, so far as the law is concerned, the one</p> <p>20 passage I wanted to show your Lordship is in fact from</p> <p>21 Re Nortel, which is 1B, tab 57. It's the paragraph</p> <p>22 before the paragraph I showed your Lordship earlier,</p> <p>23 paragraph 121. I show your Lordship this because it's</p> <p>24 not referred to, I think, in our skeleton, but</p> <p>25 Lord Neuberger says:</p> <p style="text-align: center;">Page 85</p>	<p>1 MR JUSTICE DAVID RICHARDS: That's right. So presumably</p> <p>2 therefore in breach of it.</p> <p>3 MR DICKER: Yes.</p> <p>4 MR JUSTICE DAVID RICHARDS: You don't need this paragraph to</p> <p>5 deal with that.</p> <p>6 MR DICKER: Well, you may not need it in the sense there may</p> <p>7 be other remedies for it.</p> <p>8 MR JUSTICE DAVID RICHARDS: Correct.</p> <p>9 MR DICKER: But that doesn't mean that this isn't a possible</p> <p>10 avenue open to ... In other words, if the</p> <p>11 administrators --</p> <p>12 MR JUSTICE DAVID RICHARDS: I see, yes. I should have</p> <p>13 thought the concept of unfairness is being used in</p> <p>14 distinction to unlawfulness.</p> <p>15 MR DICKER: Yes.</p> <p>16 MR JUSTICE DAVID RICHARDS: So there's an analogy, clearly,</p> <p>17 with unfairly prejudicial conduct in the company</p> <p>18 context, or indeed in the context of employment law.</p> <p>19 The interesting thing about fairness is that in the</p> <p>20 last 30 or so years unfairness has become the source of</p> <p>21 substantive rights in a way which largely didn't exist</p> <p>22 before.</p> <p>23 MR DICKER: My Lord, yes, and we say obviously paragraph 74</p> <p>24 effectively is one localised --</p> <p>25 MR JUSTICE DAVID RICHARDS: It is. It is interesting that</p> <p style="text-align: center;">Page 87</p>
<p>1 "Paragraph 74 entitles a creditor to apply to the</p> <p>2 court if he considers the administrator proposes to act</p> <p>3 in a way which would unfairly prejudice it. This</p> <p>4 cannot, in my view, apply to a case where the</p> <p>5 administrator is proposing to do that which the</p> <p>6 legislation requires him to do [in other words, the same</p> <p>7 answer to the underlying issue in Nortel]. It applies</p> <p>8 where the administrator is exercising a power or</p> <p>9 discretion, most obviously carrying on the company's</p> <p>10 business in a certain way or selling off an asset of the</p> <p>11 company or not performing an obligation such as</p> <p>12 paying-off creditors in the order mandated by the</p> <p>13 legislation."</p> <p>14 In other words, it may be engaged by a departure</p> <p>15 from a distribution in accordance with the statutory</p> <p>16 waterfall.</p> <p>17 My Lord, that's --</p> <p>18 MR JUSTICE DAVID RICHARDS: With all due respect to</p> <p>19 Lord Neuberger, I'm not sure I fully understand the last</p> <p>20 example because if the administrator is not performing</p> <p>21 an obligation, then the creditor need only enforce the</p> <p>22 obligation.</p> <p>23 MR DICKER: Which is why I read that as meaning effectively</p> <p>24 doing something otherwise than in accordance with his</p> <p>25 statutory obligations.</p> <p style="text-align: center;">Page 86</p>	<p>1 Lord Neuberger picks up on the use of the words</p> <p>2 "fairness" and "unfairness" in relation to</p> <p>3 Ex parte James. Admittedly, it was one of the earlier</p> <p>4 cases -- was it Mr Justice Walton? Anyway, one of the</p> <p>5 earlier cases --</p> <p>6 MR DICKER: In Re Clark.</p> <p>7 MR JUSTICE DAVID RICHARDS: -- had introduced the concept of</p> <p>8 fairness, but Lord Neuberger clearly picks that up.</p> <p>9 MR DICKER: Yes, we've certainly moved away from</p> <p>10 descriptions of Ex parte James in terms of dishonesty,</p> <p>11 dishonourable conduct --</p> <p>12 MR JUSTICE DAVID RICHARDS: It looks like it.</p> <p>13 MR DICKER: My Lord, I have no idea why I said --</p> <p>14 MR JUSTICE DAVID RICHARDS: Then we'll rise now, but just</p> <p>15 let me say this: that while we're mentioning this topic</p> <p>16 of unfairness, you quite rightly identified as a point</p> <p>17 of importance arising from the authorities what is</p> <p>18 unfairness and you made the point perfectly fairly that</p> <p>19 in the context of Ex parte James, which the Court of</p> <p>20 Appeal has said applies only to the officers of the</p> <p>21 court, they are exercising, in a sense, the powers of</p> <p>22 the court. But I would be assisted by a submission from</p> <p>23 you as to what is the test for unfairness. It is not</p> <p>24 always an easy question. But how do you express the</p> <p>25 test the court should apply to determine whether</p> <p style="text-align: center;">Page 88</p>

<p>1 something is unfair or not? 2 Thank you very much. 2.05. 3 (1.05 pm) 4 (The Short Adjournment) 5 (2.05 pm) 6 MR DICKER: Your Lordship asked before the short adjournment 7 about the concept of fairness. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: I'm not sure to what extent I'm going to be able 10 to provide useful assistance to your Lordship. The 11 cases refer to the issue as being a difficult one. My 12 learned friend Mr Trower described it over the break as 13 the elephant you can recognise but less easily define. 14 In our submission, it's not hard to answer the 15 question in this case: one simply looks at the relevant 16 facts and asks whether in the light of those it would be 17 fair and we say plainly not for all the reasons I've 18 given. 19 In our respectful submission, it may not be that 20 helpful to try and add a layer of analysis between the 21 facts and effectively the conclusion on the facts. 22 My Lord, that said, can I perhaps add the following? 23 Part of the difficulty, in our respectful submission, is 24 it involves the court asking a question which is 25 slightly different from the question it normally asks.</p> <p style="text-align: center;">Page 89</p>	<p>1 commercial men intent on pursuing their own interests, 2 but the court, if I may respectfully say so, is expected 3 still to have a sense of what those concepts involve and 4 an ability to decide whether or not particular conduct 5 falls within it or not. 6 MR JUSTICE DAVID RICHARDS: When the phrase is used in 7 paragraph 74, unfairly harmful, that's slightly 8 different from what the court -- 9 MR DICKER: Your Lordship is quite right. I think the 10 emphasis is slightly different there. 11 One final point in relation to fairness so far as 12 Ex parte James is concerned, and it's really another 13 way, I think, of putting the same point. This is not 14 a situation in which you have two commercial parties or 15 otherwise on opposite sides of a transaction. What you 16 effectively have here is a group of creditors on one 17 side and the court, through its officers, on the other. 18 So when one is talking about enforcing it, one is 19 not talking about enforcing a bargain in the same way or 20 raising the same issues as any bargain between 21 commercial men, but subject to those points, as I said, 22 I'm not sure I can take the submissions very much 23 further. I'm afraid, ultimately, it's a question for 24 your Lordship. 25 As we say, on the facts of this case, certainly if</p> <p style="text-align: center;">Page 91</p>
<p>1 It's normally there to decide issues between two parties 2 and in that context is effectively sitting as a separate 3 party, if I can put it that way, applying principles of 4 law, which may be well-established, slightly less 5 established, but from that perspective. 6 The issue here is slightly different. It's 7 essentially the question of the standard by which the 8 court thinks it is appropriate for its own officers to 9 act, or, put another way, by reference to the old cases, 10 the standard by which the court thinks it is appropriate 11 for it, through its own officers, to act. 12 My Lord, if one sees it in that way it's slightly 13 difficult to make further submissions without becoming 14 personal. But the question we say is therefore 15 essentially: does the judge who has to decide the issue 16 think the result is one which it would be appropriate 17 for him or her as a judge to bring about through his or 18 her own officers? 19 That's one way of looking at it, effectively asking 20 the judge, having regard to his office as a judge, to 21 consider whether it would be appropriate. The cases 22 also have various references to gentlemen and honourable 23 individuals and the other approach is essentially to 24 have regard to those. They sound obviously slightly odd 25 to those of us who spend all our lives dealing with</p> <p style="text-align: center;">Page 90</p>	<p>1 one goes back to Re Clark and the petrol case, it's 2 slightly difficult to understand on one level why that 3 involved the conscience of the trustee at all in the 4 sense that he wasn't directly involved. But despite 5 that having come on to the scene, given the benefit 6 received at the expense of the creditor, the court 7 concluded it would be unfair to permit him to enforce 8 it, even though he came on to the scene afterwards. 9 So far as paragraph 74 is concerned, your Lordship 10 is quite right. In our respectful submission it's not 11 quite the same issue as it is in relation to 12 Ex parte James. I think it's easiest, in our 13 submission, to analyse it in this way. The first 14 question is: is there harm? Which is essentially an 15 objective question. The second is: is it unfair? 16 In our submission, in a sense, that's easiest tested 17 by reference to the statutory scheme in the sense that 18 if what's being done is in accordance with the statutory 19 scheme, it plainly can't be unfair because that is 20 something which the legislature has dictated should 21 happen. That's effectively Nortel. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR DICKER: So what one's looking for is some departure from 24 the statutory scheme which is unfair, we say, because 25 there isn't a sufficient justification for it. So if</p> <p style="text-align: center;">Page 92</p>

<p>1 one considers, say, the different effect according to 2 Wentworth of the agreed claims CDD and the admitted 3 claims CDD, is there harm? The answer is yes because 4 creditors are giving up valuable rights, which we say as 5 part of an ordinary proof process they wouldn't have 6 needed to give up. Is it unfair in the sense of is it 7 capable of justification? We say no. No good reason 8 has been given for the arbitrary distinctions -- the 9 arbitrary differences, in effect -- between those two 10 types of CDD. As I said, the relevant one was simply 11 presented to the creditor to sign.</p> <p>12 The reason why one rather than the other was given 13 depended on the irrelevant fact of whether or not they 14 had a client money claim or accurately whether the 15 administrators thought they had one or not. If one asks 16 therefore is that differential treatment of creditors 17 unfair, is that unequal treatment unfair, we would say 18 yes because there was no good justification for it. 19 Indeed, I've made the submission my learned friend 20 didn't even attempt to provide one.</p> <p>21 That's unequal treatment. We say the same approach 22 can effectively be applied to unfairness in the sense of 23 stripping value from creditors in respect of their 24 proved claims. If one can say, well, the right way of 25 looking at the CDDs is they were intended essentially to</p> <p style="text-align: center;">Page 93</p>	<p>1 sufficient to show unequal or differential treatment 2 which cannot be justified by reference to the interests 3 of the creditors as a whole or to achieving the 4 objective of the administrators or whatever they were 5 doing.</p> <p>6 Thirdly, a lack of commercial justification for the 7 decision causing harm to creditors as a whole may be 8 unfair -- again, this was my next point -- in the sense 9 the harm is not one that we should be expected to 10 suffer.</p> <p>11 The fourth is it's not necessary to show that the 12 administrators' decision was perverse or so unreasonable 13 that no reasonable person would have done it. So one's 14 not looking for perversity or irrationality.</p> <p>15 So far as the facts are concerned, we've already 16 been through them. We say there is harm here in the 17 sense that I've described. It's unfair either because 18 it results in creditors being treated unequally for no 19 good reason or it's unfair in the sense that the process 20 devised by the administrators resulted in them losing 21 value in respect of the claim which they were seeking to 22 prove without them being told that was the consequence 23 and without that being a necessary consequence of what 24 the administrators wanted to achieve. In a sense, 25 that's the long and the short of it.</p> <p style="text-align: center;">Page 95</p>
<p>1 provide a speedier proof process and it was unnecessary 2 for rights in the event of a surplus to be stripped out 3 as part of that process, then there was simply 4 insufficient justification for removing those rights as 5 part of the process which the administrators were trying 6 to comply with. Nor is it justified by the underlying 7 statutory scheme. Indeed, to the contrary, the 8 statutory scheme would have produced a different result.</p> <p>9 So my Lord, we agree with your Lordship there is 10 this difference between Ex parte James and paragraph 74. 11 It may be that the paragraph 74 test in that way may 12 have a slightly more modern or at least ostensibly 13 objective aspect to it than perhaps certainly the 14 Ex parte James principle certainly appears at first 15 sight to have.</p> <p>16 We, as your Lordship knows, submit both are engaged 17 here. Just four specific points in relation to 18 paragraph 74. They're made in the skeleton and I don't 19 think I need to develop them. I just want to make sure 20 your Lordship has them clearly identified. They're 21 these.</p> <p>22 The first is unfair harm does not require misconduct 23 on the part of the administrators. This isn't a blame 24 game, if I may use that phrase.</p> <p>25 Secondly, it is, as I've already submitted,</p> <p style="text-align: center;">Page 94</p>	<p>1 So we do say that if we're wrong on the question of 2 construction, the administrators should be directed not 3 to enforce the releases. As I say, directed not to 4 enforce them so far as they remove value, whether that's 5 in respect of statutory interest, currency conversion 6 claims, or other non-provable claims which they would 7 have in that situation had they proved in the ordinary 8 way.</p> <p>9 Unless I can help your Lordship further, those are 10 our submissions.</p> <p>11 MR JUSTICE DAVID RICHARDS: Thank you, Mr Dicker. 12 Mr Zacaroli?</p> <p>13 Further submissions by MR ZACAROLI</p> <p>14 MR ZACAROLI: My Lord, the starting point here is that there 15 is a series of valid and enforceable contracts at law. 16 There is no question of them being induced by undue 17 influence, no misrepresentation, no mistake justifying 18 rescission. So none of the remedies available at law 19 would undermine the agreements that have been made. 20 That has to be the starting assumption. I know there 21 are some issues left behind from 36B perhaps, but the 22 starting point is that's the position.</p> <p>23 Our case is really quite simple. Whatever the 24 precise formulation of the rule in Ex parte James or 25 indeed what unfair harm means in paragraph 74, it</p> <p style="text-align: center;">Page 96</p>

<p>1 undoubtedly does not extend to preventing the 2 enforcement of an otherwise perfectly valid contract, 3 carefully negotiated, where substantial benefit was 4 obtained by creditors and where the release of the 5 claims, which is now complained of, was part of the give 6 and take of a commercial bargain, including a reciprocal 7 release of claims against creditors and, critically, the 8 early determination of claims, which was a big advantage 9 to creditors.</p> <p>10 All of which, my Lord, was done properly in 11 accordance with the administrators' duties and in 12 accordance with the purposes of administration. I have 13 made those submissions before; I needn't repeat them.</p> <p>14 To turn it on its head in a way, why should 15 creditors who have achieved a substantial advantage or 16 substantial advantages from entering into a CDD be 17 entitled to renege on part of the price which they 18 freely agreed to as part of that bargain, ie the release 19 of unknown un contemplated claims?</p> <p>20 In opening his case on this point before the short 21 adjournment, my learned friend said:</p> <p>22 "If the creditor goes to the administrators, 23 advances a claim, and if somehow during the course of 24 that process loses various parts of that claim which he 25 wouldn't lose if he had proved in the ordinary way,</p> <p style="text-align: center;">Page 97</p>	<p>1 what he said there. He was recording in shorthand how 2 the principle has been stated in earlier cases.</p> <p>3 Just a few references to the cases. Can we start 4 with TH Knitwear, which my Lord has seen, but there's 5 one paragraph I want to emphasise. Bundle 1A, tab 21. 6 The case, as my Lord will remember, was about the 7 Commissioners of Customs & Excise seeking to claim that 8 it was unfair that they weren't being allowed to recover 9 the VAT element.</p> <p>10 My Lord was shown a passage at page 288 in the 11 judgment of Lord Justice Slade beginning with 12 "Mr Mummery helpfully took us through". And then 13 my Lord was also shown a passage at the bottom page 289 14 beginning "in case this view be wrong".</p> <p>15 The passage I wish to emphasise is the one just 16 above E where he holds it doesn't apply to a voluntary 17 winding-up. He says:</p> <p>18 "The entire basis of the principle as I discern it 19 from cases is that the court will not allow its own 20 officer to behave in a dishonourable manner. There is 21 no doubt much to be said in favour of the principle. 22 However, where it is invoked, it is likely, save in the 23 most obvious cases, to induce a less welcome element of 24 uncertainty.</p> <p>25 "As Mr Justice Salter commented in Re Wigzell, legal</p> <p style="text-align: center;">Page 99</p>
<p>1 that's the point at which Ex parte James and 2 paragraph 74 step in."</p> <p>3 If that were right, it would effectively destroy any 4 real use of the administrators' statutory power of 5 compromise because a compromise necessarily or very 6 often necessarily will involve giving up rights which 7 wouldn't have been given up in the ordinary proof 8 process.</p> <p>9 A creditor would always be able to say that 10 a release given in return for the admittance of a claim 11 to proof shouldn't be enforced if another claim 12 discovered later would have been recognised through the 13 proof process and that simply can't be right, 14 irrespective, that is, of whether the other claim is 15 provable or non-provable.</p> <p>16 Turning just to the law, first of all, and the test 17 in Ex parte James. The touchstone, in my submission, 18 remains something which has been described in the past 19 as "dishonourable conduct". It has not been watered 20 down to something akin to unfairness, whatever that may 21 mean, and just to foreshadow what I'll say about 22 Lord Neuberger, it can't be suggested that 23 Lord Neuberger in a single paragraph in the decision in 24 Nortel, where the facts were clearly outside the 25 principle, was intending to reformulate the principle in</p> <p style="text-align: center;">Page 98</p>	<p>1 rights can be determined with precision by authority, 2 but the questions of ethical propriety have always been 3 and will always be the subject of honest difference 4 between honest men. The principle is itself anomalous. 5 I would not for my part extend the anomaly and the 6 inevitable uncertainty which it involves by holding that 7 it applies to liquidators in a voluntary winding-up or 8 indeed to ordinary trustees ..."</p> <p>9 So that's how it's been described by 10 Lord Justice Slade in 1988.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ZACAROLI: My Lord had reason to consider the principle 13 in one of the T&N cases, which is at bundle 1B, tab 30. 14 This was an application for directions by administrators 15 of T&N. The question being whether they should permit 16 various associated companies to serve notice, 17 withdrawing from pension schemes on the basis that would 18 or could leave the pension schemes with liabilities 19 which would not be paid by the companies.</p> <p>20 That was the background. My Lord dealt with the 21 question of Ex parte James at paragraphs 16 through 18. 22 Perhaps my Lord can remind himself of what he said at 23 paragraphs 16 to 18.</p> <p>24 MR JUSTICE DAVID RICHARDS: I will. (Pause)</p> <p>25 It seems a long time ago. (Pause)</p> <p style="text-align: center;">Page 100</p>

<p>1 Yes.</p> <p>2 MR ZACAROLI: Particularly my Lord was echoing the words of</p> <p>3 Lord Justice Slade:</p> <p>4 "The principle is a difficult one to apply and is</p> <p>5 regarded as anomalous. Dishonourable conduct, taking</p> <p>6 unfair advantage is the touchstone."</p> <p>7 My Lord, that's 2004. That was entirely correct,</p> <p>8 we would say, as at the date of that judgment and</p> <p>9 remains the position today. There has been no case</p> <p>10 applying the principle in Ex parte James since then</p> <p>11 which has in any way varied, altered the way in which</p> <p>12 the test should be applied.</p> <p>13 One other reference is to the case of Re Wigzell,</p> <p>14 which has been referred to in both the cases we have</p> <p>15 looked at. That's at tab 9 of bundle 1A. My Lord, you</p> <p>16 were shown this this morning by my learned friend.</p> <p>17 Again, a couple of passages that you weren't shown,</p> <p>18 first of all, in the judgment of Lord Justice Younger at</p> <p>19 page 866. You were asked to look at the top of that</p> <p>20 page --</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>22 MR ZACAROLI: -- and I'd just ask my Lord to read on to the</p> <p>23 sentence beginning, just above halfway:</p> <p>24 "But I agree fully in thinking that as a matter of</p> <p>25 prudence the court is well advised to exercise this</p> <p style="text-align: center;">Page 101</p>	<p>1 to get out of them. A contract freely entered into for</p> <p>2 proper consideration can't be dishonourable to require</p> <p>3 it's enforceable and that's our basic proposition on</p> <p>4 this point.</p> <p>5 I'll deal next with a couple of points from the</p> <p>6 cases on unfair harm because our argument in terms of</p> <p>7 applying the law to the facts is really the same for</p> <p>8 both principles.</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR ZACAROLI: So turning to paragraph 74, the two essential</p> <p>11 requirements are that the relevant action, actual or</p> <p>12 threatened, would be causative of harm to the creditors'</p> <p>13 interests and, secondly, that harm would be unfair. My</p> <p>14 learned friend understandably declined the invitation to</p> <p>15 try and define what constitutes unfairness and</p> <p>16 essentially takes the opposite line to us that whatever</p> <p>17 it is, this case is it.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR ZACAROLI: Obviously, we take the completely opposite</p> <p>20 view to that and whatever it is that this case is, it is</p> <p>21 not it.</p> <p>22 Two references in the cases. They don't elucidate</p> <p>23 the point terribly much, but they do provide some</p> <p>24 elucidation. First, the Four Private Investments Funds</p> <p>25 case at bundle 1B, tab 39.</p> <p style="text-align: center;">Page 103</p>
<p>1 power only in clear cases ..."</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes. (Pause)</p> <p>3 MR ZACAROLI: To the end of the paragraph. (Pause)</p> <p>4 MR JUSTICE DAVID RICHARDS: So the court should be slow to</p> <p>5 refrain from exercising it in a case in which good sense</p> <p>6 would be shocked?</p> <p>7 MR ZACAROLI: Yes, so he's putting it in reverse there.</p> <p>8 The other passages is in the judgment of</p> <p>9 Lord Justice Scrutton at page 858 to 859. Beginning at</p> <p>10 858, at the paragraph break just below halfway, if</p> <p>11 my Lord can read that to the paragraph break on the next</p> <p>12 page, including the reference to the elephant.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, certainly. (Pause)</p> <p>14 MR ZACAROLI: So emphasising the dangers of judges being</p> <p>15 asked to enter upon questions involving morality as</p> <p>16 opposed to law, but without any clearly discernable</p> <p>17 principles.</p> <p>18 My Lord, as I said at the beginning, we would say</p> <p>19 however the test is defined, it's very difficult to see</p> <p>20 how it could be described as dishonourable by any</p> <p>21 high-minded or honourable person to hold someone to</p> <p>22 a bargain freely entered into for good consideration and</p> <p>23 for which that consideration has been achieved or</p> <p>24 received. It's the opposite in a sense. It's the</p> <p>25 dishonourable thing to break contracts or allow people</p> <p style="text-align: center;">Page 102</p>	<p>1 My Lord, the context, which is not particularly</p> <p>2 important for the principles that are then set out</p> <p>3 in the passages I'm going to take my Lord to, but</p> <p>4 my Lord will see from the headnote it was an application</p> <p>5 for and on the administrators of a company disclosed by</p> <p>6 way of statement in writing of information in respect of</p> <p>7 certain securities held by the applicants.</p> <p>8 So this was one of the cases in the early stages of</p> <p>9 this administration when creditors were seeking</p> <p>10 disclosure quickly to enable them to determine their own</p> <p>11 asset position, and the administrators were essentially</p> <p>12 saying, we can't deal with that now, we need to deal</p> <p>13 with this in a proper and sensible order. So that was</p> <p>14 the background.</p> <p>15 Against that background, one of the arguments was</p> <p>16 the administrators were acting in a way which created</p> <p>17 unfair harm for the creditors, and Mr Justice Blackburne</p> <p>18 addresses that point at paragraph 34, where he states</p> <p>19 what I've already stated, the two things you have to</p> <p>20 show are -- well, the first thing is harm, paragraph 34,</p> <p>21 letter B, page 644, and then, 37:</p> <p>22 "The second aspect is that the harm must be unfair.</p> <p>23 Harm alone is not enough. What is the ingredient</p> <p>24 implied by the need to show unfairness?"</p> <p>25 Can my Lord read 38 and 39?</p> <p style="text-align: center;">Page 104</p>

<p>1 MR JUSTICE DAVID RICHARDS: Certainly. (Pause)</p> <p>2 MR ZACAROLI: Although the context is different, there's an</p> <p>3 echo there of the point I make here, which is that the</p> <p>4 administrators were acting there in accordance with</p> <p>5 their statutory purposes by dealing with cases in the</p> <p>6 order they were. Here, the entry into the contracts</p> <p>7 in the first place was undoubtedly done in the course of</p> <p>8 the proper exercise of the administrators' powers to</p> <p>9 compromise claims with a view to speeding up</p> <p>10 distributions to creditors across the board or to as any</p> <p>11 many of them who were willing to partake in that</p> <p>12 process.</p> <p>13 That's probably the only other reference. Let me</p> <p>14 just check one further matter before I put this bundle</p> <p>15 away. (Pause)</p> <p>16 I think nothing else in the authorities takes the</p> <p>17 point much further. Certainly we say that where you're</p> <p>18 acting in accordance with the statutory scheme, as the</p> <p>19 administrators were here, then it cannot be unfair even</p> <p>20 if it does cause some harm. In a sense, that echoes</p> <p>21 precisely the point my learned friend made just after</p> <p>22 the short adjournment when he said it's okay for the</p> <p>23 office-holder to act in accordance with the statutory</p> <p>24 scheme. His point, of course, is they're not acting in</p> <p>25 accordance with the statutory scheme here because there</p> <p style="text-align: center;">Page 105</p>	<p>1 paragraph 191, the argument is put in broad terms in</p> <p>2 this way. They say if, contrary to their argument as to</p> <p>3 construction, the agreements had the effect of releasing</p> <p>4 the claims, then the last two lines:</p> <p>5 "... such an effect was an inadvertent consequence</p> <p>6 of a process initiated by and, until 2014, required by</p> <p>7 the administrators."</p> <p>8 And I want to respond to that concept of inadvertent</p> <p>9 consequence. My submissions I'll take very shortly</p> <p>10 because they do echo what I've already said on</p> <p>11 construction on this point.</p> <p>12 Assuming no civil law remedy to undo these</p> <p>13 agreements, we can start from the point that they are</p> <p>14 fully enforceable as a matter of law. It's not entirely</p> <p>15 clear to me, but I think the Senior Creditor Group's</p> <p>16 position is not that there was any dishonourable or</p> <p>17 unfairly harmful conduct in entering into the</p> <p>18 agreements. It doesn't appear to be put in that way,</p> <p>19 that there was something dishonourable about entering</p> <p>20 into the agreements.</p> <p>21 What is said is it's dishonourable or unfairly</p> <p>22 harmful to enforce them.</p> <p>23 MR JUSTICE DAVID RICHARDS: I think Mr Dicker kept open both</p> <p>24 limbs, although I think it's probably right that he put</p> <p>25 a little more emphasis on the second limb than on the</p> <p style="text-align: center;">Page 107</p>
<p>1 may be creditors who are not being able to assert</p> <p>2 claims, non-provable claims, as a result of the</p> <p>3 agreements. But that is to over-ignore the important</p> <p>4 step in the process which is that there has been an</p> <p>5 agreement reached with creditors for proper purposes in</p> <p>6 accordance with the statutory scheme and it's the</p> <p>7 consequence of the agreement that they now can't assert</p> <p>8 those claims, not the actions of the administrators.</p> <p>9 They chose to enter into the agreements; they didn't</p> <p>10 have to. In so doing it has had some consequences.</p> <p>11 Which also leads to another point, dealing with</p> <p>12 a point my learned friend made about sufficient</p> <p>13 justification, that there must be sufficient</p> <p>14 justification for the actions the administrators have</p> <p>15 taken. Well, for a start they're acting in accordance</p> <p>16 with the statutory scheme, so that's sufficient</p> <p>17 justification, but actually there's more justification</p> <p>18 here, namely that there was a real benefit to be</p> <p>19 achieved by the estate as a whole, all creditors, and</p> <p>20 each creditor who entered into a CDD in terms of speed,</p> <p>21 certainty and finality. It would enable the</p> <p>22 administration to be brought to an end more quickly than</p> <p>23 otherwise. That is a perfectly good justification for</p> <p>24 entering into the documents in the form that they did.</p> <p>25 My Lord, in my learned friend's skeleton at</p> <p style="text-align: center;">Page 106</p>	<p>1 first, I think understandably.</p> <p>2 MR DICKER: My Lord, your Lordship has it right, but just so</p> <p>3 we're clear, I referred your Lordship to both bits in</p> <p>4 paragraph 74 --</p> <p>5 MR JUSTICE DAVID RICHARDS: You did. You did.</p> <p>6 MR DICKER: -- "has acted or is proposing to act", and we</p> <p>7 said both are triggered: the first by getting creditors</p> <p>8 to enter into these agreements in the first place and</p> <p>9 the second by seeking to enforce the releases now.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR ZACAROLI: My Lord, I think I understood it to be the</p> <p>12 other way or at least no emphasis was being placed on</p> <p>13 the first stage, because firstly they're not criticising</p> <p>14 the conduct of the administrators as such, they're not</p> <p>15 saying they've done anything wrongful, and it's slightly</p> <p>16 difficult to square that proposition with a submission</p> <p>17 that entering into these agreements was dishonourable</p> <p>18 conduct.</p> <p>19 MR JUSTICE DAVID RICHARDS: It seems to me that limb B is</p> <p>20 where battle is more obviously joined.</p> <p>21 MR ZACAROLI: Yes.</p> <p>22 MR JUSTICE DAVID RICHARDS: Because one thing is clear: the</p> <p>23 administrators didn't intend to deprive the creditors of</p> <p>24 these particular rights or didn't intend that they</p> <p>25 should release them. It is very difficult to see --</p> <p style="text-align: center;">Page 108</p>

<p>1 I mean, I can see no conceivable basis on which it would 2 be said that by negotiating with the committees and then 3 arriving at a standard form and tendering them to 4 creditors for signature, that could be in any sense or 5 on any ground stigmatised as dishonourable or really 6 even unfair. I think it's more a question, in the light 7 of, let us suppose -- if the true construction is, as 8 you contend, would it now be unfair for the 9 administrators to enforce the contracts in that 10 respect --</p> <p>11 MR ZACAROLI: Yes.</p> <p>12 MR JUSTICE DAVID RICHARDS: I appreciate Mr Dicker has put 13 his submissions on both limbs, but without giving too 14 much away, it seems to me that limb B is the more 15 obvious territory --</p> <p>16 MR ZACAROLI: And to be fair to him it's limb B which he has 17 focused on in his skeleton. That's why I think that's 18 their case.</p> <p>19 Our point is this: if it wasn't dishonourable to 20 enter into the agreement then it can't be dishonourable 21 to enforce it. If the agreement was a proper one to 22 have entered into at the time it was entered into, then 23 it can't be dishonourable now to require it to be 24 enforced when creditors have had the advantage of 25 entering into it.</p> <p style="text-align: center;">Page 109</p>	<p>1 MR JUSTICE DAVID RICHARDS: What we do know -- because 2 I think this is relevant to this argument -- is that we 3 know that the administrators did not intend the 4 agreement to have this consequence. We know that not 5 because of their evidence, but because of what they 6 subsequently did.</p> <p>7 MR ZACAROLI: My Lord, no --</p> <p>8 MR JUSTICE DAVID RICHARDS: They carved out these claims.</p> <p>9 MR ZACAROLI: We don't know that, with respect, for two 10 reasons. The first is -- well, again I'm taking issue 11 with the statement they did not intend to carve out 12 these claims. They intended to carve out --</p> <p>13 MR JUSTICE DAVID RICHARDS: They did not knowingly intend.</p> <p>14 MR ZACAROLI: Sorry.</p> <p>15 MR JUSTICE DAVID RICHARDS: I mean, what we do know is that 16 once they were alive to these claims, they carved them 17 out.</p> <p>18 MR ZACAROLI: Well, what we know --</p> <p>19 MR JUSTICE DAVID RICHARDS: So I think one can deduce that 20 if someone had directed their minds to these back at the 21 start of the use of these forms, they would have carved 22 them out then.</p> <p>23 MR ZACAROLI: Let me deal with the facts first because I'm 24 quibbling with the definition of "no intention to 25 release these claims". They intended to release any</p> <p style="text-align: center;">Page 111</p>
<p>1 And although, of course, I accept my Lord's comment 2 that we can't suggest the administrators intended to 3 release a currency conversion claim, that in our 4 submission doesn't take one far enough because they 5 didn't intend to release any particular non-contemplated 6 or uncontroverted claim. What they did intend to do was 7 to release any claim that was not in contemplation. And 8 that's both ways: any claim by the creditor against the 9 estate or any claim by the estate against the creditor.</p> <p>10 So it's not an inadvertent consequence that it turns 11 out that there was a claim that was not in contemplation 12 which has been released. Again, I've made those points 13 in --</p> <p>14 MR JUSTICE DAVID RICHARDS: Inadvertent, is that the same 15 thing as unintended, or is it different? That's not 16 a question for you, I suppose, but are you reading it as 17 being different?</p> <p>18 MR ZACAROLI: I'm focusing on what it is that's 19 inadvertent -- yes, it is inadvertent in the sense that 20 they didn't have in mind the release of the currency 21 conversion claim, but that's not the point. The point 22 was they entered into an agreement with eyes open, both 23 the creditor and the administrators did, eyes wide open 24 to the fact that it would release any claim which wasn't 25 in contemplation.</p> <p style="text-align: center;">Page 110</p>	<p>1 claim and therefore this claim falls within the class of 2 claims they intended to release, so that's why I take 3 issue with the statement they did not intend to release 4 these claims. They did because they intended to release 5 any claim.</p> <p>6 MR JUSTICE DAVID RICHARDS: A man is taken to intend the 7 consequences of his contract as properly construed.</p> <p>8 MR ZACAROLI: My Lord, it's not so much that, it's that by 9 intending to release anything, by definition you're 10 intending to release everything which falls within that 11 class.</p> <p>12 MR JUSTICE DAVID RICHARDS: As construed.</p> <p>13 MR ZACAROLI: Assuming I'm right on construction, of course. 14 Otherwise any creditor could come along and say, 15 I've got this class of claim, or these creditor have 16 a new class of claim -- the law's changed and now they 17 can have claims of a completely different variety and it 18 was intended that that claim would be released, in the 19 same which it's intended that this claim, the currency 20 conversion claim, is released because there was an 21 intention to release all claims. It's a semantic point, 22 perhaps.</p> <p>23 MR JUSTICE DAVID RICHARDS: I think your intention is simply 24 the intention to be deduced from applying the rules of 25 construction to this contract --</p> <p style="text-align: center;">Page 112</p>

<p>1 MR ZACAROLI: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: -- and then saying: that was the</p> <p>3 parties' intention.</p> <p>4 MR ZACAROLI: I accept that and therefore I've got to be</p> <p>5 right on construction.</p> <p>6 MR JUSTICE DAVID RICHARDS: But we know that parties are</p> <p>7 sometimes found bound by contracts with the consequences</p> <p>8 they did not intend. They can't rely on that for saying</p> <p>9 they're not bound by it, but we know that they didn't --</p> <p>10 I mean, that's a fact of life.</p> <p>11 MR ZACAROLI: That is, my Lord, but that might be the</p> <p>12 case --</p> <p>13 MR JUSTICE DAVID RICHARDS: It's irrelevant to the</p> <p>14 construction of the contract.</p> <p>15 MR ZACAROLI: Yes. But again, that's not the sort of</p> <p>16 difference between intentions that I am focusing on</p> <p>17 because it might be that the contract -- no one thought</p> <p>18 the contract had a particular meaning. No one thought</p> <p>19 the contract had a particular meaning, but it did as</p> <p>20 a matter of objective analysis, and therefore --</p> <p>21 MR JUSTICE DAVID RICHARDS: What you saying is what I can</p> <p>22 take it the administrators actually intended was that</p> <p>23 everything should be released bar this --</p> <p>24 MR ZACAROLI: Yes.</p> <p>25 MR JUSTICE DAVID RICHARDS: -- but I think that's what I'm</p> <p style="text-align: center;">Page 113</p>	<p>1 claims that have been released. The same would have</p> <p>2 happened whatever the claim was subsequently discovered</p> <p>3 to be.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR ZACAROLI: My Lord, the administrators, or the company</p> <p>6 of course, is bound by the terms of the contract as much</p> <p>7 as the creditor is. So if it had subsequently</p> <p>8 transpired that claims could have been asserted against</p> <p>9 a creditor or many creditors, classes of creditors, then</p> <p>10 the company, the estate in general, is barred from</p> <p>11 pursuing that claim because it's agreed to release it.</p> <p>12 You might say had it known about that claim at the time,</p> <p>13 it would not have released that claim. That's again the</p> <p>14 wrong question. The question is: is it not</p> <p>15 dishonourable to enter into the agreement in the first</p> <p>16 place? Clearly not. Having done so, the creditors</p> <p>17 haven't benefited, the estate hasn't benefited. Neither</p> <p>18 party could properly then renege on the agreement when</p> <p>19 what was at the time not contemplated became in</p> <p>20 contemplation.</p> <p>21 Looking at this in terms of harm, we submit that it</p> <p>22 cannot be -- I think my learned friend suggested the</p> <p>23 relevant harm here is the giving up of a claim, the loss</p> <p>24 of the ability to pursue a claim against the company.</p> <p>25 My Lord, that harm, if it be harm at all, is simply the</p> <p style="text-align: center;">Page 115</p>
<p>1 querying. If you're right about that, why did they</p> <p>2 subsequently introduce the carve-outs?</p> <p>3 MR ZACAROLI: Well, that is why I am going to come on to the</p> <p>4 facts. It is not the case when they saw it, they</p> <p>5 thought, oh gosh, we'd better amend the contract.</p> <p>6 MR JUSTICE DAVID RICHARDS: But why didn't they?</p> <p>7 MR ZACAROLI: Let's look at the evidence, my Lord.</p> <p>8 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>9 MR ZACAROLI: It's probably best found in Mr Lomas' tenth</p> <p>10 witness statement at bundle 2, tab 2. Paragraph 75</p> <p>11 under the heading "Currency conversion claims", page 25</p> <p>12 of the document.</p> <p>13 It's paragraphs 75 and 76. (Pause)</p> <p>14 So in effect the reason is because creditors were</p> <p>15 refusing to sign the documents, which the administrators</p> <p>16 first sought to get them to carry on doing, but</p> <p>17 creditors were refusing to do that without the carve-out</p> <p>18 language being incorporated.</p> <p>19 One can speculate, but it's likely to be the case</p> <p>20 that whatever claim or class of claim might subsequently</p> <p>21 have been discovered, at the point that it's discovered,</p> <p>22 creditors would have been unwilling to enter into an</p> <p>23 agreement that then caused them to lose their claim they</p> <p>24 then knew about. There's nothing special about currency</p> <p>25 conversion claims therefore amongst the universe of</p> <p style="text-align: center;">Page 114</p>	<p>1 consideration that is given by the creditor or part of</p> <p>2 the consideration given by the creditor for entering</p> <p>3 into the agreement in the first place. It can't be</p> <p>4 right that every piece of consideration which involves</p> <p>5 giving something away can be regarded as harm. It's</p> <p>6 actually something given up in return for something</p> <p>7 coming the other way -- in this case the certainty of</p> <p>8 getting its claim accepted early, early payment, the</p> <p>9 benefits that go with that -- and the release is the</p> <p>10 other way. So we would suggest there's actually no harm</p> <p>11 here of the relevant kind because the harm is simply</p> <p>12 something the creditors agreed to for valuable</p> <p>13 consideration.</p> <p>14 My Lord, that in a nutshell is our argument on the</p> <p>15 two ways in which this point is put under issue 36A.</p> <p>16 I'm now going to turn to deal with some of the detail of</p> <p>17 the points my learned friend made this morning, but</p> <p>18 that's the crux of our arguments.</p> <p>19 One point made this morning was reliance on the</p> <p>20 Austin Securities case.</p> <p>21 MR JUSTICE DAVID RICHARDS: What can be said about the</p> <p>22 Austin Securities case was that the issue there was</p> <p>23 whether the court should exercise its discretion to</p> <p>24 strike out the proceedings for want of prosecution,</p> <p>25 which involves a balancing of factors. It's a rather</p> <p style="text-align: center;">Page 116</p>

<p>1 different exercise from Ex parte James.</p> <p>2 MR ZACAROLI: Yes. We needn't go to it, I think. It</p> <p>3 doesn't help. The only other point to make about it is</p> <p>4 perhaps the less analytical point that of course the</p> <p>5 conduct there was a complete failure to engage with</p> <p>6 creditors. The conduct here is the administrators going</p> <p>7 out of their way to engage with creditors early to</p> <p>8 enable quicker distributions to be made to them than</p> <p>9 would otherwise happen. So it's the opposite in terms</p> <p>10 of the facts.</p> <p>11 Reference was made again to the administrators'</p> <p>12 supposed quasi-judicial functions. My Lord put to me,</p> <p>13 today or yesterday, the point about how it's really</p> <p>14 about them being subject to statutory duties, and</p> <p>15 I accepted that point. Characterising them as</p> <p>16 a quasi-judicial function doesn't really add anything to</p> <p>17 the fact that they have statutory duties, including the</p> <p>18 duty to protect the interests of all creditors against</p> <p>19 inflated claims being made against the company.</p> <p>20 The power to compromise is given to enable the</p> <p>21 administrators to reach agreement with creditors where</p> <p>22 they don't agree with the quantum of the claim being</p> <p>23 advanced, but are prepared to do a deal to save time and</p> <p>24 costs for everyone. That's actually what they were</p> <p>25 doing.</p> <p style="text-align: center;">Page 117</p>	<p>1 itself that might be said to be acting dishonourably.</p> <p>2 MR JUSTICE DAVID RICHARDS: I'm not sure. I think that</p> <p>3 Lord Justice Slade possibly did think that was</p> <p>4 significant.</p> <p>5 MR ZACAROLI: Well, it adds nothing in my submission to the</p> <p>6 question of what constitutes dishonourable conduct or --</p> <p>7 MR JUSTICE DAVID RICHARDS: That was the reason why,</p> <p>8 I think, he said that the Ex parte James principle</p> <p>9 should be confined to officers of the court and not</p> <p>10 extended, for example, to personal representatives or</p> <p>11 trustees of ordinary trusts.</p> <p>12 MR ZACAROLI: I accept that.</p> <p>13 MR JUSTICE DAVID RICHARDS: Okay.</p> <p>14 MR ZACAROLI: But there is that difference between -- the</p> <p>15 court's involvement in administration is far less than</p> <p>16 its involvement in a liquidation, so it doesn't really</p> <p>17 add very much that they're an officer of the court as</p> <p>18 giving the foundation for the rule in Ex parte James.</p> <p>19 My Lord, my learned friend said at some point this</p> <p>20 morning that the creditors, in practice, they had to</p> <p>21 enter into the CDDs, they weren't given any real choice</p> <p>22 because the disadvantages were laid out for them so</p> <p>23 clearly because if they didn't they could wait many</p> <p>24 years for distributions to be made to them.</p> <p>25 My Lord, we turn that point on its head. The</p> <p style="text-align: center;">Page 119</p>
<p>1 I quibbled with the suggestion that anything is</p> <p>2 added to that concept of them having statutory duties by</p> <p>3 describing the administrators as in essence equal to the</p> <p>4 court, the court itself through its office of doing</p> <p>5 various things. My Lord, that's not how administration</p> <p>6 works in my submission. The administrators are</p> <p>7 appointed. They are an officer of the court, but the</p> <p>8 court doesn't conduct the administration.</p> <p>9 MR JUSTICE DAVID RICHARDS: No, but I think that that's</p> <p>10 the -- that does definitely find ... Perhaps Mr Dicker</p> <p>11 is echoing what Lord Justice Slade, for example, said</p> <p>12 in the TH Knitwear case.</p> <p>13 MR ZACAROLI: The difference is in a liquidation, of course,</p> <p>14 traditionally the court did itself carrying out the</p> <p>15 functions of a liquidator --</p> <p>16 MR JUSTICE DAVID RICHARDS: I know, but it stems from the</p> <p>17 liquidator in a compulsory liquidation being an officer</p> <p>18 of the court. For good or ill, schedule B1 states that</p> <p>19 an administrator is an officer of the court,</p> <p>20 notwithstanding -- you are quite right -- the very</p> <p>21 different functions that an administration and</p> <p>22 administrators are meant to perform.</p> <p>23 MR ZACAROLI: Yes. It's a small point. I'm not suggesting</p> <p>24 that he's not an officer of the court. Of course he is.</p> <p>25 But it doesn't add anything to say that it's the court</p> <p style="text-align: center;">Page 118</p>	<p>1 factual situation in which the parties found themselves</p> <p>2 was that distributing under normal processes would take</p> <p>3 many years, involve great cost and potential litigation.</p> <p>4 So against that background the administrators were</p> <p>5 offering creditors a real advantage, to have a quicker,</p> <p>6 perhaps dirtier determination, but in order to achieve</p> <p>7 that benefit they had to enter into a bargain with the</p> <p>8 terms and conditions we looked at at great length in the</p> <p>9 last four days.</p> <p>10 Some creditors chose not to and take their chances</p> <p>11 and preserve any and all claims they may have. They</p> <p>12 of course did not get the benefit that those creditors</p> <p>13 who signed up to CDDs did get.</p> <p>14 Then a further point made relates to the</p> <p>15 differential outcome between different forms of CDD.</p> <p>16 My Lord, here we say this is not an example of</p> <p>17 administrators treating creditors differently. The</p> <p>18 creditors are being treated, when it comes to</p> <p>19 enforcement, in precisely the same way amongst each</p> <p>20 other, namely they're all being held to the bargain</p> <p>21 which they entered into.</p> <p>22 The difference in consequence arises from the fact</p> <p>23 that the creditors entered into different agreements.</p> <p>24 It so happens that the -- whether one calls it a change</p> <p>25 or a clarification in the law which has subsequently</p> <p style="text-align: center;">Page 120</p>

<p>1 happened -- affects those who entered into one type of 2 CDD but not another. But that's the happenstance in 3 a way, that some of them are affected by it but others 4 aren't. But a different change in the law, a different 5 claim which arises might have affected creditors in 6 entirely different ways, so the classes would have been 7 split differently.</p> <p>8 It doesn't matter how you divide up the classes, the 9 difference in treatment is caused by the different 10 agreements they entered into, not by anything the 11 administrators are seeking to do now.</p> <p>12 And one compares the creditor A who wanted 13 a speedier resolution of his claims and so entered into 14 the CDDs. It's suffering a disadvantage because it 15 entered into an agreement. It's wrong to compare that 16 creditor with someone who didn't enter into a CDD at all 17 because they took their chances; a point I made a moment 18 ago. There's differential treatment there, but that's 19 because one agreed and one didn't and therefore one 20 released claims and one didn't.</p> <p>21 Then it's suggested that the situation here has been 22 created by an oversight on the part of the 23 administrators and/or their legal advisers because it 24 was -- I don't use the word s"their fault" in any 25 pejorative way because my learned friend didn't, but it</p> <p style="text-align: center;">Page 121</p>	<p>1 21 then 25 and 26.</p> <p>2 MR JUSTICE DAVID RICHARDS: Right. (Pause)</p> <p>3 Yes.</p> <p>4 MR ZACAROLI: My Lord, two particular points to pick up on.</p> <p>5 First of all, the point about the intention to 6 release in paragraph 25. He explains what he meant by 7 that phrase: because he wasn't thinking about currency 8 conversion claims, there was no specific intention to 9 release them. That echoes a point that I've been making 10 this afternoon to my Lord, that there is an intention to 11 release generally. What he means by "no intention to 12 release these claims" is he hadn't thought about these 13 claims and therefore hadn't appreciated they would fall 14 within the class of claims released.</p> <p>15 Then paragraph 26. Clearly there was some form of 16 disagreement amongst the administrators as to what the 17 appropriate steps were here. Mr Copley does not speak 18 for all the administrators, clearly. He's one of them, 19 but what was put out by the administrators was certainly 20 not what he had proposed putting out.</p> <p>21 For completeness, perhaps my Lord could read on to 22 27 and 28 because that does complete the story from his 23 perspective. (Pause)</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR ZACAROLI: Just so that my Lord doesn't get the</p> <p style="text-align: center;">Page 123</p>
<p>1 was down to them to know whether the law was as it was 2 said to be in Re Lines Brothers or not.</p> <p>3 Again, I've made submissions on this topic 4 in relation to issue 34, but I reiterate: these are not 5 agreements being thrust on widows and orphans. Legal 6 advice was available to and viewed by many creditors, as 7 the evidence shows, no doubt law firms on a par with the 8 calibre of Linklaters. My Lord can't assume and can't 9 decide issue 36A on the assumption that we're dealing 10 here with people who did not have access to lawyers of 11 the same calibre. Perhaps some didn't, but we know many 12 did and this is an issue being determined as a matter of 13 generality. If that's an important point, that the 14 creditor did not have access to lawyers, then my Lord 15 simply can't determine that as a matter of generality 16 and it has to be a case by case analysis. We would say 17 it's irrelevant anyway, but insofar as it's thought to 18 be relevant, it can't form my Lord's reasoning on this 19 issue being treated as a matter of generality.</p> <p>20 Reliance was placed on Mr Copley's expressed views 21 as to what he might have done in different 22 circumstances. Can we look at his evidence on this? 23 Bundle 2, tab 8, and in particular, paragraph 21. 24 Perhaps my Lord can remind himself of paragraph 21 and 25 then paragraph 26. (Pause)</p> <p style="text-align: center;">Page 122</p>	<p>1 impression that what's said here was being said 2 universally to all creditors, the evidence from Mr Ryan 3 at tab 9, just two paragraphs in Mr Ryan's statement at 4 tab 9 of the bundle, paragraphs 16 and 17, indicate that 5 at least he wasn't being told the same thing as 6 Mr Copley had been saying to some other creditors. 7 Paragraphs 16 and 17. (Pause)</p> <p>8 We know what the administrators as a body's reaction 9 was to the emergence of currency conversion claims. 10 That was first of all to try and tell creditors they 11 must still sign the same formal agreement, but then bow 12 to the pressure that creditors wouldn't otherwise enter 13 into agreements at all and so agree to variations. What 14 Mr Copley may or may not have said about what he would 15 have done had he known matters differently back then has 16 no relevance at all to this question. Largely for the 17 reasons I've given, which is whatever the administrators 18 may now think of what would have happened had they known 19 about currency conversion claims is no different to what 20 they might have thought about any other claim that would 21 have arisen that wasn't contemplated at the time.</p> <p>22 This leads on to a further point my learned friend 23 made about those CDDs entered into in that, if I can 24 call it, twilight period between the issue having arisen 25 and the variation language being incorporated. He</p> <p style="text-align: center;">Page 124</p>

<p>1 elided his submissions here to deal with both statutory 2 interest and currency conversion claims. It has never 3 been our case that statutory interest has been waived by 4 any CDD and I would accept that if the administrators 5 are telling creditors at the time that there is no 6 express preservation language for statutory interest, 7 don't worry, statutory interest is clearly not being 8 released, then that undoubtedly would affect the 9 structure of the agreements. But that is not the case 10 when it comes to currency conversion claims because you 11 do not have any evidence -- certainly not any general 12 evidence -- that creditors were being told once 13 [inaudible] had raised the possibility of currency 14 conversion claims, oh, don't worry because they're 15 already waived.</p> <p>16 In fact, the opposite is true. During that period, 17 making the assumption that a creditor who enters into 18 a CDD is aware of the possibility of currency conversion 19 claims, they are then entering into a CDD having been 20 told by the administrators, this may or may not waive 21 that claim, take your own advice. So they're entering 22 into it with their eyes open. They have a choice to do 23 so, they don't have to enter into it, but if they do 24 they know they're potentially waiving a currency 25 conversion claim and therefore for those creditors</p> <p style="text-align: center;">Page 125</p>	<p>1 only persons to benefit will be the shareholders, the 2 members. This again repeats a submission I made 3 in relation to 34, that at the time the contracts are 4 entered into, it could not be known whether the 5 shareholders would benefit.</p> <p>6 Take the case where it depends upon assets and 7 liabilities. Take the case where there is an 8 insufficiency of assets now to pay all non-provable 9 claims. It remains the case that the shareholders will 10 get nothing.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR ZACAROLI: There is, of course, also the sub-debt to take 13 into account. Yes, it's contractually subordinated, but 14 they're still creditors entitled to the benefit of the 15 asset realisations during the administration.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR ZACAROLI: My Lord, with that, those are my submissions 18 in answer.</p> <p>19 MR JUSTICE DAVID RICHARDS: Thank you very much.</p> <p>20 We'll take a break now and I will rise for five 21 minutes. 22 (3.18 pm) 23 (A short break) 24 (3.23 pm) 25 MR JUSTICE DAVID RICHARDS: Am I going to hear from</p> <p style="text-align: center;">Page 127</p>
<p>1 actually the answer is opposite to what my learned 2 friend suggested. For those creditors there can be no 3 question of that release or waiver having been unfairly 4 obtained. They agreed to it with the knowledge it might 5 be waiving the claim.</p> <p>6 My Lord, I have just two points left, if I may carry 7 on beyond the break time. I shall finish shortly.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR ZACAROLI: My learned friend made a point about the fact 10 that the estate, the insolvency estate, benefited to 11 some extent from delaying before converting dollars into 12 sterling. That, although superficially attractive 13 point, we say, must be irrelevant. If you assume for 14 a moment that we're right that the conduct of the 15 administrators in holding creditors to their bargain is 16 not dishonourable without that element, in my submission 17 it's impossible to see how the presence of that fact, 18 which means that creditors generally have benefited from 19 there being more assets available, how that fact can 20 render what was otherwise not dishonourable suddenly 21 dishonourable. It's irrelevant to it.</p> <p>22 Finally, very briefly, to deal with the point 23 about -- and this is a point made more in their skeleton 24 than today, but the point that there's some 25 dishonourable conduct or unfair conduct here because the</p> <p style="text-align: center;">Page 126</p>	<p>1 Mr Trower on this?</p> <p>2 MR TROWER: Not unless your Lordship has any questions from 3 me, no. I'm very happy to address your Lordship on any 4 points you would like assistance on, but I wasn't 5 proposing to say anything.</p> <p>6 MR JUSTICE DAVID RICHARDS: So the administrators take no 7 position on this?</p> <p>8 MR TROWER: We take no position on this for this reason: 9 having looked at the position papers and skeleton 10 arguments, we took the view that all the arguments were 11 properly being advanced and that it wasn't appropriate 12 in the circumstances for us to take a position.</p> <p>13 MR JUSTICE DAVID RICHARDS: Right, thank you very much.</p> <p>14 Mr Dicker.</p> <p>15 Further reply by MR DICKER</p> <p>16 MR DICKER: My Lord, I have seven points by way of reply. 17 Your Lordship will no doubt remind me when I get to 18 point 8!</p> <p>19 The first point is this. One needs to start by 20 deciding what world we are living in. My learned friend 21 Mr Zacaroli's submissions proceeded on the basis that 22 we're essentially in a commercial world, these are 23 contracts freely entered into, and, as he put it: 24 "It cannot be dishonourable to enforce a contract 25 freely entered into."</p> <p style="text-align: center;">Page 128</p>

<p>1 We say that is plainly wrong for the simple reason 2 it is necessarily to limit parties to their strict legal 3 or equitable rights. The whole point of Ex parte James 4 is that in certain circumstances it produces a result 5 different from that which would result from the 6 application of such rights.</p> <p>7 My Lord, the second point is an example of this, 8 essentially derived from Ex parte James itself. 9 Ex parte James involved a payment made by a mistake of 10 law at a time when the mistake of law didn't entitle you 11 to recover from the recipient. The trustee was regarded 12 as not being in the position of an ordinary commercial 13 party and treated as knowing of the law and it was 14 regarded as dishonourable, unfair for it to retain the 15 money in those circumstances.</p> <p>16 We say the result would plainly be exactly the same 17 if the payment had been made pursuant to a contract 18 entered into between the third party and the trustee, 19 which contained or was premised on a mistake of law. 20 The trustee would be no more entitled in that situation 21 to say it's a contract freely entered into between the 22 two of us and we may both have proceeded on the basis of 23 an error of law, and if it turns out it has been to my 24 disadvantage, hard luck.</p> <p>25 So the first point is we're simply not in the world</p> <p style="text-align: center;">Page 129</p>	<p>1 compromises in this case. He described those 2 essentially as an agreement like any other, freely 3 entered into and binding therefore on the parties. That 4 can't be a sufficient reason for the non-application of 5 the principle. Take an example where you've got an 6 office-holder, inexperienced or with inadequate legal 7 advice, who proposes a compromise to creditors that 8 everyone gets 10p in the pound, and he fails to take 9 into account that some of those creditors are 10 preferential creditors entitled to be paid in full 11 first.</p> <p>12 One may hope that amongst those preferential 13 creditors there were some that would appreciate that 14 this isn't what the statute provided for and would 15 ensure that didn't happen. But if for whatever reason 16 that didn't occur, because they weren't aware themselves 17 and the compromise was entered into, in our submission 18 it would not subsequently lie in the office-holder's 19 mouth, let alone through him or other creditors, to say, 20 this was the bargain you freely entered into. It would 21 have been a compromise premised on an implicit mistake 22 of law, not otherwise justifiable, and not something to 23 which those who were prejudiced should be held to be 24 bound.</p> <p>25 My Lord, the sixth point, references to limb A and</p> <p style="text-align: center;">Page 131</p>
<p>1 that my learned friend would wish us to be in.</p> <p>2 The third point concerns the comments by 3 Lord Justice Scrutton in Wigzell that your Lordship was 4 referred to. It is plainly a difficult test to apply, 5 but it is one that Lord Justice Scrutton went on to 6 apply in that case with the result your Lordship has 7 seen, and the reason why it needs to be applied, however 8 difficult it may be, is because otherwise the court 9 would effectively be accepting that its officers were 10 entitled to behave like any other commercial party with 11 the consequences that that would have on them and 12 indirectly on the court itself.</p> <p>13 For that reason, anomalous the principle may or may 14 not be, but to avoid the consequences of that, it exists 15 and needs to be applied.</p> <p>16 The fourth point. Your Lordship was taken to 17 your Lordship's judgment in T&N. The short point 18 in relation to that is we say there's nothing 19 inconsistent in your Lordship's judgment and the 20 subsequent expression of the law by Lord Neuberger in 21 Nortel. Your Lordship picks up both the phrase 22 dishonourable and also the concept of taking unfair 23 advantage.</p> <p>24 My Lord, the fifth point is this. My learned friend 25 effectively sought to apply his commercial world to the</p> <p style="text-align: center;">Page 130</p>	<p>1 limb B, I think it was called, and your Lordship is 2 absolutely right: our primary focus is on what was 3 referred to as limb B. In other words: would it be fair 4 for the administrators now to be permitted to enforce 5 the releases if the agreements have the effect for which 6 Wentworth contends? We do also say that if Wentworth 7 was right, then unfairness would also have existed 8 at the earlier stage. We plainly don't say that in the 9 sense of saying that the administrators would 10 consciously have acted dishonourably. Far from it. One 11 only has to imagine that to realise how unlikely that 12 was.</p> <p>13 What we do say is if the effect of the process which 14 the administrators went through was objectively to 15 result in the consequences for which Wentworth contends, 16 then whether or not the administrators appreciated it, 17 objectively they have engaged in a process which would 18 be characterised as unfair.</p> <p>19 One could take an extreme example. Imagine the 20 administrators had done everything they did consciously 21 intending to achieve the results for which Wentworth 22 contends. In other words, they had said to themselves, 23 what we would like to achieve is to have an agreed CDD 24 which preserves currency claims for these creditors and 25 have an admitted CDD which gets rid of currency claims</p> <p style="text-align: center;">Page 132</p>

<p>1 for these other creditors and we will allocate the forms 2 out as between creditors depending simply on whether we 3 think they have a client money claim or not. 4 If one essentially was to construe the 5 administrators' actions as if they were consciously 6 intending to achieve all the results which Wentworth 7 says objectively contracts produce, we do say at an 8 earlier stage objectively that conduct would have been 9 unfair. 10 MR JUSTICE DAVID RICHARDS: Well, the unfairness there would 11 have been in inducing creditors to enter into these 12 contracts with those results known or intended by the 13 administrators without disclosing it. 14 MR DICKER: Yes, absolutely. 15 MR JUSTICE DAVID RICHARDS: That's not our case. 16 MR DICKER: No -- well -- 17 MR JUSTICE DAVID RICHARDS: So the question is whether in 18 this case they acted unfairly in putting the contracts 19 to creditors. 20 MR DICKER: And our short submission is that unfairness 21 doesn't require subjective unfairness on the part of the 22 administrators. This isn't a hearing which requires one 23 to cross-examine the administrators. It is sufficient 24 if the court concludes that what they have done, taking 25 into account all the circumstances, was unfair.</p> <p style="text-align: center;">Page 133</p>	<p>1 the preservation language in relation to currency 2 conversion claims. Your Lordship was shown both 3 Mr Lomas' tenth witness statement and also Mr Copley's 4 statement. As your Lordship will recall, it was 5 Mr Copley who said in paragraph 14 of his statement that 6 he was the administrator with primary responsibility for 7 Project Canada and the consensual approach. 8 MR JUSTICE DAVID RICHARDS: Yes. 9 MR DICKER: It may just be worth reminding your Lordship of 10 that. In 14, it's bundle 2, tab 8, paragraph 14. He 11 says he became a partner in 2009 and from June 2010 was 12 charged with managing the development and implementation 13 of Project Canada, reporting directly to Mr Lomas: 14 "I was appointed as a joint administrator of LBIE, 15 2 November 2011. From that date until December 2013 16 I had primary joint administrator responsibility for 17 inter alia the agreement of creditors' claims, including 18 Project Canada." 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: My Lord, we do emphasise, so far as Mr Copley is 21 concerned, paragraph 28, to which my learned friend took 22 you, which we say is the best indication that 23 your Lordship is effectively being provided with as to 24 the administrators' views, where he says: 25 "Had I known, which I did not, about the existence</p> <p style="text-align: center;">Page 135</p>
<p>1 MR JUSTICE DAVID RICHARDS: But what would the consequence 2 of that be? What remedy would the court give if that 3 were unfairly harmful or found to have been unfairly 4 harmful? 5 MR DICKER: In a sense at that point we come back to 6 your Lordship's point, which is that the remedy is, of 7 course, exactly the same: to enforce the releases. 8 What I wanted to avoid was the suggestion that -- 9 and I think my learned friend sought to take advantage 10 of it -- essentially everything that happened, even 11 objectively, was totally unfair. His submission was, 12 well, if that's the case, how on earth can it be unfair 13 to enforce it now? To which our response was, well, 14 that's not quite right. Undoubtedly, nothing was done 15 that was unfair knowingly and wilfully. Objectively, if 16 Wentworth is right as a matter of construction, we say 17 not so. 18 But your Lordship's absolutely right, on a practical 19 level the issue that your Lordship now has to decide is 20 whether or not the administrators should be permitted to 21 enforce the releases and, so far as that issue is 22 concerned, ultimately the question turns on where we are 23 now in the light of everything that's happened for 24 whatever reason. 25 The seventh, final point concerns the reasons for</p> <p style="text-align: center;">Page 134</p>	<p>1 of such claims at the time the release clause was 2 drafted, I would have sought to have carved them out 3 from the effect of the release clause if it was 4 necessary to do so in order to preserve them. The 5 reason for my making such a statement was that had 6 I known at the time the CDDs were drafted that 7 a currency conversion claim would be available as 8 a non-provable claim in the event there was a surplus, 9 then I believe my own preference at that time would have 10 been to carve them out." 11 My Lord, in our respectful submission, it really is 12 not very far from the mistake of law situation, which 13 led to the original decision in Ex parte James itself. 14 Mr Copley is saying, I didn't know the currency 15 conversion claims existed and if I had I would have 16 carved them out". 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR DICKER: My Lord, the final point, point 8, is that 19 your Lordship was shown -- was referred to the witness 20 statements of Mr Ryan and Mr Goldschmid at tabs 9 and 21 10. I won't take your Lordship through them. They're 22 the witness statements essentially served on behalf of 23 my learned friend's clients. 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR DICKER: My Lord, what your Lordship may find striking</p> <p style="text-align: center;">Page 136</p>

<p>1 when you read them is that although they discuss 2 comments made by Mr Copley, either were or were not 3 made, the one thing you won't find in there is an echo 4 of my learned friend's stance: in other words, this is 5 a contract freely entered into, we knew full well what 6 was going to occur. Effectively saying, as far as we're 7 concerned, there was nothing unfair, and even if 8 everyone else is entitled to avoid the effect of the 9 releases, not us, because the same points don't occur to 10 us. 11 My Lord, unless I can help your Lordship any 12 further. 13 MR JUSTICE DAVID RICHARDS: I don't think so. Can you just 14 give me one moment? (Pause) 15 No. Thank you very much, Mr Dicker. 16 MR ZACAROLI: My Lord, may I just correct one very small 17 point? I wouldn't have taken my Lord to Mr Goldschmid's 18 statement had my learned friend not mentioned it. 19 But paragraphs 17 and 18, I don't rely upon them 20 other than to rebut the point that there's nothing in 21 these statements about the perception of Mr Goldschmid 22 about when entering into the agreements. At 23 paragraphs 17 and 18 he says: 24 "It was my general expectation and understanding 25 that there was to be a release of all of</p> <p style="text-align: center;">Page 137</p>	<p>1 now by reference to the judgment. I don't know whether 2 Mr Zacaroli takes the position that the Court of Appeal 3 judgment is, as it were, neutral so far as the 4 Waterfall II(a) issues are concerned. 5 MR ZACAROLI: My Lord, it is simply an issue we haven't yet 6 had a chance to bottom out, given what we've been doing 7 this week. I doubt there will be anything that -- from 8 our review so far, we don't think there is anything, but 9 if Mr Dicker wants to make a submission, I'll obviously 10 need to respond to that. 11 MR JUSTICE DAVID RICHARDS: Of course. 12 Mr Dicker, I can't even remember actually the point 13 to which it went, but standing now, can you identify 14 anything in the Court of Appeal judgment that you'd say 15 is of assistance or supports your position in relation 16 to Waterfall II(a)? 17 MR DICKER: Standing now, I confess I'm not in a position to 18 develop submissions, but there are points -- 19 MR JUSTICE DAVID RICHARDS: I wouldn't be interested in 20 straws in the wind; I'd only be interested in something 21 that seemed to provide some substantial addition to the 22 submissions already made. 23 MR DICKER: Yes. We say nothing in, I think, the majority 24 of the Court of Appeal is inconsistent with the 25 submissions we were making.</p> <p style="text-align: center;">Page 139</p>
<p>1 a signatory/s/creditor's rights against LBIE." 2 So those paragraphs that -- it does indeed pre-echo, 3 as it were, one of the points I've been making. 4 MR JUSTICE DAVID RICHARDS: Thank you very much. 5 Mr Trower? 6 Discussion 7 MR TROWER: My Lord, I think that concludes, subject to any 8 further questions your Lordship has, the argument 9 in relation to issues 34, 35, 36A and 38. We've parked 10 issue 9 for the reasons that I -- 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR TROWER: -- mentioned at the beginning. 13 The only other point I had is that your Lordship 14 mentioned the point of written submissions in relation 15 to the Court of Appeal judgment, which we obviously 16 haven't had a chance to think about, and whether there's 17 anything that we could helpfully say or usefully say 18 in the light of the position we took. 19 I don't know whether your Lordship had a sort of -- 20 MR JUSTICE DAVID RICHARDS: Well, I must say I hadn't really 21 anticipated that there would be anything in that 22 judgment which would particularly assist in relation to 23 Waterfall II(a), but Mr Dicker made the point that his 24 position was supported by what was said. I don't know 25 whether Mr Dicker just wants quickly to make that point</p> <p style="text-align: center;">Page 138</p>	<p>1 MR JUSTICE DAVID RICHARDS: Nothing inconsistent? 2 MR DICKER: No. There are elements, particularly the 3 possibility of, for example, Bower v Marris being 4 a non-provable claim, given the approach taken by 5 Lord Justice Briggs to the nature of the statutory 6 scheme and the need for judges to effectively add and 7 supplement to the statutory scheme in various respects. 8 My Lord, I know, as it were, I introduced this. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: I'm slightly concerned that we don't turn this 11 effectively into a further round. 12 MR JUSTICE DAVID RICHARDS: So am I. I would absolutely 13 share that. I was only raising it because I wondered 14 whether you had something rather specific in mind. 15 MR DICKER: No, and I wonder -- I don't have instructions on 16 this, but, my Lord, can I suggest that, to avoid 17 satellite litigation and burdening your Lordship further 18 with further material, I think we would be content for 19 your Lordship, as it were, to read the judgment and no 20 doubt draw the conclusions which, if I were making 21 submissions, I would be inviting your Lordship to draw. 22 MR JUSTICE DAVID RICHARDS: I certainly wouldn't begin to 23 construct the submissions you might make to me, 24 Mr Dicker. But no, that's fine. 25 Thank you all very much. In view of the lateness of</p> <p style="text-align: center;">Page 140</p>

1	the hour, I will resist the temptation to give judgment
2	straightaway. I will therefore reserve judgment.
3	(3.45 pm)
4	(The hearing concluded)
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