

<p>1 Wednesday, 20 May 2015</p> <p>2 (10.30 am)</p> <p>3 Submissions by MR DICKER (continued)</p> <p>4 MR DICKER: My Lord, I was dealing with currency conversion</p> <p>5 claims under the CRA and I had just finished dealing</p> <p>6 with the argument that essentially the net financial</p> <p>7 claim only exists for the purposes of receiving</p> <p>8 a dividend from the estate.</p> <p>9 There's just one additional point I wanted to make</p> <p>10 before turning to Wentworth's and the administrators'</p> <p>11 arguments. That is to pick up the position in relation</p> <p>12 to the NTA individuals under the CRA.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR DICKER: As your Lordship knows, our position in relation</p> <p>15 to this is that although they were permitted to sign the</p> <p>16 CRA, it was very much a subsidiary aspect, and the first</p> <p>17 point we make is drawing your Lordship's attention back</p> <p>18 to the conditions for any NTA acceptance, which</p> <p>19 your Lordship will find in schedule 1 to the CRA, that's</p> <p>20 volume 3, page 480.</p> <p>21 It's paragraph 9 of schedule 1:</p> <p>22 "The form of acceptance submitted by an NTA offeree</p> <p>23 to the company should be subject to the following</p> <p>24 condition [the NTA condition]."</p> <p>25 9.1.1:</p> <p style="text-align: center;">Page 1</p>	<p>1 occurred. Possibly (v) occurred, I don't know.</p> <p>2 MR DICKER: Well, one certainly got to a stage which</p> <p>3 presumably the administrator decided not to promise</p> <p>4 date.</p> <p>5 MR JUSTICE DAVID RICHARDS: That's what I'm wondering. They</p> <p>6 would have to notify the NTA offerees.</p> <p>7 MR DICKER: That's right, and I think that's the piece of</p> <p>8 evidence that --</p> <p>9 MR JUSTICE DAVID RICHARDS: What one deduces from this is so</p> <p>10 far as the NTA signatories were concerned, the CRA was</p> <p>11 there for the purposes of the scheme only, not for any</p> <p>12 distribution in the administration or subsequent</p> <p>13 liquidation. I had assumed, I am afraid wrongly, the</p> <p>14 condition was something to do with a percentage signing</p> <p>15 up.</p> <p>16 MR DICKER: My Lord, as I understand it, the percentage</p> <p>17 related to the TAs --</p> <p>18 MR JUSTICE DAVID RICHARDS: Well, that I understand.</p> <p>19 MR DICKER: And so far as the NTAs were concerned it was</p> <p>20 conditional on the NTA condition being satisfied.</p> <p>21 MR JUSTICE DAVID RICHARDS: So it was a prelude, it was part</p> <p>22 of the machinery for a scheme or a CVA.</p> <p>23 MR DICKER: That would be one way of looking at it. One</p> <p>24 starts with the CRA --</p> <p>25 MR JUSTICE DAVID RICHARDS: You say it would be one way of</p> <p style="text-align: center;">Page 3</p>
<p>1 "One of the following events having occurred."</p> <p>2 And those events are effectively ultimately</p> <p>3 a decision not to have either a scheme of arrangement or</p> <p>4 a CVA, or the court holding for one reason or another</p> <p>5 either a scheme or a CVA cannot take place. So it's</p> <p>6 essentially a negative. If there was a scheme or a CVA,</p> <p>7 then the whole NTA process would simply be irrelevant.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes. I see.</p> <p>9 MR DICKER: And 9.2:</p> <p>10 "Any form of acceptance submitted by an NTA offeree</p> <p>11 shall not be valid and effective unless and until the</p> <p>12 NTA condition is satisfied in the absolute opinion of</p> <p>13 the company."</p> <p>14 MR JUSTICE DAVID RICHARDS: So was this the condition?</p> <p>15 I mean ... Was there any other condition?</p> <p>16 MR DICKER: I don't believe so.</p> <p>17 MR JUSTICE DAVID RICHARDS: Because I thought Mr Trower told</p> <p>18 me that the CRA did not become unconditional and</p> <p>19 therefore didn't bind(?) NTA signatories.</p> <p>20 MR DICKER: Well, I assume --</p> <p>21 MR JUSTICE DAVID RICHARDS: Maybe -- sorry, forgive me, go</p> <p>22 on.</p> <p>23 MR DICKER: I assume that was because the NTA condition --</p> <p>24 MR JUSTICE DAVID RICHARDS: Well, I'm just looking for some</p> <p>25 elucidation on that because none of (i) to (iv)</p> <p style="text-align: center;">Page 2</p>	<p>1 looking at it but is there actually any other way of</p> <p>2 looking at it?</p> <p>3 MR DICKER: No. Well, save this, there may still be</p> <p>4 circumstances in which, assuming -- it's probably wrong</p> <p>5 because if the NTA is satisfied, then presumably there</p> <p>6 would be a scheme or a CVA and that's how it would be</p> <p>7 dealt with.</p> <p>8 MR JUSTICE DAVID RICHARDS: Mr Trower will no doubt tell me</p> <p>9 at some point how the condition failed. I'd just like</p> <p>10 to have that.</p> <p>11 MR DICKER: That was the first point. The second point is</p> <p>12 if your Lordship goes back to page 333, it's clause 10</p> <p>13 of the CRA itself, the bottom of 333. My learned friend</p> <p>14 Mr Trower took your Lordship to this. Clause 10 at the</p> <p>15 bottom:</p> <p>16 "Priorities of the company under this agreement.</p> <p>17 The company may, in its absolute discretion ..."</p> <p>18 And then:</p> <p>19 "(i) determine the asset claims ... in respect of TA</p> <p>20 signatories first, prior to determining the net</p> <p>21 contractual positions of the NTA signatories;</p> <p>22 "(ii) deal with the disputes from TA signatories</p> <p>23 first, prior to those of NTA signatories."</p> <p>24 Et cetera. So even if one got to the stage of</p> <p>25 having the NTA condition satisfied, the priority, as one</p> <p style="text-align: center;">Page 4</p>

<p>1 would expect, is dealing with trust assets first.</p> <p>2 The third point is that we were informed by the</p> <p>3 administrators overnight, and no doubt Mr Trower can</p> <p>4 confirm this, that only 60 NTA offerees submitted a form</p> <p>5 of acceptance. And we're told that none ultimately</p> <p>6 became signatories. Presumably because the NTA</p> <p>7 condition wasn't satisfied. But we're not told -- and</p> <p>8 it may not matter -- whether any of the NTA signatories</p> <p>9 who submitted offers actually had their claims</p> <p>10 ascertained.</p> <p>11 The fourth point is a small one, but just to make</p> <p>12 good a point I made to your Lordship yesterday. There</p> <p>13 is one sentence in the evidence that suggests that at</p> <p>14 least some creditors may have found it difficult trying</p> <p>15 to sign up to the NTA. If your Lordship goes to</p> <p>16 bundle 2, tab 11, it's the second witness statement of</p> <p>17 Ms Browning. Paragraph 8, she says:</p> <p>18 "Mr Pearson appears to agree the principal objective</p> <p>19 of the CRA was to expedite the return of trust assets."</p> <p>20 Then she says it's essential to calculate a client's</p> <p>21 net contractual position. Then it's just the last</p> <p>22 sentence where -- two sentences:</p> <p>23 "In support of the view this was the principal</p> <p>24 objective of the CRA, I am aware that certain funds were</p> <p>25 not able to accede because they did not have trust</p> <p style="text-align: center;">Page 5</p>	<p>1 a scheme or a CVA. And it's only if effectively you</p> <p>2 don't have a scheme or a CVA, the fallback position is</p> <p>3 then effectively agreement of the claims of an NTA</p> <p>4 signatory, which can be then fed into a distribution</p> <p>5 process.</p> <p>6 MR JUSTICE DAVID RICHARDS: I see.</p> <p>7 MR DICKER: It's for that reason, given we say it comes so</p> <p>8 low in the scheme of things, it would obviously be wrong</p> <p>9 to construe the CRA effectively by reference to this as</p> <p>10 opposed to primarily its principal purpose, being to</p> <p>11 return trust assets.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR DICKER: My Lord, that's that point. Then turning to</p> <p>14 Wentworth's position in relation to currency conversion</p> <p>15 claims under the CRA. Its position, as we understand</p> <p>16 it, is that if your claim is originally denominated in</p> <p>17 US dollars, you have a currency conversion claim still.</p> <p>18 But if it wasn't, you don't. In other words, everyone</p> <p>19 else loses any currency conversion claim which they</p> <p>20 otherwise have had, but do not get a US dollar claim</p> <p>21 giving rise to a currency conversion claim in exchange.</p> <p>22 Now, we say that has some obviously odd</p> <p>23 consequences. Assume a creditor whose claim was</p> <p>24 denominated not in US dollars, but say in euros or</p> <p>25 Swiss francs, those currencies also appreciated against</p> <p style="text-align: center;">Page 7</p>
<p>1 assets."</p> <p>2 That's not developed, I can't take it any further,</p> <p>3 but one might not be surprised if the administrators'</p> <p>4 emphasis on dealing with TA signatories first</p> <p>5 effectively discouraged NTA signatories from bothering</p> <p>6 to submit or try and become signatories to the CRA.</p> <p>7 Can I just go back? I think I may have said yes to</p> <p>8 your Lordship when in fact I should have said no. It's</p> <p>9 the NTA condition, which is bundle 3, page 480. We have</p> <p>10 an NTA condition, it's:</p> <p>11 "One of the following events having occurred."</p> <p>12 And the event is --</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes, it's the other way round</p> <p>14 from the way I thought. It's actually not for a scheme.</p> <p>15 That's the point. Yes, sorry. I read it too quickly.</p> <p>16 MR DICKER: My Lord, I was wrong too.</p> <p>17 MR JUSTICE DAVID RICHARDS: I follow. It's designed for</p> <p>18 there not to be a scheme, okay. Right, thank you.</p> <p>19 MR DICKER: So when one thinks about the position of NTA</p> <p>20 signatories, one starts with the idea that the CRA is</p> <p>21 primarily concerned with returning trust assets. One</p> <p>22 knows the calculation mechanism one needs to do to</p> <p>23 achieve that. What the administrators appear, my</p> <p>24 learned friend Mr Trower said yesterday, to have had in</p> <p>25 mind at this stage at least was the possibility of</p> <p style="text-align: center;">Page 6</p>	<p>1 sterling. Indeed, the Swiss franc rather more as</p> <p>2 a matter of fact than US dollars. On Wentworth's case</p> <p>3 those creditors would lose their currency conversion</p> <p>4 claim, they wouldn't get a currency conversion claim as</p> <p>5 a result of exchanging essentially their old claim for</p> <p>6 a new US dollar denominated claim.</p> <p>7 We say that doesn't make an enormous amount of sense</p> <p>8 under the terms of the CRA. How do you give up your old</p> <p>9 claim save in exchange for a new claim denominated in US</p> <p>10 dollars?</p> <p>11 Now, Wentworth's answer appears to be that the</p> <p>12 reason why they do not get currency conversion claims in</p> <p>13 US dollars is because it's a necessary attribute of the</p> <p>14 dollar claim agreed under the CRA that it must be</p> <p>15 converted back into sterling. That was my learned</p> <p>16 friend Mr Zacaroli's submission, day 2, page 109, line</p> <p>17 19 to page 110, line 3.</p> <p>18 If that's right, one may ask, why isn't exactly the</p> <p>19 same point capable of being made for those creditors who</p> <p>20 had underlying claims in US dollars, but on my learned</p> <p>21 friend's submissions gave them up for a US dollar claim</p> <p>22 under the CRA? Why can't you say equally in relation to</p> <p>23 them, well, a necessary attribute of the US dollar claim</p> <p>24 that they obtained under the CRA, just like everyone</p> <p>25 else, was also that it had to be converted back into</p> <p style="text-align: center;">Page 8</p>

<p>1 sterling? In other words, if what's significant, if 2 what causes the euro and the Swiss franc creditors not 3 to have a currency conversion claim is that although 4 they get a US dollar claim, it needs to be converted 5 back into sterling, why isn't that equally true of US 6 dollar creditors who acquire a new US dollar claim? 7 There's simply an inconsistency there, and the 8 explanation doesn't make sense.</p> <p>9 So we say there really are only two possibilities. 10 The first of which is the CRA released all old claims 11 and gave everybody a new claim denominated in US 12 dollars, or it did not because, for example, one 13 concludes the exercise was just for administrative 14 convenience, a way of working out what the net position 15 was, in which event everyone should be able to rely on 16 the underlying currency of entitlement.</p> <p>17 Wentworth's position in relation to the euro and 18 Swiss franc creditors is effectively that they lost 19 their old claims, they didn't get in exchange a claim 20 which the CRA apparently gave them. We say that just 21 doesn't make any sense.</p> <p>22 So far as Wentworth's argument that the reason why 23 the euro and yen creditors, Swiss franc creditors, don't 24 get a currency conversion claim is because the claim 25 they get must be converted back into sterling, I have</p> <p style="text-align: center;">Page 9</p>	<p>1 MR JUSTICE DAVID RICHARDS: I think Mr Trower's made their 2 position clear!</p> <p>3 MR DICKER: So far as the argument proffered to 4 your Lordship by the administrators is concerned, the 5 argument is that the CRA deprived all creditors of their 6 underlying right to payment in a particular currency and 7 instead effectively gave them a right solely to payment 8 in sterling. So they've lost their currency conversion 9 claims.</p> <p>10 We say that's wrong for the following reasons. 11 Firstly, the CRA is expressed to give you a new claim 12 denominated in US dollars. Secondly, there is no 13 express reference to sterling anywhere in the CRA. 14 Thirdly, the CRA does not even contain a distribution 15 mechanism which provides for such claims to be converted 16 into sterling. The nearest you get is 4.4.2, stating 17 that creditors would have an ascertained claim for such 18 amount as determined, and as your Lordship knows, the 19 ascertained claim is something which could subsequently 20 be fed into a subsequent distribution mechanism.</p> <p>21 My Lord, but even assuming, even if it were correct 22 to read the CRA as if it incorporated by reference 23 effectively a distribution mechanism in accordance with 24 the Insolvency Act and Rules, why would that mean 25 creditors had released any currency conversion claim</p> <p style="text-align: center;">Page 11</p>
<p>1 essentially dealt with that already.</p> <p>2 The mere fact your net financial claim may in due 3 course be fed into a distribution mechanism cannot 4 deprive you of a currency conversion claim, and one can 5 see that from Wentworth's own approach to creditors 6 whose claims were originally denominated in US dollars. 7 So that's Wentworth's position. We say suggesting that 8 US dollar creditors have a currency conversion claim, 9 which they accept and we agree with, but that somehow 10 the euro, the Swiss franc and the yen creditors lose any 11 currency conversion claims they would have had and don't 12 get in exchange a US dollar claim, doesn't appear to 13 make sense under the terms of the CRA.</p> <p>14 The administrators' position we say is even more 15 surprising. Their position, as we understand it, is the 16 CRA deprived all creditors --</p> <p>17 MR JUSTICE DAVID RICHARDS: To be fair to Mr Trower and the 18 administrators, I think it's unfair to describe it as 19 the administrators' position. I think that the 20 administrators and Mr Trower feel they are duty-bound to 21 advance their submission because no one else is. I just 22 want to make that clear.</p> <p>23 MR DICKER: My Lord, I'm happy to proceed on that basis. 24 I described it as their position because it's set out in 25 their position paper as their position.</p> <p style="text-align: center;">Page 10</p>	<p>1 they would otherwise have had? Why wouldn't that, 2 effectively, incorporation by reference operate in 3 exactly the same way as the Insolvency Act and Rules? 4 In other words, in accordance with the effect of rule 5 2.86, ie converted for the purposes of proof only.</p> <p>6 So if the underlying scheme doesn't deprive you of 7 a currency conversion claim, why should 8 a cross-reference in the CRA, even assuming that that's 9 how one construes it, operate to do so?</p> <p>10 So far as the background materials are concerned, 11 our submission is a short one. There's nothing in the 12 circular, the reader's guide or any of the other 13 materials that suggests that the CRA was intended to 14 have the effect for which either Wentworth or the 15 administrators contend. Your Lordship's already seen 16 the references. There are numerous references to the 17 CRA giving you a new claim, there are numerous 18 references to claims under the CRA being denominated in 19 US dollars. There's absolutely no suggestion anywhere, 20 take the majority creditors, the US dollar denominated 21 creditors, that they would be giving up a currency 22 conversion claim by entering into the CRA.</p> <p>23 MR JUSTICE DAVID RICHARDS: I take it that rule 2.86 is 24 mandatory? It's not something that creditors and 25 administrators can contract out? Is that right or not?</p> <p style="text-align: center;">Page 12</p>

<p>1 MR DICKER: My Lord, it is certainly a mandatory rule. One 2 could imagine a scheme varying creditors' rights under 3 the rules, although, as your Lordship said yesterday, 4 effectively questions of class and fairness would then 5 depend critically on creditors' underlying rights, and 6 for these purposes their underlying rights would include 7 reference to 2.86.</p> <p>8 MR JUSTICE DAVID RICHARDS: This is the difficulty I have 9 with the whole idea of the new claim. I still have 10 difficulty understanding how, if I have a yen claim 11 at the date of administration, this can by a subsequent 12 contract be converted into a dollar claim, which is then 13 converted into sterling for the purposes of proof. The 14 rule, I think, applies on the basis that you convert the 15 yen claim into sterling. And I don't see how a new 16 right or obligation, new right created by a new contract 17 post-administration, can give rise to a provable debt, 18 unless it's simply a compromise of an existing right, in 19 which case that's a very different question. But 20 I don't think a compromise could involve a departure 21 from rule 2.86.</p> <p>22 MR DICKER: My Lord, two points. Firstly, obviously, from 23 the perspective of the Senior Creditor Group what is 24 critical is the question of whether or not those whose 25 claims were originally denominated in US dollars gave up</p> <p style="text-align: center;">Page 13</p>	<p>1 to see how those could have resulted effectively in 2 creditors restating their claims in some other currency, 3 giving rise to rights which they otherwise wouldn't have 4 had.</p> <p>5 So there may conceivably be a distinction in this 6 respect between the CRA on the one hand and the CDDs, 7 driven essentially because they have slightly different 8 purposes and arise in slightly different contexts.</p> <p>9 MR JUSTICE DAVID RICHARDS: I see that because for the 10 purposes of distribution of trust assets, clearly the 11 Insolvency Rules don't apply. You're not concerned with 12 those. So as you rightly say, you could have some quite 13 different approach to the calculation of claims and so 14 on for that purpose.</p> <p>15 MR DICKER: And if one tries to imagine how the 16 administrators may have been thinking at the time, they 17 may have been thinking that given the majority of the 18 assets were in US dollars, the majority of the claims 19 were in US dollars, they may not have even thought there 20 were any non-US dollar claimants at all, as 21 your Lordship has seen from the reference in the surplus 22 proposal I showed your Lordship yesterday. In that 23 context, it may not be so surprising if for the purposes 24 of distributing, making sure everyone gets a fair share 25 of the trust assets, this approach was taken.</p> <p style="text-align: center;">Page 15</p>
<p>1 a currency conversion claim which they otherwise would 2 have had. If your Lordship is right and effectively one 3 can't have a new claim in a full sense, and you have to 4 look back to your underlying rights, then plainly their 5 currency conversion claim is protected.</p> <p>6 The only way one could reach a different conclusion 7 is if what one effectively said was the valuation that 8 was being done pursuant to the CRA was effectively 9 a valuation and a compromise of creditors' claims, but 10 for whatever reason the appropriate currency in which to 11 express the quantified claim was, and the agreement 12 between the parties was, that it would be US dollars as 13 opposed to --</p> <p>14 MR JUSTICE DAVID RICHARDS: Yes, I see that.</p> <p>15 MR DICKER: My Lord, in the context of the CRA, where one's 16 focusing essentially on returning trust assets rather 17 than simply on the question of proof, where one needs 18 a common currency to ensure that everyone has 19 effectively a pro rata share of the trust assets, one 20 can just about see why that might be an appropriate 21 course. Now, obviously, your Lordship's absolutely 22 right, when one comes to the CDDs, if, as is common 23 ground between the parties, those were essentially 24 intended as a speedier and more final proof mechanism, 25 I absolutely agree with your Lordship, it's much harder</p> <p style="text-align: center;">Page 14</p>	<p>1 What we certainly do agree with your Lordship on 2 is that sort of analysis, which may be applicable in 3 a trust context, obviously breaks down entirely when one 4 comes to thinking about all we're doing is proving in 5 a quicker and more final way. You would not expect 6 in the latter context, as your Lordship said, 7 a departure from the effect of rule 2.86.</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR DICKER: So that's currency conversion claims. Can 10 I turn to statutory interest under the CRA? My Lord, as 11 your Lordship knows, the Senior Creditor Group's 12 position is that signatories under the CRA are entitled 13 to interest from the date of administration in 14 accordance with their underlying contractual rights or 15 at the Judgments Act rate if that is greater.</p> <p>16 We say the starting point, again, is the purpose of 17 the CRA, to ascertain claims for the purposes of 18 returning trust assets. There's no reason why the need 19 to determine the net balance at the relevant time should 20 have affected creditors' rights in respect of interest 21 that would otherwise have accrued, continued to accrue 22 in the future. In other words, to return trust assets 23 you obviously had to take a time, identify the net 24 contractual position at that time to make sure you knew 25 whether the creditor was a debtor or a creditor of LBIE,</p> <p style="text-align: center;">Page 16</p>

<p>1 to make sure it got a fair share of the trust assets. 2 That process does not require any alteration to parties' 3 rights in respect of interest for the future. It's just 4 striking a balance at that date. 5 Now, in looking at how the CRA deals with interest, 6 we say one needs to look at interest at two separate 7 stages. The first stage concerns determining the 8 close-out amount, ie as part of the valuation process. 9 The second stage concerns interest on the net financial 10 claim, which is the outcome of that valuation process. 11 So two exercises are going on here. The first is 12 working out what the net position is, close-out amount 13 leading to the net contractual position. That's one 14 exercise. That produces a net financial claim, the 15 second issue concerns interest on that net financial 16 claim. Your Lordship needs to look at both. 17 So far as interest as part of the close-out amount 18 is concerned, if your Lordship again takes up the CRA, 19 bundle 3, and starts with clause 21.2. 21.2, again, 20 your Lordship's seen this. 21.2.1: 21 "Subject to the other provisions of this clause -- 22 MR JUSTICE DAVID RICHARDS: Sorry, it's? 23 MR DICKER: 21.2.1. Page 353. 24 MR JUSTICE DAVID RICHARDS: I was looking in the summary. 25 Yes.</p> <p style="text-align: center;">Page 17</p>	<p>1 20.4, and the relevant one is 20.4.7 on page 352: 2 "In determining the close-out amount in respect of 3 a financial contract, no interest shall accrue on any 4 unpaid liability of the company from the administration 5 date, save to the extent that such interest would accrue 6 under rule 2.88 of the Insolvency Rules." 7 So in determining the close-out amount, you 8 effectively start simply with what the parties are 9 entitled to, the overriding provision to the extent it 10 operates at all caps that at what you would have 11 received in accordance with rule 2.88. 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR DICKER: Now, so far, there is absolutely nothing to 14 suggest that in determining the close-out amount, you 15 ignore the parties' contractual rights to interest. 16 Indeed, it would be commercially extraordinary if, when 17 you take the net balance, you ignored the parties' 18 contractual rights to interest. What this does is 19 basically say you take them into account, the only 20 restriction imposed by 20.4.7 is they can't be more than 21 you would have got under rule 2.88. 22 So nothing here which in any way suggests that 23 creditors are limited to, for example, just the 24 Judgments Act rate. This is plainly intended to cover 25 every contractual right which the party had, whether</p> <p style="text-align: center;">Page 19</p>
<p>1 MR DICKER: 21.2.1: 2 "Subject to the other provisions of this clause 21, 3 in respect of each financial contract the close-out 4 amount shall be determined in accordance with the 5 relevant contractual valuation provisions as modified 6 and supplemented by the overriding valuation 7 provisions." 8 So starting with the contractual valuation 9 provisions, going up, 21.1: 10 "In respect of each financial contract, contractual 11 valuation provisions shall be any terms in such 12 financial contract which provide for the calculation of 13 an amount or amounts payable by one party to the other 14 as a result of the termination of such financial 15 contract." 16 And that can obviously include a provision for 17 interest. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: In other words, when calculating the close-out 20 amount, obviously part of the calculation of the net 21 position may include interest to which one or other 22 party is entitled. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR DICKER: That's obviously subject to the overriding 25 valuation provisions, and your Lordship has those at</p> <p style="text-align: center;">Page 18</p>	<p>1 that right is expressed in terms of a percentage, 2 compounding, or indeed the ability to say that a payment 3 he's received in the past, ie prior to the close-out 4 amount being calculated, was a sum which he was entitled 5 to appropriate first to interest. 6 That's determination of the close-out amount. The 7 other stage obviously is when you get to interest on the 8 net financial claim. That's dealt with, again as 9 your Lordship knows, separately in 25.1. It's the last 10 line, 25.1, on page 362: 11 "For the avoidance of doubt no interest shall accrue 12 on any net financial claim, save to the extent provided 13 in rule 2.88 of the Insolvency Rules." 14 MR JUSTICE DAVID RICHARDS: To go over rather old ground, 15 the close-out amounts are determined in accordance with 16 20.1, subject to the overriding valuation which you have 17 shown me. 18 MR DICKER: Yes. 19 MR JUSTICE DAVID RICHARDS: If you have more than one 20 contract, there's a netting off that goes on, that's 21 under some other clause, that you've got the close-out 22 amount, and then that produces a net contractual 23 position, which, if it's a positive number, is a net 24 financial claim? 25 MR DICKER: Yes. And that net financial claim accrues</p> <p style="text-align: center;">Page 20</p>

<p>1 interest, although it's worded using the language: 2 "For the avoidance of doubt, no interest shall 3 accrue on any net financial claim save to the extent 4 provided in rule 2.88." 5 That net financial claim accrues interest in 6 accordance with rule 2.88 of the Insolvency Rules. You 7 don't get more than that, you get what you would get 8 under rule 2.88. 9 MR JUSTICE DAVID RICHARDS: I'm finding it a bit puzzling 10 really, because we get interest accruing under rule 2.88 11 coming in twice, once in the close-out amount and then 12 in the net financial claim. So how do these mesh 13 together? 14 MR DICKER: Plainly, one can't have double counting, so to 15 the extent your interest is taken into account in 16 determining close-out amount and the net contractual 17 position, the interest you would be entitled to on the 18 result of that, ie the net financial claim, can only run 19 from essentially that. 20 MR JUSTICE DAVID RICHARDS: The date of that determination. 21 But if the net financial claim is being ascertained in 22 part for the purposes of proof in a distribution amongst 23 unsecured creditors, it is including an impermissible 24 element. That's to say post-administration interest. 25 Because that comes in under the determination of the</p> <p style="text-align: center;">Page 21</p>	<p>1 a sum. Now, the basic approach to quantification, as 2 you would expect in the trust context, is everything is 3 included. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: When you get to the stage of a subsequent 6 distribution because there isn't a payment mechanism for 7 unsecured claims in the CRA, when you come to 8 a subsequent distribution obviously the circumstances in 9 which you'll be entitled to payment of post-insolvency 10 interest will be determined by the rules governing their 11 distribution mechanism. 12 MR JUSTICE DAVID RICHARDS: Yes. So it may be because of 13 some provisions which I don't have in mind at the 14 moment, this calculation of close-out amount does not 15 feed into the ascertainment of a provable debt. 16 MR DICKER: It does so in the sense that it feeds into the 17 determination of the net ascertained claim. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR DICKER: And the net ascertained claim can subsequently 20 be fed into a distribution mechanism. 21 MR JUSTICE DAVID RICHARDS: Without any modification to it? 22 MR DICKER: Well, presumably what the draftsman had in mind 23 was -- in a sense that's dealt with by 20.4.7 and the 24 last sentence of 25.1. 25 MR JUSTICE DAVID RICHARDS: 25?</p> <p style="text-align: center;">Page 23</p>
<p>1 close-out amount, doesn't it? 2 MR DICKER: Yes, and presumably the draftsman's thinking 3 in that respect was -- there's two separate issues, one 4 of which is how much are you entitled to, and obviously 5 there's a second issue, which is in what circumstances 6 are you entitled to payment of that back from LBIE. 7 You need to do both because for the purposes of 8 working out how much trust assets a party was entitled 9 to -- 10 MR JUSTICE DAVID RICHARDS: Well, I don't have any 11 difficulty about the trust asset aspect of this because 12 it seems to me that's in a sense an open field. The 13 difficulty I have is just in understanding how this 14 works in relation to a distribution in the 15 administration. 16 MR DICKER: The answer in a sense comes back in our 17 submission to a point I made previously. There isn't 18 a distribution mechanism in the CRA. 19 MR JUSTICE DAVID RICHARDS: I suppose if the matter which is 20 concerning me has substance, and it may be that it's 21 wrong for some reason, you would say, well, that 22 supports your approach to it, that this isn't concerned 23 with distributions, fixing amounts for distributions? 24 MR DICKER: Yes, but in our submission in a sense there 25 isn't an issue here. What one is doing is quantifying</p> <p style="text-align: center;">Page 22</p>	<p>1 MR DICKER: 20.4.7, your Lordship's seen, and 25.1. In 2 other words ... 3 MR JUSTICE DAVID RICHARDS: Just go back to the close-out 4 amount. Supposing you have a contract which 5 automatically terminated on 15 September, so what has to 6 be determined is a close-out amount as at that date, and 7 the non-defaulting party is entitled to calculate its 8 loss, which it does, it comes in at \$1 million. And 9 that is then applied -- let's assume that that can be 10 done for the purposes of this agreement -- but subject 11 to the overriding valuation provisions, one of which is 12 20.4.7, which says that no interest will accrue on that 13 million dollars from the administration date save to the 14 extent that such interest would accrue under rule 2.88 15 of the Insolvency Rules. 16 So my question then is: well, does any interest 17 accrue on that million dollars under 2.88, to which 18 I think your answer is yes, interest at either the 19 judgment rate or the contractual rate if higher. 20 MR DICKER: That's what you would certainly assume the 21 parties intended so far as determining net position for 22 the return of trust assets was concerned. 23 MR JUSTICE DAVID RICHARDS: Yes. But it would not produce 24 an amount for which the creditor could prove? 25 MR DICKER: No. No, certainly --</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: It's fair to say that -- I mean, the CRA,</p> <p>3 I think, as everyone acknowledges, is a very complicated</p> <p>4 document, no doubt because it needed to deal with a very</p> <p>5 complicated series of issues. I think the draftsman</p> <p>6 did, if I may say, remarkably well in achieving what he</p> <p>7 did. There are certainly, as your Lordship saw</p> <p>8 yesterday, some aspects of it which aren't entirely easy</p> <p>9 to understand. The new claim is one. The reference</p> <p>10 I showed your Lordship, for example, in clause 33 to</p> <p>11 LBIE effectively being able to pursue a counterparty by</p> <p>12 reference to the underlying currency is another.</p> <p>13 MR JUSTICE DAVID RICHARDS: Mr Dicker, I think what I'm</p> <p>14 interested in understanding is whether, if under the</p> <p>15 terms of the CRA, if the net financial claim becomes --</p> <p>16 whatever the expression is -- an ascertained ... I've</p> <p>17 forgotten what the term is now.</p> <p>18 MR DICKER: An ascertained claim.</p> <p>19 MR JUSTICE DAVID RICHARDS: Just show me the link, just</p> <p>20 remind me -- I appreciate I've seen it -- how does a net</p> <p>21 financial claim become an ascertained claim? What is</p> <p>22 the provision that does that? Well, I suppose it's ...</p> <p>23 I mean, actually, 25.1 tells us that the net contractual</p> <p>24 provision will constitute an ascertained unsecured claim</p> <p>25 in the winding-up. Then is there something else that</p> <p style="text-align: center;">Page 25</p>	<p>1 net financial claim says you get interest in accordance</p> <p>2 with rule 2.88, similarly no logic in saying: what you</p> <p>3 get on your net financial claim is only Judgments Act</p> <p>4 rate as opposed to contractual interest as well.</p> <p>5 In that respect, we do say it's important that 25.1</p> <p>6 refers to rule 2.88 as a whole. 2.88 obviously includes</p> <p>7 2.88.9, which entitles you to the greater of the</p> <p>8 Judgments Act rate and rate applicable apart from the</p> <p>9 administration. And we say that for the purposes of</p> <p>10 interest -- effectively, in determining the amount of</p> <p>11 interest under 2.88.9, when you have the reference to</p> <p>12 the rate applicable to the debt apart from the</p> <p>13 administration, to determine that you need to look at</p> <p>14 the rate payable pursuant to the relevant underlying</p> <p>15 financial contract or contracts.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR DICKER: And there's no difficulty in doing so. That was</p> <p>18 the rate applicable at the point when the CRA was</p> <p>19 entered into. It's the rate which has just been taken</p> <p>20 into account in determining the close-out amount and</p> <p>21 it's the rate that would have applied if the</p> <p>22 administration order had never been made.</p> <p>23 Now, we say the reference simply to 2.88 makes no</p> <p>24 sense if the draftsman intended you wouldn't get</p> <p>25 interest at the greater amount, you'd simply get</p> <p style="text-align: center;">Page 27</p>
<p>1 actually --</p> <p>2 MR DICKER: There is, as I showed your Lordship yesterday,</p> <p>3 405, 60.1.5.</p> <p>4 MR JUSTICE DAVID RICHARDS: "If it exceeds ...", yes,</p> <p>5 you have that set-off. Then, "Shall become an</p> <p>6 ascertained claim".</p> <p>7 Everyone's telling you 62. Yes, there it is.</p> <p>8 MR DICKER: And there is a similar provision in 60.2.4.</p> <p>9 MR JUSTICE DAVID RICHARDS: Anyway, it's not really for you</p> <p>10 to provide the answer to this, but I'm raising the point</p> <p>11 so others can in due course.</p> <p>12 MR DICKER: And our point, as your Lordship knows,</p> <p>13 in relation to the CRA is straightforward. One has</p> <p>14 determination of a close-out amount. You wouldn't</p> <p>15 expect as part of that determination the creditors to be</p> <p>16 deprived of contract rights to interest and to be</p> <p>17 limited simply to Judgments Act rate interest. There is</p> <p>18 no logic in determining the net position for the</p> <p>19 purposes of returning trust assets, to say: I'll</p> <p>20 determine the net position but I'm only going to give</p> <p>21 you interest in determining the close-out amount at the</p> <p>22 Judgments Act rate rather than the contractual rate.</p> <p>23 That's our short submission in relation to that.</p> <p>24 We say, similarly, when the close-out position</p> <p>25 ultimately results in the net financial claim, and the</p> <p style="text-align: center;">Page 26</p>	<p>1 Judgments Act rate interest. Now, the point that's made</p> <p>2 against us is that that doesn't work because although</p> <p>3 your right to statutory interest is preserved, when you</p> <p>4 come to apply rule 2.88.9 and you ask which is the</p> <p>5 greater of the Judgments Act rate and the rate</p> <p>6 applicable to the debt apart from administration, it has</p> <p>7 to be, so the argument goes, the Judgments Act rate</p> <p>8 because there is no longer an underlying financial</p> <p>9 contract; and the submission effectively has to be it's</p> <p>10 impossible to look back therefore to the underlying</p> <p>11 financial contract to give you the relevant rate.</p> <p>12 So although the draftsman appears to have given you</p> <p>13 statutory interest in its full sense, actually, because</p> <p>14 you've given away, you've released the contract which</p> <p>15 contains the rate to which you're contractually</p> <p>16 entitled, actually, so the argument goes, under 2.88.9,</p> <p>17 it can only ever be Judgments Act rate. We say that's</p> <p>18 plainly not what the draftsman intended. There is no</p> <p>19 such conceptual problem and one can see that plainly</p> <p>20 from other provisions in the CRA. For example,</p> <p>21 provisions dealing with the obligation of a signatory to</p> <p>22 pay interest to LBIE, in other words the other side of</p> <p>23 the coin.</p> <p>24 Just to show your Lordship how this works, if</p> <p>25 your Lordship goes to clause 25.2, page 362:</p> <p style="text-align: center;">Page 28</p>

<p>1 "A net contractual position in respect of 2 a signatory expressed as a negative number will 3 represent an amount due and owing by that signatory to 4 the company. Interest shall accrue daily in respect of 5 such amount from the administration date on any gross 6 uncollateralised liability and be calculated as the net 7 financial interest amount." 8 Net financial interest amount is dealt with in 9 25.3.1: 10 "A net financial interest amount in respect of any 11 date for which it is required to be determined is an 12 amount determined by the company that is equal to the 13 amount of gross uncollateralised liability interest." 14 Now, again, following the definitions, if 15 your Lordship goes to the right-hand page, 25.3.2: 16 "The gross uncollateralised liability interest shall 17 be an amount of interest on the gross uncollateralised 18 liability calculated on the basis at the then prevailing 19 applicable rate from the administration date until the 20 date on which such gross uncollateralised liability is 21 reduced to zero." 22 And then in (iii), effectively the point of the 23 various provisions I have been showing your Lordship: 24 "The applicable rate means a simple rate of interest 25 equal to the lesser of (a) US dollar LIBOR plus 1 per</p> <p style="text-align: center;">Page 29</p>	<p>1 case I advanced to my Lord yesterday. It's not the case 2 in our skeleton. We've accepted on the CRA that the 3 right to statutory interest includes the right under 4 2.88.9 to the contractual rate if higher than the 5 Judgments Act rate. Our only case on interest and the 6 CRA is you don't get more than 2.88 entitles you to, so 7 the non-provable claim if it exists has gone. 8 MR JUSTICE DAVID RICHARDS: So I think this is issue 38, 9 isn't it? 10 MR ZACAROLI: 35. 11 MR JUSTICE DAVID RICHARDS: That arises on the CDDs, not on 12 the CRA. 13 MR ZACAROLI: On some of the CDDs. My learned friend 14 Mr Trower I think does make this argument. 15 MR JUSTICE DAVID RICHARDS: He does? Right. 16 MR TROWER: My Lord, it was raised by Mr Zacaroli originally 17 in his position paper and we thought your Lordship, with 18 respect, ought to decide it, even though it was no 19 longer being argued by Wentworth. 20 MR JUSTICE DAVID RICHARDS: Thank you, right. 21 MR DICKER: Your Lordship's quite right and I apologise to 22 my learned friend. The point I've just been addressing 23 is the submission or an argument made by the 24 administrators and was the position taken by Wentworth. 25 So I've dealt with that.</p> <p style="text-align: center;">Page 31</p>
<p>1 cent, and (b) [and this is the relevant bit] the highest 2 rate of interest applicable to any sum due from that 3 signatory to the company where the signatory is not the 4 defaulting party, as specified in any financial contract 5 between that signatory and the company." 6 So the long and short of it is the draftsman has had 7 no difficulty when he's been looking at the other side 8 of the coin in talking about interest owed by the 9 signatory to LBIE, defining that by reference to rates 10 of interest under a financial contract between that 11 signatory and the company. Although on Wentworth's 12 argument, LBIE, just like the signatory, released all 13 its rights and obligations under the old financial 14 contracts. 15 So if Wentworth's argument is right, it's difficult 16 to see how the draftsman could have logically included 17 this provision in 25.3. We say there's absolutely no 18 difficulty when you're looking at 2.88 and you're asking 19 what is the rate applicable to the debt apart from the 20 administration and saying, well, this is essentially 21 a quantification and compromise of your underlying 22 claims. It is, of course, the amount of interest you 23 were entitled to under your underlying claims. 24 MR ZACAROLI: My Lord, I hesitate to interrupt. Can I just 25 make it clear, that is not our case. That wasn't the</p> <p style="text-align: center;">Page 30</p>	<p>1 As my learned friend has just pointed out, 2 Wentworth's position in relation to interest has 3 changed. It did originally take the same line as the 4 administrators are now arguing and saying you were 5 limited to Judgments Act rate. He now accepts under the 6 CRA, you are entitled to interest at Judgments Act rate 7 or contractual rate of interest. The only thing you 8 lose, according to Wentworth, is any non-provable claim 9 in relation to interest. 10 The reason they say that, if your Lordship goes to 11 their skeleton argument, is in paragraph 171. They say: 12 "In light of the express preservation of rights 13 under rule 2.88, 7 to 9, in the CRA, Wentworth does not 14 pursue this argument in relation to those agreements." 15 Now, obviously, the CRA doesn't in terms refer to 16 2.88, 7 to 9, but it does refer to rule 2.88. So 17 Wentworth's position is, as my learned friend indicated, 18 under the CRA that the reference to rule 2.88 is 19 sufficient to preserve contractual and Judgments Act 20 rate rights, they take a different line in relation to 21 the CDDs. In relation to the CRA, their point is you 22 nevertheless have lost all non-provable claims to 23 interest and, obviously, the critical aspect of that 24 now, in the light of the stance taken on part A, is a 25 right to appropriate in accordance with the rule in</p> <p style="text-align: center;">Page 32</p>



<p>1 Bower v Marris.</p> <p>2 As we understand it, Wentworth's position therefore</p> <p>3 is that it hopes to succeed on essentially two points.</p> <p>4 First of all, to have persuaded your Lordship in the</p> <p>5 context of part A that the rule in Bower v Marris did</p> <p>6 not survive the introduction of rule 2.88, and secondly</p> <p>7 that if under part A you would therefore have</p> <p>8 a non-provable claim for the interest that you would</p> <p>9 have received but as a result haven't received, you've</p> <p>10 released that by entering into the CRA.</p> <p>11 We say it would be bizarre to conclude that parties</p> <p>12 to the CRA intended that creditors would preserve their</p> <p>13 right to interest at the higher of the Judgments Act</p> <p>14 rate and contractual rights, but to release and</p> <p>15 effectively to release only their right to appropriate</p> <p>16 any payments first to the payment of interest. In the</p> <p>17 context of the CRA, bearing in mind the purpose of the</p> <p>18 CRA, we say there is no sensible commercial reason why</p> <p>19 that distinction is one that they would have drawn. In</p> <p>20 answer to that, we say two things. Firstly, not wishing</p> <p>21 to reargue part A, but our submission is Bower v Marris</p> <p>22 survived the introduction of rule 2.88, and we say the</p> <p>23 approach of the Court of Appeal is strongly supportive</p> <p>24 of that.</p> <p>25 The second point however for present purposes is</p> <p style="text-align: center;">Page 33</p>	<p>1 that submission is that if one's treating this as a new</p> <p>2 claim arising under the CRA, the interest to which</p> <p>3 you are entitled from the date of administration is that</p> <p>4 which would accrue under rule 2.88. If Bower v Marris</p> <p>5 applies to 2.88, you have the benefit of it. If it</p> <p>6 doesn't, you don't.</p> <p>7 MR DICKER: It involves drawing a distinction between on the</p> <p>8 one hand a right to interest, which is essentially the</p> <p>9 distinction that my learned friend sought to draw on the</p> <p>10 last occasion between going back to percentage rate or</p> <p>11 whether it's compounded or not, and treating Bower v</p> <p>12 Marris as essentially something different, not to do</p> <p>13 with the quantification of your claim to interest, but</p> <p>14 simply a right to appropriate.</p> <p>15 My Lord, there are two ways of regarding Bower v</p> <p>16 Marris, either it's part of your right to interest,</p> <p>17 which we say it's preserved by rule 2.88, or it's</p> <p>18 something different. If it's something different, in</p> <p>19 other words simply a right to receive a payment, when</p> <p>20 you receive it to appropriate it first to payment of</p> <p>21 interest and for some reason you don't regard it as to</p> <p>22 do with the quantification of the amount of interest</p> <p>23 you're receiving, then there is no reason why you can't</p> <p>24 treat your net financial claim in the same way as any</p> <p>25 creditor would be entitled to treat it.</p> <p style="text-align: center;">Page 35</p>
<p>1 even if the rule in Bower v Marris isn't part of</p> <p>2 rule 2.88, creditor can still rely on it as giving rise</p> <p>3 to a non-provable claim, and he has not given up that</p> <p>4 right by entering into the CRA. My learned friend's</p> <p>5 argument appears to proceed on the basis that the right</p> <p>6 of appropriation is effectively a right which you had</p> <p>7 under your original financial contract, which you have</p> <p>8 given up and you have got a new claim instead.</p> <p>9 The assumption he makes, which we say is wrong, is</p> <p>10 even assuming you have given up in the full sense your</p> <p>11 old claim and acquired an entirely new claim, his</p> <p>12 assumption is that for some reason that new claim</p> <p>13 doesn't carry the same right to appropriate first to</p> <p>14 payment as interest as any other contractual claim would</p> <p>15 carry. So we say when you get a net financial claim</p> <p>16 under the agreement and you agree with -- and the</p> <p>17 agreement, taking my learned friend's approach, is</p> <p>18 effectively a new claim which you have against LBIE,</p> <p>19 which carries interest, we say there is no reason why</p> <p>20 that new claim doesn't give you a contractual right to</p> <p>21 appropriate any sums you receive, first to the payment</p> <p>22 of interest, and secondly to the payment of principal.</p> <p>23 There is no reason why your new claim should operate in</p> <p>24 any way differently from any other claim you might have.</p> <p>25 MR JUSTICE DAVID RICHARDS: The bit I don't understand about</p> <p style="text-align: center;">Page 34</p>	<p>1 Just stepping back. So far as the CRA is concerned,</p> <p>2 bearing in mind, as I said, its purpose, it would be</p> <p>3 very odd indeed, we say, if the consequence of entering</p> <p>4 into the CRA concerning with distribution of trust</p> <p>5 property was to have this collateral effect. You</p> <p>6 maintain your right to interest but for some reason</p> <p>7 you've given up the right which you otherwise would have</p> <p>8 had, which would have subsisted as a non-provable claim,</p> <p>9 we say, to appropriate any payments received first to</p> <p>10 interest.</p> <p>11 One answer to that, as your Lordship has indicated</p> <p>12 from time to time, if one doesn't treat the net</p> <p>13 financial claim as in all respects an entirely new</p> <p>14 animal and one is effectively entitled to look back at</p> <p>15 the underlying position and regard this simply as</p> <p>16 a quantification of the underlying position, if that's</p> <p>17 how one views it, why should a creditor who has simply</p> <p>18 quantified his underlying position, particularly one who</p> <p>19 does so for the purposes of getting trust asset back,</p> <p>20 suddenly find that the process of that quantification</p> <p>21 means he loses a non-provable claim essentially to say:</p> <p>22 if the administration hadn't happened, I would</p> <p>23 ultimately have received X pounds because I would have</p> <p>24 had a right to appropriate first to interest. I haven't</p> <p>25 received X pounds, I've received something less, I am</p> <p style="text-align: center;">Page 36</p>

<p>1 therefore entitled to the balance of that claim as 2 a non-provable claim. How on earth could the parties to 3 the CRA have intended, given its context, the party 4 creditor to have given up that right? 5 So we say under the CRA you're entitled to interest 6 at the higher of the Judgments Act rate and rate 7 applicable to the debt apart from the administration. 8 We say, obviously in accordance with our submissions on 9 part A, built into that is effectively the right to 10 appropriate in accordance with the rule in <i>Bower v</i> 11 <i>Marris</i>. Alternatively, under part A if that's not 12 right, you'd have a non-provable claim with a shortfall 13 and there's absolutely nothing in the CRA which 14 indicates the creditors intended to give up that right 15 which they otherwise would have had. 16 My Lord, I should probably just show your Lordship 17 one other provision of the CRA. It deals with the 18 converse position, and I do so for completeness rather 19 than anything. It's 25.4. Again, this is the mirror 20 position. It's dealing with net financial liabilities. 21 25.4: 22 "Any reduction of net financial liabilities should 23 first be deemed to reduce the portion comprising any net 24 financial interest amount until that has been reduced in 25 full and then the proportion not comprising any net Page 37</p>	<p>1 second paragraph, last sentence: 2 "Joint administrators believe that this contractual 3 solution, which includes appropriate terms from the 4 drafts scheme, will balance all parties' interests, and 5 if widely supported will be a robust alternative to the 6 scheme." 7 357, which forms part of an update meeting 8 in October 2009. Your Lordship has that three lines 9 down under the heading "Contractual solution": 10 "No class issues, no jurisdiction issues, no 11 restrictions on terms. Must be fair to unsecured 12 creditors." 13 Obviously, we say an approach which required 14 creditors to give up part of their claims to interest, 15 it would be difficult to square with that. 16 377 is slides for a meeting with trust asset clients 17 in December 2009. If your Lordship goes to 381, it's 18 the third bullet and the third key message: 19 "CRA is balanced, composite solution for trust asset 20 claimants." 21 And it identifies the benefits. 22 If your Lordship then goes on in that to 423, 23 benefits to signatories. I don't need to, I think, go 24 through the list, but they're set out on 423. 25 425, position of non-signatories. These are the Page 39</p>
<p>1 financial interest amount." 2 So certainly from the other way round, LBIE appears 3 to be able to continue to rely on the right to 4 appropriate. Again, to the extent that these are 5 properly to be regarded as effectively mirror images of 6 each other. It would be surprising if the position were 7 different for creditors. 8 My Lord, then finally, just some references to the 9 background materials. We do say that if our submissions 10 are incorrect and the CRA has the effect for which 11 either the administrators or Wentworth contend, that is 12 a surprising and unfortunate result, given the content 13 of the background materials, showing the purpose and 14 genesis of the CRA. 15 Obviously, the starting point, we say, was the CRA 16 was originally devised by the administrators and devised 17 primarily to enable them to comply with their duty to 18 return trust assets. My learned friend Mr Trower 19 mentioned that there was certainly strong encouragement 20 by administrators to signatories to enter into it. Can 21 I just show your Lordship a few references in that 22 respect? 23 If your Lordship takes up bundle 6, page 334. Doing 24 this as quickly as I can, 334 is a client assets update, 25 5 October 2009. It's on the right-hand page, 335, the Page 38</p>	<p>1 disadvantages of not taking part in the CRA. And the 2 conclusion, 427, last bullet point on the page headed 3 "Conclusion": 4 "The best available solution, your support 5 essential." 6 So absolutely no suggestion anywhere that one 7 consequence necessary or otherwise was giving up rights 8 which you would otherwise have had in relation to 9 interest or currency conversion claims. 10 My Lord, similarly the covering letter, just going 11 back to 218. Sorry, your Lordship needs bundle 3, not 12 bundle 6. Again, your Lordship's seen these, so I can 13 just remind your Lordship of them. Page 219, 14 paragraph 5, it's the last sentence on that page where 15 they say: 16 "For this and other reasons outlined, the 17 administrators are also of the opinion that the 18 agreement is in the best interests of the creditors of 19 the company as a whole." 20 And in paragraph 8 under the heading "Conclusion", 21 they're of the opinion that the agreement represents the 22 most efficient method of returning trust assets to those 23 clients with ownership claims to them, for the reasons 24 set out in this letter. 25 My Lord, as I say, no indication there at all that Page 40</p>

<p>1 they may be giving up rights to interest or currency 2 conversion claims in that sentence. My Lord, I have two 3 further short points in relation to the CRA. I wonder 4 whether it would be convenient just to deal with those 5 first? 6 MR JUSTICE DAVID RICHARDS: And then take a break, 7 certainly. 8 MR DICKER: The next point is the position of signatories in 9 this respect. My Lord, obviously their position was 10 that after the court held it didn't have jurisdiction to 11 sanction the scheme of arrangement, this was effectively 12 the only process being offered to them for the return of 13 their trust assets, certainly within any sort of 14 reasonable period. 15 Whilst it's undoubtedly true, as my learned friend 16 Mr Trower says, the administrators could not have forced 17 signatories to enter into the CRA, the commercial 18 reality is that they really only had one option. The 19 downside of not doing so, as the administrators pointed 20 out in their own materials, was likely to be 21 disadvantageous to them. 22 There is an issue -- your Lordship asked a question 23 about the extent to which unsecured creditors' views 24 formed part of the process of devising the CRA. Can 25 I just show your Lordship one reference in Mr Pearson's</p> <p style="text-align: center;">Page 41</p>	<p>1 say claims to contractual interest or currency 2 conversion claims didn't form part of that compromise. 3 There was no reason why the position of creditors in the 4 event of a surplus needed to form part of this 5 compromise. It wasn't necessary to deal with those 6 issues to determine the net balance as at the relevant 7 date and to identify who is entitled to the return of 8 trust assets. And given that no one, it appears, had 9 a surplus in mind, there is no reason to assume that 10 anyone thought about it. 11 My Lord, certainly so far as the administrators' 12 position is concerned, compromise would not have been a, 13 in our submission, fair or balanced one in the sense 14 that or to the extent that it would have involved some 15 creditors giving up valuable rights but not others. 16 Take, for example, the position of a currency creditor 17 with a currency conversion claim. If the effect of the 18 CRA was, as the administrators contend, "He gave up 19 a currency conversion claim", that would be a detriment 20 to him and it would be a detriment to him not borne 21 equally by all creditors in any sense at all. 22 My Lord, that was all in relation to the CRA. That 23 would now be a convenient moment. 24 MR JUSTICE DAVID RICHARDS: Certainly. I'll rise for five 25 minutes.</p> <p style="text-align: center;">Page 43</p>
<p>1 witness statement in that respect, which I don't think 2 your Lordship has seen. It's bundle 2, tab 7, 3 paragraph 42. 4 One can't, I think, draw too firm a conclusion from 5 this, but if your Lordship looks at paragraph 42, 6 Mr Pearson says: 7 "The contribution of the creditor representatives to 8 the draft scheme and the CRA through their participation 9 in the working groups, not only in respect of the key 10 terms, but also at a granular level in respect of the 11 operation effect of particular provisions. Creditor 12 representatives also contributed to the way in which the 13 structure and effect of the draft scheme, then the CRA, 14 was presented to trust asset creditors and facilitated 15 the communication of feedback from trust asset creditors 16 over the course of its development." 17 The focus, not surprisingly, is in relation to trust 18 asset creditors. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR DICKER: My Lord, the final point is this. It is said 21 the CRA was a compromise with advantages and 22 disadvantages for creditors and there's nothing 23 surprising in that context in them agreeing to give up 24 currency conversion claims or claims to interest. It's 25 plain that the CRA was, of course, a compromise, but we</p> <p style="text-align: center;">Page 42</p>	<p>1 (11.53 am) 2 (A short break) 3 (12.00 pm) 4 MR DICKER: Can I turn now to deal with the CDDs? 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR DICKER: As your Lordship knows, there are a large number 7 of different forms of CDDs, although our case is they 8 all had essentially the same effect. Non-released 9 rights in respect of statutory interest or currency 10 conversion claims. 11 My Lord, a few preliminary points before looking at 12 the three main types of CDDs. The first, as I've 13 already submitted, we say that when one construed CDDs, 14 one should do so by assuming that the administrators 15 intended to devise agreements that were consistent with 16 their functions and duties, which did not result in 17 creditors giving up potentially valuable rights in the 18 event of a surplus, which they did not need to give up, 19 and for which they did not receive any additional 20 consideration and which did not result in creditors 21 being treated unequally for no good or sufficient 22 reason. 23 Only one point in relation to the law. 24 Your Lordship asked me about the duty of an 25 administrator in relation to the admission of claims.</p> <p style="text-align: center;">Page 44</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: And my description of that duty as being</p> <p>3 quasi-judicial. Can I show your Lordship two</p> <p>4 authorities in that respect? They're both in bundle 1A,</p> <p>5 the first is at tab 29. It's a decision of</p> <p>6 Mr Justice Etherton as he then was in Menastar Finance</p> <p>7 Ltd. And the relevant passage begins at paragraph 43</p> <p>8 under the heading "the law". Mr Justice Etherton says:</p> <p>9 "... a long line of authority going back to the 19th</p> <p>10 Century establishing the principle that on making</p> <p>11 a winding-up order or a bankruptcy order in the case of</p> <p>12 both personal and corporate insolvency, considering</p> <p>13 whether to admit a creditor's proof based on a judgment</p> <p>14 debt, the court can in appropriate circumstances go</p> <p>15 behind the judgment and see whether the debt is truly</p> <p>16 due."</p> <p>17 44:</p> <p>18 "The power of a liquidator is in this respect no</p> <p>19 different from that of the court itself since the</p> <p>20 liquidator, in deciding whether to accept or reject</p> <p>21 a creditor's proof in whole or in part, is acting in</p> <p>22 a quasi-judicial capacity."</p> <p>23 And then a reference to Tanning Research</p> <p>24 Laboratories v O'Brien:</p> <p>25 "His statutory duty is to ensure the company's</p> <p style="text-align: center;">Page 45</p>	<p>1 MR DICKER: -- "I can see it is the duty of the liquidator</p> <p>2 to discharge ..."</p> <p>3 Then in contrast, it may be worth your Lordship just</p> <p>4 looking at 340, the last paragraph on the page:</p> <p>5 "If the liquidator in performing his function of</p> <p>6 considering the admissibility of proofs of debt decides</p> <p>7 to reject a proof, the ordinary remedy of the person</p> <p>8 claiming to be admitted as a creditor is to apply to the</p> <p>9 court to reverse or modify the decision."</p> <p>10 And then over the page, four lines down, a contrast</p> <p>11 is drawn between the liquidator adjudicating on a proof</p> <p>12 and then dealing with an appeal against his</p> <p>13 adjudication. Four lines down, the judgment says:</p> <p>14 "In such proceeding a liquidator who defends his</p> <p>15 decision to reject a proof of debt is no longer acting</p> <p>16 in a quasi-judicial capacity. He is cast in the role of</p> <p>17 an adversary defending the assets available for</p> <p>18 distribution against a liability, which according to the</p> <p>19 view he formed when acting quasi-judicially, is not</p> <p>20 legally enforceable. The liquidator may defend those</p> <p>21 assets against the creditor's claim on any ground which</p> <p>22 the company might have defended the claim had it been</p> <p>23 sued by the creditor."</p> <p>24 So the contrast between the adjudication for proof,</p> <p>25 which is a quasi-judicial duty. In other words, the</p> <p style="text-align: center;">Page 47</p>
<p>1 property is collected in and applied in satisfaction of</p> <p>2 its liabilities pari passu, among its proper creditors."</p> <p>3 I think that's all I need to show your Lordship from</p> <p>4 that.</p> <p>5 The other decision I was going to show your Lordship</p> <p>6 was the Tanning Research Laboratories case referred to</p> <p>7 by Mr Justice Etherton, which your Lordship will see at</p> <p>8 tab 23. It's a decision of the High Court of Australia.</p> <p>9 The first judgment delivered by Justice Brennan and</p> <p>10 Dawson begins at 335. I wanted to pick it up at 338</p> <p>11 at the bottom if your Lordship has that.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR DICKER: Again, in the circumstances, in the context of</p> <p>14 going behind judgments, but at 338 it says:</p> <p>15 "In determining whether to admit or reject a proof</p> <p>16 of debt a liquidator has been said to act in</p> <p>17 a quasi-judicial capacity according to standards no less</p> <p>18 than the standards of a court or judge. This</p> <p>19 description of the liquidator's functions reflects his</p> <p>20 duty to distribute the assets in his hands or under his</p> <p>21 control among the persons truly entitled. That duty was</p> <p>22 stated by Viscount Simonds in Government of India v</p> <p>23 Taylor."</p> <p>24 And the quote --</p> <p>25 MR JUSTICE DAVID RICHARDS: I have read that.</p> <p style="text-align: center;">Page 46</p>	<p>1 role of the liquidator at that stage is not to try and</p> <p>2 reduce the proof to the minimum, let alone to persuade</p> <p>3 the creditor to give up his rights, it's to give him the</p> <p>4 amount to which he is properly entitled, and obviously</p> <p>5 the position changes in the event that the liquidator,</p> <p>6 having paid his adjudication, is then faced with dealing</p> <p>7 with an appeal. At that point it's no longer</p> <p>8 quasi-judicial, he is entitled to make whatever</p> <p>9 arguments he considers appropriate.</p> <p>10 MR JUSTICE DAVID RICHARDS: But he is required to act fairly</p> <p>11 in conducting the litigation, is how the paragraph ends.</p> <p>12 MR DICKER: Yes. And your Lordship's absolutely right, even</p> <p>13 at that stage, he's obviously still subject to the</p> <p>14 general duties of a litigant and, more importantly, his</p> <p>15 position as an officer of the court. But that is not</p> <p>16 obviously quite the same as acting quasi-judicially.</p> <p>17 MR JUSTICE DAVID RICHARDS: No, no, clearly. Agreed.</p> <p>18 Thank you.</p> <p>19 MR DICKER: So when construing the CDDs, we say that</p> <p>20 your Lordship needs to start by construing them against</p> <p>21 the assumption that what the administrators were trying</p> <p>22 to do, albeit through what may have been a quicker,</p> <p>23 speedier, more final process, was nevertheless a process</p> <p>24 intended to enable them to comply with their</p> <p>25 quasi-judicial duty to give creditors sums to which they</p> <p style="text-align: center;">Page 48</p>

<p>1 were properly entitled.</p> <p>2 The next point is that all the CDDs, we say, had</p> <p>3 a common purpose intended to provide a speedier and more</p> <p>4 final mechanism for agreeing and proving claims so as to</p> <p>5 enable the administrators to make an earlier</p> <p>6 distribution.</p> <p>7 My Lord, can I just remind your Lordship in this</p> <p>8 context of one paragraph in the statement of agreed</p> <p>9 facts? If your Lordship has that.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR DICKER: It's paragraph 63.</p> <p>12 MR JUSTICE DAVID RICHARDS: So this is tab 18.</p> <p>13 MR DICKER: Paragraph 63:</p> <p>14 "The primary purpose of the CDD is stated by the</p> <p>15 joint administrators to be to provide an efficient</p> <p>16 process for agreeing the amount of a creditor's claim,</p> <p>17 such that distributions could be expedited."</p> <p>18 And then there's a reference to Mr Lomas' tenth</p> <p>19 statement at 48. My Lord, there are echoes of the same</p> <p>20 point elsewhere in the statement of facts.</p> <p>21 Your Lordship may just like to note in the introductory</p> <p>22 part dealing with the CDDs, paragraph 53.</p> <p>23 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>24 MR DICKER: The last sentence:</p> <p>25 "The administrators intended to use CDDs, amongst</p> <p style="text-align: center;">Page 49</p>	<p>1 a right to interest or a currency conversion claim</p> <p>2 in the event of a surplus. The differences between them</p> <p>3 were driven by other things entirely. We say those</p> <p>4 other things cannot sensibly have led the parties to</p> <p>5 intend that, for example, under an agreed claims CDD</p> <p>6 denominated in US dollars they would have a currency</p> <p>7 conversion claim, but under an admitted claims CDD</p> <p>8 denominated after conversion into sterling for the</p> <p>9 purposes of proof in sterling, they would not.</p> <p>10 My Lord, so far as the releases in the CDDs are</p> <p>11 concerned, we say the fact they're very broadly worded</p> <p>12 is irrelevant for the simple reason that they did not</p> <p>13 concern the claim which was agreed and admitted for</p> <p>14 proof and for those purposes converted into sterling.</p> <p>15 Going back to the example I gave right at the start of</p> <p>16 my submissions, between claim 1 on the one hand and</p> <p>17 claims 2 to 10 on the other, releases may be very</p> <p>18 broadly worded, but one thing it's obvious they were not</p> <p>19 intended to deal with is the very claim which the</p> <p>20 creditor is advancing, which the liquidators are</p> <p>21 adjudicating on pursuant to their quasi-judicial duty</p> <p>22 and which is then agreed and converted into sterling for</p> <p>23 the purposes of proof.</p> <p>24 It is, in our submission, wrong to approach the</p> <p>25 releases as if they were in some way intended to affect</p> <p style="text-align: center;">Page 51</p>
<p>1 other things, to streamline the process of creditors</p> <p>2 agreeing the valuation of their claim amounts to enable</p> <p>3 them to make distributions in respect of these claims."</p> <p>4 And then the same reference to paragraph 47 and 48</p> <p>5 of Mr Lomas' tenth statement. Can I show your Lordship</p> <p>6 two other paragraphs of Mr Lomas' tenth statement, which</p> <p>7 is in bundle 2, tab 2. It's paragraphs 33 and 34 if</p> <p>8 your Lordship would just glance at those. (Pause).</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>10 MR DICKER: I have obviously already explained how, in our</p> <p>11 submission, one should view the process essentially as</p> <p>12 a speedier and more final process of agreeing claims for</p> <p>13 the purposes of distributions in respect of proved</p> <p>14 debts. And achieving finality in the sense that</p> <p>15 a creditor chooses what claims he wishes to make, he has</p> <p>16 agreed and admitted for proof, and the finality is</p> <p>17 essentially him agreeing that he won't challenge the</p> <p>18 adjudication and submit an amended proof or a new proof,</p> <p>19 and to the extent that he chose not to advance claims</p> <p>20 for whatever reason, then obviously to release those.</p> <p>21 There are obviously differences between the various</p> <p>22 CDDs, but, as your Lordship knows and your Lordship will</p> <p>23 see in more detail in a moment, the differences between</p> <p>24 them and the reason why one was used rather than another</p> <p>25 had nothing to do with whether a creditor should have</p> <p style="text-align: center;">Page 50</p>	<p>1 everything. By definition, they're not. They say in</p> <p>2 terms they're not to deal with the agreed claims. It's</p> <p>3 effectively everything else that is being released.</p> <p>4 So reference and repeated reference to the breadth</p> <p>5 of the language of the releases is, with the greatest</p> <p>6 respect, we say, simply beside the point. It's not</p> <p>7 dealing with the claims which are being advanced, agreed</p> <p>8 and admitted.</p> <p>9 Again, I've already made the point the CDD process</p> <p>10 did not require creditors to give up claims in the event</p> <p>11 of a surplus to get earlier distributions in respect of</p> <p>12 their proved debts. There was no logical reason why</p> <p>13 that was necessary simply to get an earlier distribution</p> <p>14 in respect of your proved debt. Issues in relation to</p> <p>15 the surplus would only need to be addressed if and when</p> <p>16 there turned out to be a surplus. And you're not going</p> <p>17 to slow down distributions in respect of proved debts by</p> <p>18 preserving claims which would only arise and only need</p> <p>19 to be dealt with if a surplus did arise; and obviously</p> <p>20 it's important in this context that at the times the</p> <p>21 CDDs were originally developed, no one appears to have</p> <p>22 been anticipating a surplus.</p> <p>23 My Lord, turning to the first of the CDDs, we say</p> <p>24 the right place to start is with the agreed claims CDDs</p> <p>25 because they were the first form of CDDs which were</p> <p style="text-align: center;">Page 52</p>

<p>1 devised. They started to be used from 30 November 2010 2 onwards. The example your Lordship I think has been 3 working from is bundle 11, tab 1A. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: Before going to the wording, again your Lordship 6 needs to understand the context and the way in which the 7 process worked. So far as the context is concerned, the 8 agreed claims CDDs, as your Lordship knows, were devised 9 in circumstances where there was a real uncertainty as 10 to whether particular creditors had client money claims 11 or not. And it was obviously vitally important the 12 agreed claims CDD process didn't prejudice any client 13 money claim that might exist, particularly important 14 given that a client money claim could potentially enable 15 the credit to recover 100 per cent of his claim when at 16 that stage obviously no one was anticipating -- appears 17 to have been anticipating a surplus in LBIE's unsecured 18 estate. 19 My Lord, one also needs to bear in mind again the 20 majority of LBIE's assets were denominated in US dollars 21 and certainly if the creditors' underlying claim was in 22 US dollars, he would want to maintain that claim in US 23 dollars so as to preserve his right to a proportionate 24 share of any client money. Put another way, there is no 25 reason why the process of an agreed claims CDD would</p> <p style="text-align: center;">Page 53</p>	<p>1 in the amount agreed between LBIE and the creditor, and 2 (2) for the agreed claim to become an admitted claim, 3 admitted for unsecured dividends in administration upon 4 either ..." 5 And then the two conditions are summarised. 6 Your Lordship can see that reflected in the agreed 7 claims CDD itself, if your Lordship would then turn ... 8 MR JUSTICE DAVID RICHARDS: Which do we want? The CDD? 9 MR DICKER: Yes. I'm sure your Lordship finds you have 10 every bundle open. 11 MR JUSTICE DAVID RICHARDS: Yes, thank you. 12 MR DICKER: Bundle 11, tab 1A. One has, if your Lordship 13 goes to clause 2 and 3, the two stages. 2 is dealing 14 with claims agreement, so that's what I have called 15 stage 1. Clause 3 is dealing with entitlement to an 16 admitted claim. 3.1: 17 "Save as set out in clause 3.2 and 3.3 below, the 18 agreed claim shall not be accepted in whole or in part 19 as an admitted claim." 20 And your Lordship was shown these provisions before. 21 Essentially either you have to have given up your client 22 money claim, alternatively it needs to be determined 23 before you have an admitted claim, and in the event that 24 you have an admitted claim, it's the agreed claim being 25 converted to pounds sterling at the exchange rate.</p> <p style="text-align: center;">Page 55</p>
<p>1 have involved him taking on a currency exposure on his 2 client money claim which he didn't previously have. 3 Two short references to the CASS rules. If 4 your Lordship takes up bundle 3 of the authorities, the 5 first is tab 13 and it's CASS 7. The two paragraphs 6 I wanted to show your Lordship were on page 24. It's 7 paragraph 8 towards the bottom of page 24. I don't 8 think the detail matters. Paragraph 8 towards the 9 bottom of page 24: 10 "A firm should calculate the individual client 11 balance using the contract value of any client purchases 12 or sales." 13 As one would expect. At paragraph 7 above it says: 14 "The individual client balance for each client 15 should be calculated in accordance with the table." 16 I don't think I need take your Lordship through the 17 detail. The short point is, as one would expect, client 18 money claims are ascertained in accordance with your 19 contractual rights, and one of those rights is the 20 currency in which your claim is denominated. 21 The agreed claims CDD essentially involved 22 a two-stage process. Your Lordship will see this 23 reflected in the statement of agreed facts, again 24 tab 18. Paragraph 17, the statement of agreed facts: 25 "Agreed claims CDD provided (1) for an agreed claim</p> <p style="text-align: center;">Page 54</p>	<p>1 Now, before looking in a little more detail at that, 2 just so your Lordship understands the process by which 3 each stage was conducted, starting with stage 1, 4 agreement, what happened was firstly creditors were 5 required to submit a proof of debt, complying with the 6 Insolvency Act and Rules, on LBIE's claim portal. And 7 I think your Lordship's seen this before. That's 8 referred to in the fifth progress report, for example, 9 if your Lordship takes bundle 8, tab 1. It's page 29. 10 It's at the top of the left-hand column at 29 under 11 the heading "LBIE determination": 12 "In order to be eligible for receipt of a LBIE 13 determination, the administrators require that the 14 relevant creditor has submitted a proof of debt that is 15 compliant with UK insolvency legislation." 16 And as Mr Garvey explains in his witness statement, 17 obviously what that required was for creditors to submit 18 their claims in the currency of their underlying 19 entitlement because that was the claim that they were 20 entitled to advance. So we have a claim that has proof, 21 which has to be compliant with the Insolvency Rules, and 22 obviously a proof which is submitted in the currency of 23 the creditor's underlying entitlement. 24 The second point is the administrators then make an 25 offer of a single amount, which the creditors claim is</p> <p style="text-align: center;">Page 56</p>

<p>1 agreed. And again, this offer was usually in the 2 currency of the underlying entitlement. This isn't 3 controversial. If your Lordship goes back to the 4 statement of agreed facts at tab 18, it's paragraph 58 5 on page 11: 6 "It was generally the case that LBIE would 7 communicate the LBIE determination in the currency of 8 the creditor's underlying entitlement." 9 And then the exception was: 10 "To the extent the creditor's underlying 11 entitlements were denominated in more than one currency 12 and the currency in which the largest element of the 13 aggregate claim was denominated." 14 The basic principle is that you submit a claim in 15 your underlying currency, the administrators look at it, 16 they make an offer, again generally in your underlying 17 currency. Now, that offer, as your Lordship knows, was 18 not intended to be a matter for negotiation. 19 Your Lordship will see that at paragraph 56: 20 "Creditors were advised the LBIE determination was 21 not intended to be a matter for negotiation ... entitled 22 either to accept or reject it." 23 Then the next stage is: 24 "If the LBIE determination was accepted, the 25 agreement would be formalised in a CDD, provided the</p> <p style="text-align: center;">Page 57</p>	<p>1 that later. 2 Then, again, just dealing with stage 1, definition 3 of agreed claim: 4 "The creditor's claim ... against the company under 5 and in connection with the creditor agreement, including 6 for the avoidance of doubt any client money claim 7 arising under or in connection with the creditor 8 agreement, but excluding any trust asset claims." 9 The agreed claim amount, although it's blanked out 10 for some reason in this copy, it's for this form in US 11 dollars. It doesn't really matter. Obviously, agreed 12 claims amounts would simply reflect the underlying 13 currency. 14 And then 2.1, your Lordship has seen, it's an agreed 15 claim: 16 "... shall be limited to the agreed claim amount [ie 17 the US dollar sum] and shall constitute the creditor's 18 entire claim against the company and, save in respect 19 thereof ..." 20 And then effectively releases of everything else. 21 So obviously, no conversion into sterling at this 22 stage. Offer, ascertainment -- rather, ascertainment, 23 offer, determination, all in the currency of underlying 24 entitlement. So one can take the example of a US 25 creditor who ends up with an agreed claim amount in US</p> <p style="text-align: center;">Page 59</p>
<p>1 other terms are accepted by the creditor." 2 That, as your Lordship will see from paragraph 72, 3 resulted, so far as agreed claims CDDs are concerned, in 4 agreed claims predominantly denominated in a foreign 5 currency. Less frequently in sterling. So you prove in 6 respect of your underlying currency, you have an offer 7 in respect of your underlying currency, a determination, 8 and that reflected in the agreed claim. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: My Lord, going back to the provisions of the 11 agreed claims CDD itself, bundle 11, tab 1A. Recital B: 12 "Consideration of the company and the creditor 13 agreeing the creditor's claims against the company under 14 the creditor agreement are limited to the agreed claim 15 amount. The company and the creditor wish to release 16 and discharge each other [et cetera]." 17 My Lord, my learned friend Mr Zacaroli referred 18 your Lordship and made submissions in relation to 19 recitals in some of the CDDs. Your Lordship ought to be 20 aware that the wording is not always the same. I'll 21 show your Lordship certainly some in relation to CRA 22 CDDs in the bundle. There are examples in relation to 23 other types as well, where this recital also refers to 24 dividends from LBIE. So a recital is not always 25 expressed simply in these terms, your Lordship will see</p> <p style="text-align: center;">Page 58</p>	<p>1 dollars. 2 Now, stage 2 involves the subsequent admission of 3 that agreed claim as an admitted claim, and 4 your Lordship saw clause 3 a moment ago. Just to pick 5 up a couple of points which we emphasise. Where your 6 agreed claim does become an admitted claim, what happens 7 is that it's then converted to pounds sterling at the 8 exchange rate. One sees that both in 3.2.1, at the end 9 of 3.2.2, and also right at the bottom of the page. So 10 it doesn't matter why it's not eligible as an admitted 11 claim, whether it is because you released your client 12 money claim or it's been determined. At that stage is 13 becomes an admitted claim converted to pounds sterling 14 at the exchange rate. 15 The exchange rate, again, as your Lordship has seen, 16 previously defined, page 4: 17 "[It is] the 'official exchange rate' set out in 18 rule 2.86(2) of the Insolvency Rules which for the 19 purpose of converting US dollars to pounds sterling 20 shall mean the following exchange rate ..." 21 Again, I'm not quite sure why that's been blanked 22 out: 23 "... and, for the purpose of converting the 24 currencies specified in appendix C ... to pounds 25 sterling shall mean the rates set out in appendix C</p> <p style="text-align: center;">Page 60</p>

<p>1 thereof." 2 So one has an exchange rate, we say pursuant to rule 3 2.86.2. 4 Again, going back to definition of admitted claim at 5 page 2: 6 "The claim of a creditor of the company which 7 qualifies for dividends pursuant to the Insolvency Rules 8 and the Insolvency Act, or if applicable as amended or 9 replaced pursuant to the terms of a scheme of 10 arrangement or a company voluntary arrangement." 11 We say the natural construction of this is, not 12 surprisingly, when you get to the stage of admitting 13 your claim, it's being admitted to proof, it's converted 14 pursuant to rule 2.86 with all the consequences that 15 would normally have, and it qualifies for dividends 16 pursuant to the Insolvency Rules or Act, again as any 17 other claim admitted to proof in the ordinary way would 18 My Lord, that, we say, is plain and obvious from the 19 terms of the CDD. It was also set out very clearly, as 20 your Lordship saw, by the administrators in various of 21 their creditors' reports. Reminding your Lordship of 22 one example, it's the fourth report, bundle 5, tab 1. 23 It's page 35 of the bundle, page 33 of the report. 24 Section 6.2: 25 "Currency matters and dividends prospects." Page 61</p>	<p>1 be calculated at a common date" is obviously what the 2 cases say is the purpose of converting in that 3 situation. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR DICKER: So we say the effect of an agreed claim CDD is 6 perfectly straightforward. The creditor is entitled to 7 statutory interest on any currency conversion claim in 8 respect of his agreed and admitted claim, just as he 9 would if he had proved for that claim in the ordinary 10 way. That is exactly what you would expect given the 11 general purpose of the process, namely to provide 12 a quicker and more final process for proving claims to 13 enable early distributions to be made. 14 Now turning to the administrators and Wentworth's 15 positions. As we understand it, the administrators, 16 certainly in their position papers, agree with the 17 Senior Creditor Group in relation to statutory interest. 18 Wentworth's position is that the creditor is entitled to 19 statutory interest on its agreed and admitted claim, but 20 it says such right is limited to interest at the 21 Judgments Act rate because any contractual right to 22 interest has been released. 23 So you enter into a CDD and you are thereby to be 24 taken as having agreed that you will have interest 25 at the Judgments Act rate, but giving up any contractual Page 63</p>
<p>1 And my learned friend Mr Zacaroli showed you this. 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR DICKER: Just emphasising the bottom left-hand column, 4 the last paragraph: 5 "Accordingly, applying rule 2.86, and general 6 principles of UK insolvency law, all unsecured 7 creditors' claims, including any unsecured claims 8 relating to CRA signatories, are to be converted into 9 sterling as at 15 September 2008 for the purposes of 10 having a proven claim against LBIE." 11 On the right-hand column, the last two paragraphs: 12 "To assist creditors, the claims portal contains 13 relevant exchange rates as at 15 September and 14 automatically converts non-sterling denominations." 15 And: 16 "In order to be able to determine the entitlements 17 of creditors to share in the estate, all claims must be 18 expressed in a single common currency and currency 19 translation must be calculated at a relevant date." 20 My Lord, obviously that sentence is only explicable 21 in the context of a provable claim, ie in the event of 22 an insolvent estate rather than dealing with a surplus. 23 Otherwise, the reference to a share doesn't make sense 24 and the statement that "all claims must be expressed in 25 a single common currency and currency translation must Page 62</p>	<p>1 right to interest. We say, given the purpose of the 2 CDDs, this consequence makes no sense. Why would 3 creditors have wanted to give up contractual rights to 4 interest and limit themselves to interest at 5 Judgments Act rate? 6 Your Lordship also knows that this consequence, if 7 this is a consequence of an agreed CDD, is different 8 from Wentworth's case in relation to the CRA. Its 9 position now in relation to the CRA is that you keep 10 your right to interest at the Judgments Act rate, the 11 higher of the Judgments Act rate and the rate applicable 12 for the debt apart from the administration. But they 13 say when you come to an agreed claims CDD, the position 14 is different. At this stage you only get your 15 Judgments Act rate. My Lord, again, we say that's not 16 something that was ever suggested in any of the 17 background materials setting out the genesis and the 18 purpose of these documents. 19 So there's that distinction to be drawn between the 20 agreed claims CDD on the one hand and CRA on the other 21 so far as Wentworth is concerned, which we say makes no 22 sense. But there's also a distinction, we say, to be 23 drawn between Wentworth's approach to these CDDs and 24 subsequent agreed claims CDDs, which contained 25 preservation language. Page 64</p>

16 (Pages 61 to 64)



<p>1 Now, just showing your Lordship two paragraphs from                  2 Wentworth's skeleton. If your Lordship could go to                  3 paragraph 60. They say:                  4 "So far as the language expressly preserving claims                  5 to statutory interest is concerned, nothing turns on it                  6 because it is not Wentworth's case that rights to                  7 statutory interest have been waived under any form of                  8 CDD."                  9 If one then goes on to paragraph 171, which                  10 your Lordship saw earlier, so far as Wentworth's latest                  11 position is concerned in 171 they say:                  12 "In the light of the express preservation of rights                  13 under 2.88, 7 to 9, in the CRA, and in the later CDDs                  14 with statutory interest preservation language, Wentworth                  15 does not pursue this argument in relation to those                  16 agreements. The express reference to sub-rule 9 can                  17 only be explained on the basis the parties intended to                  18 preserve the contractual rate that would have applied                  19 apart from administration."                  20 My Lord, I have already made the point, certainly so                  21 far as the CRA is concerned, there isn't express                  22 reference to rule 2.88 .9, simply to rule 2.88. But the                  23 point here is that on Wentworth's case, although the                  24 preservation language is expressed as being for the                  25 avoidance of doubt, and also in paragraph 60 Wentworth</p> <p style="text-align: center;">Page 65</p>	<p>1 expressly referred to in the definition of "agreed                  2 claim", and when one gets to the definition of "admitted                  3 claim", one's told it's a claim of the company and                  4 qualifies for dividends pursuant to the Insolvency Rules                  5 and the Insolvency Act, absolutely no reason to conclude                  6 that it doesn't qualify for dividends and entitle the                  7 creditor to interest in accordance with the Insolvency                  8 Rules and Insolvency Act, just as any other proved debt                  9 would. Certainly absolutely no suggestion that                  10 creditors, by going through this process, would somehow                  11 be losing rights as they went along.                  12 My Lord, that's interest. Turning to Wentworth's                  13 position in relation to currency conversion claims.                  14 MR JUSTICE DAVID RICHARDS: I put to Mr Zacaroli the wording                  15 of 2.88, that the rate of interest is the greater of                  16 judgment rate and the rate applicable to the debt apart                  17 from the administration, and I think Mr Zacaroli said                  18 that that was a point that could be made. I'm not sure                  19 he said anything else. Do you have anything to say                  20 about that?                  21 MR DICKER: My Lord, yes. The way the arguments work and                  22 the way they diverge, I think, are as follows. This is                  23 a speedier proof process for making earlier                  24 distributions. One ends up with an admitted claim. My                  25 learned friend says that because it qualifies for</p> <p style="text-align: center;">Page 67</p>
<p>1 said nothing turns on it, actually an enormous amount                  2 does turn on it because under the ordinary agreed CDD                  3 without preservation language, according to them, you                  4 only get Judgments Act rate interest, but if you include                  5 the preservation language, you get the higher of                  6 Judgments Act rate and contractual interest.                  7 Again, we say that's certainly not what the                  8 draftsmen of the later CDDs appear to have understood                  9 because if it had been, they wouldn't have used the                  10 language without -- for the avoidance of doubt.                  11 We also say that there is no conceptual difficulty                  12 in giving effect to an intention of the parties to                  13 preserve their right to interest at the greater of the                  14 Judgments Act rate or the rate applicable to the debt                  15 under the contract. There's no conceptual difficulty                  16 referring back to the underlying financial agreement,                  17 which is the subject matter of the proof, and one indeed                  18 can see that from the definition of "agreed claim"                  19 itself, bundle 11, tab 1A:                  20 "Creditors' claim (or claims, as the case may be)                  21 against the company under and in connection with the                  22 creditor agreement."                  23 So when one comes to ask what is the rate applicable                  24 to the debt apart from the administration, perfectly                  25 natural to look at the relevant creditor agreement</p> <p style="text-align: center;">Page 66</p>	<p>1 dividends pursuant to the Insolvency Rules, although                  2 there isn't an express reference to 2.88, nevertheless                  3 that's a sufficient indication to entitle creditors to                  4 statutory interest. But, he says, when you get to                  5 2.88 -- it's rather like the argument under the CRA --                  6 when you get to rule 2.88 and you get to 2.88.9, you                  7 can't give any meaning to part of it, you can't give any                  8 meaning to the reference to the rate applicable to the                  9 debt apart from the administration, because he says the                  10 earlier part of the CDD has basically given up that                  11 earlier agreement.                  12 We say that's simply not right. We are with him so                  13 far as plainly this entitles creditors to interest in                  14 accordance with rule 2.88. We are with him that it                  15 plainly entitles them to interest under 2.88.9. The                  16 question is, is there then any conceptual difficulty in                  17 giving meaning to the reference to the rate applicable                  18 to the debt? Answer: not. The agreement itself refers                  19 back to the underlying agreement. What is the                  20 difficulty in saying at that stage the relevant rate is                  21 simply the rate under the agreement in respect of which                  22 you have proved?                  23 MR JUSTICE DAVID RICHARDS: The right that arises under                  24 2.88.9 is not a contractual right, it's a statutory                  25 right. You have a statutory right to interest at one of</p> <p style="text-align: center;">Page 68</p>

<p>1 two rates, whichever is the greater. And the second 2 rate to which you are statutorily entitled is the rate 3 applicable to the debt apart from the administration, ie 4 what rate would you get if there wasn't an 5 administration? Answer: the rate under the contract 6 which exists apart from the administration. 7 It doesn't really matter in that sense what has 8 happened to the contract. It's not saying the rate 9 applicable as at some date during the administration 10 under the contract; it's saying assume no 11 administration, what rate would you be entitled to, 12 whether under a judgment, under a contract, under some 13 statutory provision other than Judgments Act or 14 whatever. 15 MR DICKER: My Lord, yes, and we agree with your Lordship. 16 There are two ways, in a sense, you can approach 2.88.9. 17 MR JUSTICE DAVID RICHARDS: In other words, this is not an 18 argument that depends upon construing the CDD at all. 19 MR DICKER: No. If 2.88.9 does, as your Lordship says, give 20 you the right of interest which you would have received 21 had there been no administration, in a sense, as 22 your Lordship said, I think, earlier, if there had been 23 no administration we wouldn't have had the CDDs, the 24 contracts would still be in existence and that's what 25 you'd get. In a sense I suppose I'm assuming -- going</p> <p style="text-align: center;">Page 69</p>	<p>1 have one. So far as Wentworth is concerned, again it's 2 a very short point. We say that the agreed claims CDD 3 can't conceivably have resulted in a release of 4 a currency conversion claim. Plainly, it didn't happen 5 at stage 1 because that gives you an agreed claim amount 6 in US dollars, assuming your underlying claim is in US 7 dollars, and it doesn't happen at stage 2 either because 8 stage 2 does convert your claim into sterling, but 9 converts it into sterling for the purposes of proof, and 10 one can see that, as I showed your Lordship, from the 11 definition of exchange rate, and that's confirmed by 12 again, for example, the extract from the fourth progress 13 report I showed your Lordship. 14 The conversion that is going on here is simply the 15 conversion required by the rules. It is a conversion 16 pursuant to the rules. It would be wholly artificial to 17 regard this agreement as essentially the parties saying 18 to themselves, "No, no, we're not just converting 19 pursuant to rule 2.86 in the sense that converted for 20 the purposes of proof, we're doing something more. 21 We're converting at a rate that happens to be the 22 official exchange rate, but we're not simply limiting 23 the consequences of that to the consequences which would 24 normally occur under rule -- conversion under 2.86, 25 we're making a conversion irrevocably for all purposes</p> <p style="text-align: center;">Page 71</p>
<p>1 a little further along the lines of my learned friends. 2 MR JUSTICE DAVID RICHARDS: I understand that. You're 3 meeting Mr Zacaroli's argument, I fully understand that. 4 MR DICKER: But if one were to read 2.88.9 as effectively 5 the draftsman saying: look, all I'm doing here is two 6 things, first of all giving you a right which you 7 otherwise wouldn't have to interest at the Judgments Act 8 rate, or, alternatively, simply saying, almost 9 incorporation by reference, you can have whatever to 10 which you were otherwise contractually entitled. 11 MR JUSTICE DAVID RICHARDS: Well, not even just 12 contractually. To what you were otherwise entitled. 13 MR DICKER: Absolutely. Even if one were to go that far, in 14 other words say that the draftsman was basically asking 15 what is it to which you were otherwise contractually 16 entitled, we say there's still no difficulty in giving 17 sensible meaning to that. This is just a simple proof 18 of debt form. But certainly if your Lordship -- on 19 your Lordship's approach in relation to 2.88.9, which, 20 as your Lordship knows, was our primary case in relation 21 to part A, then that issue doesn't arise. 22 Turning to currency conversion claims, and again 23 dealing with the administrators' and Wentworth's 24 positions, the administrators' position I can deal with 25 very shortly because, as we understand it, they don't</p> <p style="text-align: center;">Page 70</p>	<p>1 with the result that you lose your currency conversion 2 claim". 3 My Lord, if that's what the parties had intended, 4 doing that by reference to an exchange rate defined in 5 terms of the foreign exchange rate under 2.86 in the way 6 it's done, the draftsman would never have dreamt of 7 doing it in that way. 8 It is interesting, we say, to compare Wentworth's 9 position on currency conversion claims with its position 10 in relation to statutory interest. I mentioned to 11 your Lordship the position in relation to statutory 12 interest is that although there's no express reference 13 to rule 2.88, nevertheless because the admitted claim is 14 referred to as a claim entitling you to dividends in 15 accordance with the Act and rules, that is enough to 16 bring in a right to interest under 2.88. In other 17 words, taking a slightly more purposive construction, 18 perhaps a less extremely literal construction, that's 19 good enough. 20 We say why on earth can't one take exactly the same 21 approach in relation to currency conversion claims? 22 There is no difficulty in construing all of this as 23 merely being a conversion in the ordinary way for the 24 purposes of proof with all the consequences that would 25 result and no other.</p> <p style="text-align: center;">Page 72</p>

<p>1 MR JUSTICE DAVID RICHARDS: 2 o'clock. 2 (1.00 pm) 3 (The Short Adjournment) 4 (2.00 pm) 5 MR DICKER: I was dealing with agreed claims CDDs, I dealt 6 with statutory interest and currency conversion claims. 7 I was just going to add a couple of words in relation to 8 the right of appropriation. 9 We say essentially the same analysis applies to any 10 other aspects of the creditor's claim in respect of 11 which it has proved and which is agreed and admitted, 12 including his right to appropriate any payment first to 13 interest and then to principal. And we say essentially 14 that he hasn't lost such a claim if he would not have 15 lost such a claim through the ordinary proof process. 16 Now, as your Lordship knows, there are two possible 17 outcomes in our submission, depending on your Lordship's 18 judgment on part A: either it's within rule 2.88, and it 19 therefore ranks along with statutory interest, or it's 20 not, in which case it's a non-provable claim, but 21 there's absolutely no reason to attribute to creditors 22 entering into an agreed claims CDD the intention to 23 abandon such rights. Particularly if one bears in mind 24 part of the context was agreeing their claim for the 25 purposes of a client money claim.</p> <p style="text-align: center;">Page 73</p>	<p>1 mind and not focusing on the potential consequences of 2 the breadth of language which they use. My Lord, it's 3 the tree roots example your Lordship gave. 4 Before you get beguiled, if that's the right word, 5 before one gets beguiled by the width of the release 6 language, you have to do what Lord Bingham said, which 7 is put yourself in context and to work out what the 8 context was within which that broad release would be 9 granted. And we say perfectly plain what was going on 10 here, going back to my analogy of claim 1 on the one 11 hand, and claims 2 to 10 on the other, the releases had 12 nothing to do with the proof in respect of claim 1 or 13 the consequences of proving, albeit in a quicker and, 14 in the respect I've explained, more final way, so far as 15 that is concerned. 16 My Lord, the third point is again echoing a point of 17 your Lordship's. If one gets to the stage, as it were, 18 of construing the text of the release, we say it is 19 perfectly plain one can't construe it absolutely 20 literally. Again, there is the general example, the 21 tree roots example. More specifically, as I think my 22 learned friend Mr Zacaroli accepted, there is also in 23 line 3 of 2.1.1 the reference to: 24 "Releasing and forever discharging from any and all 25 losses, costs, charges, expenses, claims, including all</p> <p style="text-align: center;">Page 75</p>
<p>1 So far as the releases are concerned, again I can 2 deal with that very shortly. They don't affect the 3 position. Three essential points, if your Lordship goes 4 to bundle 11, tab 1A. My Lord, the first point is the 5 obvious one, that clause 2.1 limits the agreed claim to 6 the agreed claim amount, which shall constitute the 7 creditor's entire claim. And the releases apply to 8 everything else. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR DICKER: So the first point one essentially has to do is 11 identify what is within the scope and what is preserved. 12 And if this process is essentially a speedy proof 13 process, what is preserved is effectively an agreed 14 claim converted into sterling for the purposes of proof, 15 which one would expect to operate in just the same way 16 as any other claim admitted to proof in the ordinary 17 way, save only that the creditor can't subsequently turn 18 round and say, "I dispute the administrator's 19 adjudication, I want to submit a supplemental proof", 20 or "I want to amend my proof". 21 The second point is connected with that and the 22 second point is -- emphasised in <i>BCCI v Ali</i> -- the 23 context in which any release is agreed is absolutely 24 vital. It is very common for draftsmen to draft 25 releases extremely broadly, having a particular thing in</p> <p style="text-align: center;">Page 74</p>	<p>1 claims to interest." 2 Now, your Lordship asked whether or not you can 3 waive a right to statutory interest, and the answer to 4 that must plainly be yes, you can. If one was to take 5 an excessively literal approach to clause 1.1, you would 6 conclude therefore you had given up a right to statutory 7 interest. As your Lordship knows, that's not the 8 position for which Wentworth contends. There may be 9 disagreement about the scope of the right that's 10 effectively maintained, but you can't construe this 11 entirely literally. 12 My Lord, that's all I was going to say in relation 13 to the release provisions. One final and probably 14 peripheral point concerns the benefit of the transfer 15 provision. 16 MR JUSTICE DAVID RICHARDS: Can I just go back to 2.1? 17 I fully understand your primary submission, which is 18 that the release does not release the agreed claim and 19 what flows from the approval for the agreed claim. But 20 just looking at it more broadly, and you've mentioned 21 the tree roots and certainly implied that, in your 22 submission, the tree roots claim would not be within the 23 release, how do you construe the -- leaving aside for 24 a moment what I take to be your primary submission about 25 proof 1 is not affected, how do you construe this</p> <p style="text-align: center;">Page 76</p>

<p>1 release? How far does it go in relation to other 2 claims? If it doesn't include the tree roots claim, 3 what is the limit of the release? 4 MR DICKER: My Lord -- 5 MR JUSTICE DAVID RICHARDS: In other words, I think you're 6 saying to me -- you're submitting that the 7 post-administration tree roots claim, or let's say flood 8 claim, is not released. Whichever way it was, 9 I suppose, so Lehman's offices flood the offices of 10 a creditor below. The creditor has not released its 11 claim for nuisance or negligence arising from that. 12 MR DICKER: It's quite difficult to provide a clear answer 13 to your Lordship's question because in a sense until one 14 knows what the other claim is, you can assess whether or 15 not it formed part of what the draftsmen had in mind, 16 the context they were thinking of -- 17 MR JUSTICE DAVID RICHARDS: In your submission, does the 18 release go further than provable claims? 19 MR DICKER: Again, subject to the overarching context 20 point -- take claims 2 to 10. 21 MR JUSTICE DAVID RICHARDS: Which are all provable claims? 22 MR DICKER: Well, they're all claims capable of proof. 23 There may be potentially non-provable elements of those 24 claims as well. Assume claim 2 was a US dollar claim, 25 for example.</p> <p style="text-align: center;">Page 77</p>	<p>1 the issue before your Lordship. It's quite difficult to 2 express the dividing line between the two without 3 knowing what the claim is, what the context is, and then 4 having a look at the language in that context. 5 MR JUSTICE DAVID RICHARDS: Yes, I see. Okay, thank you. 6 MR DICKER: My Lord, perhaps my third point can best be 7 expressed -- I mean for the purposes of today -- as 8 essentially supporting my first and second points. In 9 other words, there is some textual support, so one 10 says -- the first point is the releases don't cover the 11 agreed claim at all, and there is an issue about what is 12 the agreed claim, what is it that survives. And the 13 second point is, well, if you look to the context, what 14 survives is essentially whatever you would have had, had 15 that claim been proved for in the ordinary way, subject 16 only to the fact you can't re-open the adjudication. 17 And the third point is if one wants some textual 18 support for that, when one looks, for example, at the 19 exclusion of all claims for interest, if one was to take 20 a different construction and say somehow this release 21 was cutting across the agreed claim and what was being 22 preserved by way of the agreed claim, you can't approach 23 the release literally because you then run into the 24 problem that that's actually not even consistent with 25 Wentworth's own position. What's preserved on their</p> <p style="text-align: center;">Page 79</p>
<p>1 MR JUSTICE DAVID RICHARDS: It would make no sense to say, 2 "I've released claim 2 but preserved some -- what would 3 by then be theoretical exchange loss"? 4 MR DICKER: Absolutely. What goes is the claim. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR DICKER: Not merely the provable part of it. That's why 7 right at the start of my submissions I drew the 8 distinction not between provable and non-provable, the 9 submission was not that provable claims go, but all 10 non-provable claims survive. The distinction was 11 between claim 1 on the one hand, and claims 2 to 10 on 12 the other. 13 MR JUSTICE DAVID RICHARDS: Yes, I follow. 14 MR DICKER: So how far does clause 2 go in relation to 15 claims 2 to 10? If claims 2 to 10 are pretty much the 16 same sort of claim as claim 1, if I can put it as 17 generally as that, then they'd go. 18 MR JUSTICE DAVID RICHARDS: If it's a provable claim goes 19 and any claim that is dependent on the proveable claim 20 goes. 21 MR DICKER: Yes. We say there is an ambit beyond which 22 clause 2 may not have been intended to go, whether it's 23 tree roots or flooding or fraud claims or whatever. 24 There may be claims which for one reason or another 25 aren't extinguished by clause 2. As I say, that's not</p> <p style="text-align: center;">Page 78</p>	<p>1 submissions as part of the agreed claim includes a right 2 to interest. So either one says the releases just don't 3 cover that, which, as your Lordship says, is our primary 4 submission, or the second connected submission is when 5 you look at the releases, the language of them, it can't 6 mean that because otherwise it doesn't make sense, it 7 doesn't make sense to read it literally in that way. 8 One may say -- Mr Fisher, to try and provide 9 your Lordship with a slightly clearer potential answer 10 to the ambit of the releases -- one possibility might be 11 if the claims simply weren't ever eligible for proof, if 12 the different claims weren't ever the sort of claims 13 which are eligible for proof, ignoring distinctions 14 caused by cases like Re Dynamics or Lines Brothers as to 15 whether particular bits get shunted off as non-provable, 16 then maybe they haven't been released. 17 I'm not putting that forward necessarily as the 18 answer to the overall ambit. I think the position may 19 well be one can't sensibly try and form a view on that 20 without having a particular claim and context in mind. 21 MR JUSTICE DAVID RICHARDS: Right. 22 MR DICKER: My Lord, a small point, finally, on agreed 23 claims CDDs. There is reference in the evidence to one 24 particular benefit that creditors are said to have 25 received under the CDDs, and that's the benefit of the</p> <p style="text-align: center;">Page 80</p>

<p>1 transfer provisions.</p> <p>2 On our submissions, as your Lordship knows, this is</p> <p>3 irrelevant because this agreement is not properly viewed</p> <p>4 as effectively a bargain between creditors in the sense</p> <p>5 that they've effectively agreed to exchange currency</p> <p>6 conversion claims or claims for interest in exchange for</p> <p>7 the benefit of a transfer provision. One is simply not</p> <p>8 the quid pro quo for the other.</p> <p>9 My Lord, dealing with the benefit of the provisions,</p> <p>10 therefore, in our submission doesn't arise, but can</p> <p>11 I just add this: your Lordship remarked the benefit of</p> <p>12 claims are generally assignable even absent agreement by</p> <p>13 the administrators. That's rule 2.104. Obviously,</p> <p>14 there may be contracts that prohibit assignment without</p> <p>15 agreement.</p> <p>16 MR JUSTICE DAVID RICHARDS: It's the right to the dividend</p> <p>17 that you can assign.</p> <p>18 MR DICKER: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: So you won't be in breach of</p> <p>20 contract, a non-assignable contract, by assigning the</p> <p>21 right to the dividend. That's, I think, the theory.</p> <p>22 Interestingly, here, I see, this is 4.2, this seems to</p> <p>23 reverse the position, because 4.2 says that subject to</p> <p>24 4.1, the creditor may not transfer the whole or part of</p> <p>25 its right to receive a dividend.</p> <p style="text-align: center;">Page 81</p>	<p>1 effectively being able to sell once the administrators</p> <p>2 had determined the amount of the claim. But as I say,</p> <p>3 none of this, in our submission, matters because none of</p> <p>4 this can sensibly be regarded as a quid pro quo or the</p> <p>5 price for giving up claims, statutory interest or</p> <p>6 currency conversion claims.</p> <p>7 My Lord, can I then turn to deal with admitted</p> <p>8 claims CDDs? Again, taking essentially the same</p> <p>9 structure to my submissions. Starting with a few points</p> <p>10 about the chronology, then looking at the process</p> <p>11 involved, and then turning to the admitted claims CDD</p> <p>12 itself.</p> <p>13 So far as the chronology is concerned, as</p> <p>14 your Lordship knows, admitted claims CDDs were</p> <p>15 introduced in around April 2011, so some time after the</p> <p>16 first agreed claims CDD. We say there are three</p> <p>17 important points to note about the relationship between</p> <p>18 the two types of documents, in other words which was</p> <p>19 used. The first point is there is no sharp dividing</p> <p>20 line in time between when an agreed claims CDD has been</p> <p>21 used and when an admitted claims CDD has been used, save</p> <p>22 that admitted claims CDDs were only introduced</p> <p>23 in April 2011. That's a cumbersome way of saying that</p> <p>24 from April 2011 onwards, there was a period in which</p> <p>25 both types of CDDs were in use.</p> <p style="text-align: center;">Page 83</p>
<p>1 Curious.</p> <p>2 MR DICKER: One of the points I was going to make is that</p> <p>3 when this was first introduced, my instructions are that</p> <p>4 the need for the administrators to consent to any</p> <p>5 transfer actually raised certain concerns in the market,</p> <p>6 and that was raised with the administrators. The</p> <p>7 administrators' response: this was to enable them to</p> <p>8 comply with anti-money laundering legislation,</p> <p>9 effectively knowing to whom the payment would be made</p> <p>10 MR JUSTICE DAVID RICHARDS: I see.</p> <p>11 MR DICKER: But your Lordship's noted the point that this</p> <p>12 isn't simply building on additional rights over and</p> <p>13 above the right that you would otherwise have to the</p> <p>14 extent you would have it under rule 2.104, sub-rule 1.</p> <p>15 More importantly, the additional benefit so far as</p> <p>16 creditors were concerned logically flowed from having</p> <p>17 the administrators agree their claims. Obviously, once</p> <p>18 a claim was agreed, it's easier to sell because the</p> <p>19 purchaser knows what he's getting.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>21 MR DICKER: The benefit therefore came from the LBIE</p> <p>22 determination, not from a CDD containing extensive</p> <p>23 releases. So to the extent that there was a benefit,</p> <p>24 that wasn't, as it were, a quid pro quo for providing</p> <p>25 the releases, except indirectly, the benefit was</p> <p style="text-align: center;">Page 82</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: The second point is admitted claims CDDs were</p> <p>3 used when the administrators considered that there was</p> <p>4 little or no possibility of a creditor having a client</p> <p>5 money claim. So they depended on whether the</p> <p>6 administrators thought there might be a client money</p> <p>7 claim or not. And the words "little or no possibility",</p> <p>8 which I take from the statement of agreed facts,</p> <p>9 paragraph 74, indicate that the answer to that question</p> <p>10 was not necessarily clear-cut.</p> <p>11 Thirdly, the choice between the two forms had</p> <p>12 nothing to do with whether creditors should retain</p> <p>13 claims to statutory interest or currency conversion</p> <p>14 claims or not. It's the obverse of the client money</p> <p>15 claim point; the choice between them depended on the</p> <p>16 administrators' view as to whether you might have</p> <p>17 a client money claim or not.</p> <p>18 That leads to this submission in relation to</p> <p>19 Wentworth's case. Wentworth's case is that an admitted</p> <p>20 claims CDD has a different effect from an agreed claims</p> <p>21 CDD. Wentworth's position is that in relation to an</p> <p>22 agreed claims CDD, if your underlying claim was</p> <p>23 denominated in, say, for example, US dollars, and your</p> <p>24 agreed claim was in US dollars, then you'd keep</p> <p>25 a currency conversion claim. Under an admitted claims</p> <p style="text-align: center;">Page 84</p>

<p>1 CDD, not so. Somehow by entering into that document 2 rather than an agreed claims CDD, you've lost your 3 currency conversion claim.</p> <p>4 We say no sensible reason has been given to why the 5 choice of which agreement you entered into should have 6 that result. And no sensible reason has been given as 7 to why, in particular, the administrators adjudicating 8 on a proof might have wanted to treat creditors 9 unequally in this way. In other words, depending 10 entirely on the irrelevant fact of whether the 11 administrators thought you had a client money claim or 12 not, saying to one creditor "here's an agreed claims 13 CDD, that will preserve a currency conversion claim", 14 saying to another "here's an admitted claims CDD, this 15 won't".</p> <p>16 Looking at it from the creditor's perspective, we 17 also say, why would a creditor have been willing to 18 enter into an admitted claims CDD if this was the case? 19 By the time admitted claims CDDs were in circulation, as 20 your Lordship knows, sterling had depreciated against 21 the US dollar. Of course, the exchange rate difference 22 hadn't been realised at that stage. Why would the 23 creditor have agreed to enter into an admitted claims 24 CDD if he was told that the consequence of this wasn't 25 merely converting his claim into sterling for the</p> <p style="text-align: center;">Page 85</p>	<p>1 MR JUSTICE DAVID RICHARDS: I'm surprised that over this 2 period the euro has appreciated against sterling. 3 Is that right? It entirely depends what period you take 4 for the euro, I suspect.</p> <p>5 MR DICKER: My Lord, yes. It may be that Mr Copley's brief 6 summary hides some fluctuations over the period. 7 Certainly, US dollars --</p> <p>8 MR JUSTICE DAVID RICHARDS: US dollars, the position is 9 clear, isn't it? 10 MR DICKER: It is. 11 MR JUSTICE DAVID RICHARDS: That's fine. 12 MR DICKER: My Lord, so the first point I've made 13 in relation to admitted claims CDDs is the reason for 14 their introduction had nothing to do with giving up 15 claims of this sort, it was to do with whether you had 16 a client money claim or not.</p> <p>17 The second point is, subject to that point the basic 18 purpose of an admitted claims CDD was obviously the same 19 as an agreed claims CDD, namely for the purposes of 20 speeding up proof to enable early distributions to be 21 made.</p> <p>22 So far as the process involved in an admitted claims 23 CDD is concerned, it's essentially, with one difference, 24 the same as the process for an agreed claims CDD. 25 Firstly, as with an agreed claims CDD, creditors were</p> <p style="text-align: center;">Page 87</p>
<p>1 purposes of proof, but was effectively converting it to 2 sterling for all purposes at an exchange rate that was 3 now two years old, which exchange rate was much worse 4 for him than today's exchange rate?</p> <p>5 That creditor would obviously have been giving up 6 real potential value in that situation, and we say 7 absolutely no reason to assume that that's what he would 8 have intended to do or should be taken to have done.</p> <p>9 MR JUSTICE DAVID RICHARDS: Is there anywhere in evidence -- 10 I might find it quite useful to see just some sort of 11 column as to the changing dollar/sterling exchange rate 12 over the relevant period at, let's say, quarterly 13 intervals or something. It would be interesting to see 14 something like that.</p> <p>15 MR TROWER: I don't think there's anything in the evidence. 16 MR DICKER: Mr Copley contains a general statement that 17 actually most currencies appreciated against sterling 18 during this period, but you don't have the details. I'm 19 sure --</p> <p>20 MR TROWER: We can easily put something together. 21 MR JUSTICE DAVID RICHARDS: I don't want anyone to go to any 22 great trouble, but it's quite interesting, and possibly 23 if I could see -- let me get this right -- what 24 £1 million would buy you in terms of dollars. 25 MR TROWER: We can easily put that together.</p> <p style="text-align: center;">Page 86</p>	<p>1 required to submit proofs of debt, complying with the 2 Insolvency Act and Rules. And obviously, they needed to 3 do so in the currency of their underlying entitlement, 4 given that was the claim which they had.</p> <p>5 Secondly, as with agreed claims CDDs, LBIE 6 communicated its determination in the currency of the 7 underlying entitlement. My Lord, again, all of this is 8 reflected in the statement of agreed facts and I have 9 shown your Lordship, I think, some of the paragraphs, 10 but just one specific paragraph on the last point 11 in relation to admitted claims CDDs. If your Lordship 12 goes to the statement of agreed facts at tab 18, it's 13 paragraph 75.</p> <p>14 So 75: 15 "Under an admitted claims CDD, if the currency of 16 a creditor's claim against LBIE was other than sterling, 17 joint administrators would determine the amount of that 18 claim in the currency of the underlying obligation and 19 then convert the claim into sterling pursuant to 2.86, 20 express the amount of the creditor's admitted claim 21 in the admitted claims CDD in sterling." 22 And as 75 indicates, assuming that the 23 administrators' determination was accepted, it would be 24 formalised in an admitted claims CDD, and that showed 25 the amount of the determination in sterling, converted</p> <p style="text-align: center;">Page 88</p>

<p>1 pursuant to rule 2.86. And my Lord, we say conversion 2 pursuant to 2.86(1), whether done as a matter of 3 contract or otherwise, has precisely the effect you 4 would expect.</p> <p>5 MR JUSTICE DAVID RICHARDS: Does the agreement itself say 6 anything about this process?</p> <p>7 MR DICKER: It doesn't because in a sense it comes at the 8 end of it. As I said, it's set out, summarised 9 certainly in the statement of agreed facts, and 10 your Lordship has seen references to it in some of the 11 progress reports, particularly the fourth. It's also 12 dealt with -- perhaps I can just show your Lordship 13 Mr Garvey's --</p> <p>14 MR JUSTICE DAVID RICHARDS: I raise it partly because -- 15 Mr Zacaroli objects to the admission of this part of 16 Mr Garvey's evidence on this part of the argument. 17 That's what the statement of agreed facts states. There 18 hasn't been any submissions from anyone yet on 19 admissibility. I don't know where we are on that. This 20 might be helpful. Mr Zacaroli?</p> <p>21 MR ZACAROLI: My Lord, as I understand the point my learned 22 friend is making, that there was a conversion of these 23 claims into sterling in the light of rule 2.86 before 24 the admitted claims CDD was entered into, one gets that, 25 and I accept that, from the fourth progress report.</p> <p style="text-align: center;">Page 89</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR DICKER: That was plainly the position stated by the 3 administrator in their progress reports, so that's what 4 one starts with. The next point is of course if they're 5 going to submit a complying proof, it has to be for 6 claims that they have. If you have a claim in US 7 dollars, you need to submit a proof in US dollars. 8 That's the next point. The next point is the 9 administrators essentially determine the claim by 10 reference to the US dollar amount. That's the statement 11 of agreed facts. And the final point is, how do we get 12 to sterling? We get to sterling because there's 13 a conversion pursuant to rule 2.86.</p> <p>14 Now, my Lord, where we appear to get to is, 15 essentially, what is the nature of the conversion 16 pursuant to rule 2.86? We say it does no more than 17 a conversion under 2.8 6 in relation to any claim. 18 Wentworth, just so your Lordship knows, objected at one 19 stage to statements, for example, like that in 20 paragraph 75 of the statement of agreed facts, referring 21 to conversion into sterling pursuant to 2.86. You can 22 see that if you go to the statement of disputed facts, 23 which is at tab 21. 24 It's part 1, Wentworth's alleged facts, and then 25 paragraph 9.</p> <p style="text-align: center;">Page 91</p>
<p>1 That's clearly stated in the fourth. I took my Lord to 2 that in opening.</p> <p>3 MR JUSTICE DAVID RICHARDS: What was the date of the fourth 4 progress report, is it after April 2011?</p> <p>5 MR ZACAROLI: I believe so.</p> <p>6 MR JUSTICE DAVID RICHARDS: Anyway, it's telling us how this 7 process is working?</p> <p>8 MR ZACAROLI: No, it's explaining what the proposal is.</p> <p>9 MR JUSTICE DAVID RICHARDS: I see.</p> <p>10 MR ZACAROLI: It's before the process, so it's telling you 11 what's going to happen.</p> <p>12 MR JUSTICE DAVID RICHARDS: I see. So that would be 13 probably on any footing admissible.</p> <p>14 MR DICKER: I accept that.</p> <p>15 MR ZACAROLI: It's put out to all creditors.</p> <p>16 MR DICKER: And we say in a sense, there's nothing 17 uncontroversial in any of this. In fact, it was all 18 reflected in the statement of agreed facts.</p> <p>19 MR JUSTICE DAVID RICHARDS: I know, but there are these 20 caveats throughout the statement of agreed facts. 21 That's the point I'm mentioning now.</p> <p>22 MR DICKER: And I was going to go on and say that none of 23 what I've said to your Lordship should be controversial. 24 I made the point that the creditor had to submit a proof 25 of debt complying with the rules and the Act.</p> <p style="text-align: center;">Page 90</p>	<p>1 MR JUSTICE DAVID RICHARDS: I'm a bit puzzled. Which tab 2 are we in?</p> <p>3 MR DICKER: Tab 21.</p> <p>4 MR JUSTICE DAVID RICHARDS: The oddity is, I go from 8 to 5 10. Are you looking at a different ... This is 6 Wentworth's statement of additional facts.</p> <p>7 MR DICKER: Ah, okay. Then the point may not be 8 a subsisting one. Can I show your Lordship, because 9 I think it encapsulates quite neatly the issue between 10 us? The only reference I will show you in bundle 9, if 11 your Lordship goes to correspondence at tab 29. 12 It's at page 225. Tab 29, page 225. There's an 13 e-mail exchange. Essentially, the dispute was about the 14 wording of the relevant paragraph in the statement of 15 agreed facts. The first e-mail at the top of the page 16 is from Freshfields, my instructing solicitors, and it 17 essentially records the final position, but the last 18 line: 19 "On 27 April 2015 Wentworth made clear by letter 20 that it considers the words 'pursuant to' should read 21 'using the same official rate as under'." 22 So at one stage what Wentworth were contending was 23 that the statement of agreed facts shouldn't read 24 "conversion pursuant to rule 2.86" -- 25 MR JUSTICE DAVID RICHARDS: Sorry, it's the paragraph in the</p> <p style="text-align: center;">Page 92</p>

<p>1 statement of agreed facts, it's paragraph ...</p> <p>2 MR DICKER: My Lord, you'll see, it's paragraph 75, and</p> <p>3 your Lordship will see that -- perhaps I should have</p> <p>4 started at the bottom of this e-mail chain.</p> <p>5 MR JUSTICE DAVID RICHARDS: Okay. I'll just make a note</p> <p>6 here to refer to this letter, the Freshfields e-mail.</p> <p>7 MR DICKER: And the e-mail chain starts and confirms we're</p> <p>8 dealing with paragraph 75 in the e-mail at page 226.</p> <p>9 MR JUSTICE DAVID RICHARDS: Okay. I think the only point</p> <p>10 I'm really raising is this: you've referred to this</p> <p>11 paragraph of the statement of agreed facts and maybe</p> <p>12 others which are marked with an objection to</p> <p>13 admissibility on the construction. What I don't want to</p> <p>14 find is without submissions that I find I'm not quite</p> <p>15 clear what these --</p> <p>16 MR DICKER: I understand your Lordship's position</p> <p>17 in relation to admissibility and I've addressed that.</p> <p>18 The point I was making was a slightly different one,</p> <p>19 which is we say the conversion is essentially pursuant</p> <p>20 to rule 2.86. In other words, it does what any</p> <p>21 conversion pursuant to rule 2.86 does.</p> <p>22 Now, Wentworth's position initially was that they</p> <p>23 weren't happy to have the statement of agreed facts</p> <p>24 worded in that way. What they were happy to agree to</p> <p>25 was that it should say not that it's "pursuant to", but</p> <p style="text-align: center;">Page 93</p>	<p>1 really that it is as stated here, its relevance is</p> <p>2 not ... That there is an objection to reliance.</p> <p>3 Mr Zacaroli?</p> <p>4 MR ZACAROLI: The position is as follows. We don't object</p> <p>5 to the form of paragraph 75. My understanding is that</p> <p>6 the objection at the top of page 15 is in relation to</p> <p>7 other parts of Mr Garvey's evidence.</p> <p>8 MR JUSTICE DAVID RICHARDS: Oh, I see.</p> <p>9 MR ZACAROLI: So to the statement in paragraph 75, although</p> <p>10 there was a dispute about whether it had ever been</p> <p>11 agreed, that's no longer the case. At least we're not</p> <p>12 pursuing that dispute.</p> <p>13 MR JUSTICE DAVID RICHARDS: Okay. Is that the only place in</p> <p>14 this -- it may be the only place. No, there are other</p> <p>15 places where ... There are a number of paragraphs where</p> <p>16 you're recorded as objecting to the relevance of ...</p> <p>17 While accepting the factual accuracy, I understand that,</p> <p>18 you're objecting to the relevance -- well, the wording</p> <p>19 is slightly different now I come to look at it, but</p> <p>20 I guess it comes down to the same point.</p> <p>21 In some cases, such as paragraph 27, paragraph 49,</p> <p>22 it's expressed in terms to be an objection to</p> <p>23 admissibility for the purposes of construction. The</p> <p>24 objection here is put in relation to relevance, as is 58</p> <p>25 and 75. That's it.</p> <p style="text-align: center;">Page 95</p>
<p>1 that "using the same official rate as under". So the</p> <p>2 difference between us appears to be whether it's</p> <p>3 pursuant to 2.86, in the sense it does whatever</p> <p>4 a conversion under 2.86 would do, or is simply an</p> <p>5 agreement to convert at a rate that happens to be the</p> <p>6 same as the official rate, but which has totally</p> <p>7 different consequences because it's a conversion for all</p> <p>8 purposes and for all times.</p> <p>9 My Lord, I thought that continued to be reflected in</p> <p>10 the latest version of the statement of disputed facts.</p> <p>11 I understand it wasn't, so Wentworth obviously ended up</p> <p>12 taking out that dispute. But that, as your Lordship's</p> <p>13 seen from the correspondence, was the issue between the</p> <p>14 parties. And we say the answer is perfectly clear.</p> <p>15 It's pursuant to 2.86.</p> <p>16 MR JUSTICE DAVID RICHARDS: There is an anterior question</p> <p>17 because if you go back to the statement of agreed facts</p> <p>18 and look at -- so paragraph 75 is at the bottom of</p> <p>19 page 14, but then if you go to the top of page 15 you'll</p> <p>20 see some words in italics and in square brackets. So</p> <p>21 there's an issue, as I understand it, about the</p> <p>22 relevance and hence admissibility of this evidence to</p> <p>23 the issues of construction of the agreements, which is</p> <p>24 what we are on. That's my reading of it. I suppose</p> <p>25 I need to understand Mr Zacaroli's ... I've taken it</p> <p style="text-align: center;">Page 94</p>	<p>1 MR ZACAROLI: My Lord, my understanding is that we don't</p> <p>2 object to the statements being accepted as agreed facts</p> <p>3 that appear in this statement.</p> <p>4 MR JUSTICE DAVID RICHARDS: Correct.</p> <p>5 MR ZACAROLI: Can I take instructions about whether --</p> <p>6 MR JUSTICE DAVID RICHARDS: Whether that evidence is</p> <p>7 admissible on the issue of construction.</p> <p>8 MR ZACAROLI: Yes.</p> <p>9 MR JUSTICE DAVID RICHARDS: Which is what we're on at the</p> <p>10 moment.</p> <p>11 MR ZACAROLI: Yes, I will confirm that. For the moment,</p> <p>12 my Lord can proceed on the basis it is admissible. I'm</p> <p>13 not taking that point at the moment.</p> <p>14 MR JUSTICE DAVID RICHARDS: In relation to all the cases</p> <p>15 where there are square bracketed words, you're not</p> <p>16 objecting?</p> <p>17 MR ZACAROLI: That's my understanding, but I will clarify</p> <p>18 that with those behind me.</p> <p>19 MR JUSTICE DAVID RICHARDS: Thank you.</p> <p>20 MR DICKER: That's very helpful.</p> <p>21 Just to repeat the point, we say the admitted claims</p> <p>22 CDDs effectively -- that the process was in substance</p> <p>23 exactly the same for an agreed claims CDD in the sense</p> <p>24 you submit your proof in the underlying currency, the</p> <p>25 administrators look at it, determine it in the</p> <p style="text-align: center;">Page 96</p>



<p>1 underlying currency. If it's acceptable to a creditor, 2 it's then converted into sterling, and the disagreement 3 between the two of us appears to be whether it's 4 converted, as we say, pursuant to 2.86 or, as Wentworth 5 appeared to say, simply at a rate that happens to equal 6 the official rate.</p> <p>7 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>8 MR DICKER: Then turning to interest and currency conversion 9 claims, our submissions in relation to interest are 10 identical to those that we made in relation to the 11 agreed claims CDD, the same point is made by Wentworth 12 in relation to these, and the answers that we give are 13 the same.</p> <p>14 In relation to currency conversion claims, 15 similarly, Wentworth says to the extent its a claim in 16 sterling you have given up any currency conversion 17 claim, and our short answer is, as your Lordship well 18 knows, no, because it's only converted for the purposes 19 of proof. It's true that it's not done in a two-stage 20 process in the way that it was under the agreed claims 21 CDD. It didn't need to be because there wasn't a client 22 money issue, so you didn't need to separate out the two 23 stages in the way that you did for an agreed claims CDD. 24 So when you came to express the figures, you could 25 simply cut to the chase, carry out your conversion and</p> <p style="text-align: center;">Page 97</p>	<p>1 there's multiple claims.</p> <p>2 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>3 MR DICKER: My Lord, we say Wentworth's position again can't 4 be right. Take the example of a euro or yen creditor. 5 So far as they are concerned, this agreement is 6 effectively taking away with one hand but not giving 7 back with the other, if I can put it that way. They're 8 losing any existing currency conversion claim they have 9 despite the fact that the provision is -- but they're 10 not getting anything in exchange. It's simply being 11 converted under an admitted claims CDD into sterling.</p> <p>12 We say this doesn't raise any issue at all. Again, 13 if one bears in mind that all this is simply conversion 14 for the purposes of proof. If one gets to a stage where 15 the underlying entitlements are relevant, you simply 16 disaggregate the amount of the admitted claim into its 17 underlying constituent parts and you work out the 18 currency conversion claim in respect of each underlying 19 constituent part. And that actually is precisely, as 20 I recall, what the parties' common position was 21 in relation to question 37, as part of part A. In other 22 words, where you have blended, you have one proof of 23 debt, which effectively involves a number of underlying 24 claims. If it becomes necessary for currency conversion 25 purposes, you disaggregate them.</p> <p style="text-align: center;">Page 99</p>
<p>1 give the converted sum.</p> <p>2 But when you read reference to the admitted claim 3 and you see a sterling sum, one needs to construe that 4 as effectively "an admitted claim (converted pursuant to 5 rule 2.86) for the purposes of proof", because that's 6 essentially what's going on here.</p> <p>7 Wentworth's position, we say, elevates form over 8 substance and ignores the context. The logic of its 9 position is that if the admitted claims CDD had in one 10 document recorded the agreed claim in the foreign 11 currency and then had another clause saying it is 12 converted into sterling for the purposes of proof, on 13 their analysis you would still have a currency 14 conversion claim. Their argument essentially is that 15 because you skip step 1, there's no need for it in this 16 case, and simply record the figure after conversion 17 pursuant to 86, that makes all the difference. We say 18 that can't possibly be the case.</p> <p>19 Now, my learned friend mentioned a situation in 20 which you have a mixture of claims denominated in 21 different underlying currencies. And where the agreed 22 claim is expressed in the currency of the majority of 23 the claims -- your Lordship's seen the reference in the 24 statement of agreed facts -- it is generally in the 25 currency of the underlying entitlement, save where</p> <p style="text-align: center;">Page 98</p>	<p>1 My Lord, non-provable claims, in particular Bower v 2 Marris. Our submissions are exactly the same. Your 3 rights in respect of the rule in Bower v Marris ought to 4 be exactly the same as the rights you would have had if 5 you had proved in the ordinary way. And again, so far 6 as the releases are concerned, our submissions are also 7 the same as they are for agreed claims CDDs.</p> <p>8 So far as CRA CDDs are concerned, again just 9 starting with the context. Creditors who entered into 10 the CRA, as your Lordship knows, are entitled to payment 11 of a net financial claim expressed in US dollars. The 12 CRA provided a complete mechanism for the quantification 13 of claims arising under financial contracts. So to that 14 extent it wasn't actually necessary for a CRA creditor, 15 one might have thought, to enter into a CDD. His claim 16 had already been quantified under the CRA.</p> <p>17 The position appears to be that the administrators 18 adopted a policy of requesting signatories to enter into 19 CDDs because they considered that a CDD provided a more 20 straightforward and less time-consuming way of 21 documenting the claim than the CRA.</p> <p>22 Just so your Lordship has the paragraph, it's in the 23 statement of agreed facts, tab 18. Bundle 1, tab 18. 24 It's paragraph 79: 25 "A CDD is generally considered by the joint</p> <p style="text-align: center;">Page 100</p>

<p>1 administrators to be a more straightforward and less 2 time-consuming way of documenting the unsecured claim 3 than issuing the various notices required under the CRA. 4 Creditors could also transfer their claims pursuant to 5 the transfer notice appended to the CDD." 6 So the only reason for creditors who were 7 signatories to the CRA entering into the CDD was 8 apparently, it's easier, you don't have to provide the 9 same notices under the CRA. 10 My Lord, I'm not sure why the existing notices under 11 the CRA were thought to be particularly onerous. This 12 appears to be a relatively innocuous alternative. 13 As your Lordship knows, there are also a variety of 14 different kinds of CRA CDDs. Agreed claims CDD is an 15 admitted claims CDD in particular. Our submission 16 is that they all had, surprisingly, the same effect. 17 Wentworth's position is, again not surprisingly, that 18 the distinction they draw between admitted claims CDDs 19 and agreed claims CDDs is reflected in the different 20 kinds of CRA CDDs. If it's a CRA, if it's an agreed CRA 21 CDD, you keep your currency conversion claim. If it's 22 an admitted CRA CDD, you don't. 23 We say that can't be what the parties sensibly 24 intended. If the signatory to the CRA has already had 25 his claim determined and if he is told by the</p> <p style="text-align: center;">Page 101</p>	<p>1 an ascertained claim and shall qualify for dividends 2 from the estate of the company available to its 3 unsecured creditors pursuant to the Insolvency Rules and 4 the Act or a scheme of arrangement or CVA." 5 And then releases in broadly similar terms in 2.1.4. 6 The definition of net financial claim amount, 7 your Lordship has at the top of page 4, and it is to the 8 same effect as definitions your Lordship has seen 9 previously. It's converted into sterling and we're told 10 that it's the value of the net financial claim converted 11 to pounds sterling at the official exchange rate set out 12 in rule 2.86, sub-rule 2, of the Insolvency Rules, and 13 the rate is given. So exactly the same is going on here 14 as was going on in relation to ordinary agreed and 15 admitted claims CDDs. 16 The only additional point is that not all 17 definitions are contained in this agreement. For 18 example, net financial claim requires you to go to the 19 CRA and the requirement to do so appears in 20 clause 1.2.1: 21 "Terms used but not defined in this deed shall have 22 the meanings given to them in the CRA." 23 Now, I won't take your Lordship back to the CRA, 24 your Lordship's seen it probably more often than you 25 need to, but the short point is that when you go back</p> <p style="text-align: center;">Page 103</p>
<p>1 administrators "I would like you to enter into a CRA CDD 2 because it's easier, we don't need to deal with as many 3 notices", and if the administrator says, depending on 4 whether he thinks they have a client money claim or not, 5 "Here's an admitted or here's an agreed CRA CDD", the 6 last thing in the world, in our submission, a creditor 7 would have expected is that which he signs would 8 determine whether or not he gives up any currency 9 conversion claim he might have. Simply on Wentworth's 10 case, we say, it's commercially inexplicable. 11 My Lord, we deal in our skeleton argument with two 12 types of CRA CDDs, the first referred to as the standard 13 CRA CDD and the second Wentworth's CRA CDD. Can I just 14 show your Lordship a couple of provisions in relation to 15 the first, so the standard CRA CDD, which is bundle 11, 16 tab 15. 17 Your Lordship's seen these, so I can deal with this 18 very quickly. Starting with clause 2, 2.1.1: 19 "The creditor's aggregate net financial claim shall 20 be limited to, and in an amount equal to, the net 21 financial claim amount and shall constitute the 22 creditor's entire claim against the company." 23 2.1.3: 24 "The creditor's net financial claim in an amount 25 equal to the net financial claim amount shall constitute</p> <p style="text-align: center;">Page 102</p>	<p>1 into the CRA and you go back through the net financial 2 claim and you get to the net contractual position, the 3 net contractual position is the sum of close-out 4 amounts, and close-out amounts are effectively the 5 position in relation to the underlying financial 6 contracts. So to the extent it matters, this definition 7 of net financial claim amount ultimately through the CRA 8 refers back to the underlying contracts in respect of 9 which the proof was agreed and admitted. 10 We also in the skeleton deal with a CRA CDD 11 Wentworth referred to in the attachment to their 12 position paper. I'll just show your Lordship the 13 paragraphs, I don't think I need to say anything more. 14 It's paragraphs 183 to 185 of our skeleton argument. 15 183 to 185. Can I just perhaps draw your Lordship's 16 attention to one small point? Again for what it's 17 worth, 185, sub-paragraph 3. This essentially is 18 a slight difference from the document your Lordship has 19 just seen: 20 "In addition to recording the minimum net financial 21 claim in sterling, along the words being the value of 22 the net financial claim converted [et cetera], the 23 Wentworth CRA CDD also identifies the claims admitted as 24 an ascertained claim in appendix 1, all of which are 25 shown in US dollars."</p> <p style="text-align: center;">Page 104</p>

<p>1 The Wentworth CRA CDD is at bundle 11, tab 21, and 2 pages 24 and 25 contain appendix 1, and your Lordship 3 can see the only bits that aren't blanked out in the 4 middle under the heading "Currency". It's all US 5 dollars.</p> <p>6 So releases under the CRA CDDs. My Lord, as my 7 learned friend mentioned, they come in different forms. 8 There are releases which are in similar terms to those 9 your Lordship has already seen. There are also releases 10 which are narrower in scope, and my learned friend 11 Mr Zacaroli dealt also with those. Can I just briefly 12 respond?</p> <p>13 If your Lordship goes to bundle 11, tab 17. 14 My Lord, as I understand the way the argument went, you 15 need to look at clause 2.1.3 --</p> <p>16 MR JUSTICE DAVID RICHARDS: Just to say, I don't think 17 Mr Zacaroli took me to this. Is there an almost 18 identical version?</p> <p>19 MR ZACAROLI: I took you to tab 21, which I believe is the 20 same narrow release.</p> <p>21 MR JUSTICE DAVID RICHARDS: I see.</p> <p>22 MR DICKER: I think one can do it, and I probably should do 23 it, by reference to tab 21. My Lord, if your Lordship 24 goes to clause 2, 2.1.4, and the important provision, as 25 I understand it, is (v):</p> <p style="text-align: center;">Page 105</p>	<p>1 My Lord, that's currency conversion claims. We make 2 the same submissions in relation to non-provable claims, 3 in particular the right to appropriate payments in 4 accordance with the rule in Bower v Marris.</p> <p>5 Then one very short point concerns at the later 6 stage, one gets CDDs with preservation language. Now, 7 as we understand Wentworth's position, it is that you 8 have rights to statutory interest, both Judgments Act 9 rate interest or contractual, whichever is the greater, 10 but what you have apparently given up, as far as one can 11 see the only thing one has given up in relation to your 12 claim, so far as interest is concerned, is the right to 13 appropriate in accordance with the rule in Bower v 14 Marris. Again, for similar reasons, we say that cannot 15 have been the intention of the draftsmen. What they 16 plainly intended, having realised that this issue arose, 17 was to insert language in the CDDs designed to protect 18 creditors. And in our submission, it's plain that what 19 the draftsmen intended to do was not draw a distinction 20 between preserving claims so far as statutory interest 21 were concerned, but not preserving non-provable claims 22 resulting from the rule in Bower v Marris, assuming it's 23 not within 2.88 and a credit is limited to that rule.</p> <p>24 So that's all in relation to the different types of 25 CDDs. My Lord, can I then deal briefly with the</p> <p style="text-align: center;">Page 107</p>
<p>1 "The creditor hereby irrevocably releases and 2 discharges the certain excluded claims." 3 So one has to go back to the definition of "certain 4 excluded claims". That's on page 2: 5 "B, claims referred to in paragraph 4 of the 6 definition of excluded claims. To the extent that those 7 claims arise as a consequence of the company and the 8 creditor entering into this deed." 9 My Lord, as I understand the argument, it's that if 10 you have a currency conversion claim under the CRA, 11 you are irrevocably giving up that claim because it's 12 a claim which falls within the definition of certain 13 excluded claims, which you are giving up because the 14 consequence of entering into this agreement is that 15 a claim arises as a consequence of the company and the 16 creditor entering into this deed.</p> <p>17 MR JUSTICE DAVID RICHARDS: That's right, yes.</p> <p>18 MR DICKER: My Lord, in our submission, that's a wholly, if 19 I may say, artificial construction with a strong element 20 of circularity. A creditor under the CRA, if he does 21 have a currency conversion claim, to say that he's to be 22 treated as having released it because in some way he 23 gets it under this agreement and promptly releases it, 24 I have to say I even find difficulty following the 25 logic, but there we are.</p> <p style="text-align: center;">Page 106</p>	<p>1 circumstances in which -- make a few points in relation 2 to the evidence dealing with the circumstances in which 3 they were entered into, the purpose and genesis.</p> <p>4 Again, just as we submitted in relation to the CRA, 5 we say it would be extremely surprising, and one might 6 add unfortunate, if the effect of the CDDs was to have 7 released claims to statutory interest or currency 8 conversion claims. Again, the structure of the 9 submission is similar to the CRA. CDDs devised and 10 recommended to creditors by the administrators. I'll 11 just show your Lordship one reference out of a number. 12 If your Lordship goes to bundle 4A, page 375.</p> <p>13 It's just the last paragraph in the right-hand 14 column, the last sentence: 15 "Such an approach is likely to result in an 16 equitable and relatively consistent approach to claims 17 determination and resolution." 18 Creditors were also told that if they wanted 19 a dividend, they needed to enter into a CDD. That was 20 stated in relation to the various dividends -- again 21 just giving your Lordship one reference -- in bundle 9, 22 tab 26. Tab 26, "First interim dividend" and: 23 "The below FAQs relate to the 4 May general creditor 24 update regarding the first interim dividend 25 [et cetera]."</p> <p style="text-align: center;">Page 108</p>

<p>1 The relevant paragraph is over the page, 2 paragraph 6: 3 "What is the process for participating in the first 4 interim dividend? 5 "Answer: to be considered eligible to participate in 6 the first interim dividend. To the extent they have not 7 already done so, creditors must (a) submit a proof of 8 debt; (b) have their claim assessed by LBIE; (c) execute 9 a claims determination deed or similar agreement issued 10 by LBIE and any ancillary documentation as determined by 11 the administrators." 12 So if you wanted an interim dividend, you were told 13 you had to enter into a CDD. 14 And as your Lordship knows, creditors were also told 15 the documents were non-negotiable and that there would 16 be likely to be considerable downsides to any creditor 17 who decided not to enter into a CDD. Your Lordship has 18 seen the references in the evidence where the 19 administrators claim the downside -- the obvious 20 downside is that if you don't participate and you don't 21 get an interim dividend, and it turns out that there is 22 no surplus, then you are not going to be compensated for 23 the time, value and money which you would suffer before 24 your claim is eventually admitted and eventually 25 eligible for dividends. So there was a real price to be</p> <p style="text-align: center;">Page 109</p>	<p>1 are as a matter of fact not entirely clear, this 2 potentially raises additional issues. Just to explain 3 why, take the stage when the administrators became aware 4 of the possibility the documents might have the effect 5 of releasing such -- I'm sorry, take the stage when the 6 administrators became aware of the possibility of 7 a surplus and of the question of whether or not these 8 documents might release your claim to interest. 9 The administrators' reaction at that stage was to 10 say they considered it was unnecessary to insert 11 language to preserve a creditor's right to statutory 12 interest. Mr Lomas deals with that in his witness 13 statement. 14 Now, the consequence of that was that some CDDs were 15 entered into in the period between the administrators 16 becoming aware of the possibility of a surplus, the 17 issue about the effect of the releases, and saying they 18 didn't think they had any effect on the one hand and, on 19 the other hand, actually producing revised standard 20 forms containing preservation language. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR DICKER: My Lord, we say whatever the position may be 23 in relation to any other CDDs, saying that a creditor 24 who enters into a CDD having been told by the 25 administrator they don't think preservation language is</p> <p style="text-align: center;">Page 111</p>
<p>1 paid for creditors who didn't participate in this 2 process. If you didn't think there would be a surplus, 3 you would be losing money every single day. They were 4 also told if they wanted to negotiate their claims under 5 a bilateral basis they could, but, as the administrators 6 explained, it was likely to be much more time-consuming 7 and expensive and the administrators may well end up 8 looking rather more closely. 9 So although Wentworth says creditors have a choice, 10 that of course is true in the sense they couldn't be 11 forced to enter into this agreement, these documents, 12 but they had a really commercial incentive for doing so. 13 My Lord, I had one final point before sitting down. 14 MR JUSTICE DAVID RICHARDS: We might as well continue, 15 I think. 16 MR DICKER: It'll take me a couple of minutes, but not long. 17 It's this: I've dealt with the various forms of CDD and 18 in respect of many of them, they were entered into by 19 the administrators and creditors before it appears 20 anyone thought a surplus was possible or, as far as the 21 evidence goes, there was any discussion about currency 22 conversion claims. But there came a time at which both 23 of those things, slightly different times, came on to 24 the radar. 25 We say effectively, although the boundaries of this</p> <p style="text-align: center;">Page 110</p>	<p>1 necessary because their interest claim is also 2 preserved, concluding that those CDDs nevertheless 3 release claims to interest would be the most 4 extraordinary result. 5 Now, there's a similar point in relation to currency 6 conversion claims, although as a matter of fact it 7 operates in a slightly different way. There came 8 a stage at which LBIE identified the possibility of 9 a currency conversion claim. The administrators' 10 reaction in that respect was in March 2003. Mr Copley 11 refused to change the documents at that stage. His view 12 was he didn't want to create different documents and 13 affect creditors in different ways. So the 14 administrators' reaction was "we are not going to change 15 the documents, we want consistency". 16 Between March 2013 and when preservation language 17 was eventually issued in October 2013, again there were 18 creditors who entered into the CDDs without preservation 19 language in circumstances where the administrators 20 realised there was an issue, were refusing to change the 21 CDDs but were saying to creditors, as they said 22 in relation to every distribution, "If you want an 23 interim distribution you have to enter into a CDD." 24 My Lord, again, we say similarly it would be 25 extraordinary if those agreements had the effects for</p> <p style="text-align: center;">Page 112</p>

<p>1 which Wentworth contend. I say the boundaries of these 2 two categories may not be clear and if it ever became 3 relevant, it may be necessary to investigate further. 4 We say ultimately it doesn't matter because the same 5 answer applies in relation to all CDDs. But if that 6 wasn't right then your Lordship would need to deal with 7 these. 8 So finally, as your Lordship knows, so far as the 9 CRA is concerned, we say it preserved creditors' claims 10 to statutory interest in both kinds. It entitled 11 signatories to a right to payment in US dollars, or at 12 least it didn't deprive those whose underlying claims 13 were in US dollars to a currency conversion claim, and 14 it also entitled -- certainly creditors didn't give up 15 any rights they may have pursuant to the rule in Bower v 16 Marris, and we say similarly in relation to all the 17 different kinds of CDDs. 18 My Lord, unless I can help your Lordship further. 19 MR JUSTICE DAVID RICHARDS: Thank you very much, Mr Dicker. 20 I'll rise for five minutes. 21 (3.22 pm) 22 (A short break) 23 (3.27 pm) 24 Reply by MR ZACAROLI 25 MR ZACAROLI: My Lord, a preliminary point about</p> <p style="text-align: center;">Page 113</p>	<p>1 then but came back on some occasions as underpinning the 2 argument. So page 130 actually, the bottom left-hand 3 corner of page 33 of the transcript. Line 10: 4 "My Lord, next a few general background points 5 before I come to the CRA. Those four points are these. 6 The first point concerns the administrators' functions 7 and duties." 8 And then the crux of it is at line 23: 9 "Neither of those duties [which is returning assets 10 and dealing with creditors] required or indeed permitted 11 the administrators to try and minimise the amount 12 recovered by beneficiaries or creditors so as to benefit 13 shareholders." 14 That's the first point. 15 He goes on to refer to the quasi-judicial capacity 16 in which the administrators act. The second point is 17 page 131, line 20, he says: 18 "It concerns the purposes of the CRA and the CDDs. 19 We say the purposes of those agreements did not require 20 creditors to give up potentially valuable rights which 21 they had in the event of a surplus." 22 And then he goes on to say: 23 "If one, for example, takes the CDDs, they could 24 have achieved what the administrators wanted to achieve 25 without such claims being released."</p> <p style="text-align: center;">Page 115</p>
<p>1 terminology. My learned friend Mr Dicker's submissions, 2 not surprisingly, were replete with the concept of 3 giving up currency conversion claims as if their 4 currency conversion claim is some freestanding claim 5 that exists. 6 It's not of course, and the way we put our case 7 in relation to releases is very important in this 8 respect. The currency conversion claim, so-called, and 9 I have made this point in opening, is merely the right 10 to be paid the remains of your contractual rights which 11 are not satisfied out of the insolvency process. It's 12 not a freestanding claim, it's just a reversion to your 13 contractual rights. 14 With that preliminary point, can I now turn to the 15 way my learned friend introduces four, he called them 16 background points but I think they're probably more 17 likely called underpinning points, he started off with 18 yesterday. Does my Lord have the transcript for 19 yesterday? 20 MR JUSTICE DAVID RICHARDS: I do, yes. 21 MR ZACAROLI: I'm going to take my Lord to each of the four 22 points, they're all in the same place, and then deal 23 with them in turn. It begins on page 129 of the 24 transcript for yesterday. 25 I start with these because these points were made</p> <p style="text-align: center;">Page 114</p>	<p>1 The third point is at page 132, line 9, and is: 2 "If such claims were nevertheless released, it's 3 plain from the background material this was entirely 4 inadvertent in the sense that no specific thought 5 appears to have been given as to whether or not they 6 should be released." 7 And the fourth point is page 133, beginning at 8 line 4: 9 "My Lord, the fourth point is this. No sensible 10 reason has been provided why, although the parties never 11 consciously thought about them, creditors should 12 nevertheless now be taken to have agreed to release 13 claims to statutory interest and currency conversion 14 claims. Why, for example, should any creditor with 15 a right to interest in the event of a surplus have 16 agreed to limit itself to interest at the Judgments Act 17 rate and release any right to contractual interest?" 18 And similarly at line 17: 19 "Why would any creditor with a US dollar claim have 20 agreed to release any currency conversion claims he 21 might otherwise have had?" 22 Now, my general response to those four points 23 is that they involve posing fundamentally the wrong 24 question when one is construing the documents. Taking 25 each of them in turn, so going back to the first point,</p> <p style="text-align: center;">Page 116</p>

<p>1 the crux of which is line 23 on page 130, the duties of 2 the administrator did not require or permit them to try 3 to minimise the amount recovered by beneficiaries or 4 creditors so as to again benefit shareholders. 5 That is, we say, to mischaracterise what the 6 administrators in fact did. First, they were not 7 seeking to minimise the claims of creditors. What they 8 were trying to do was to reach a final position with 9 creditors as to their claims against LBIE, with a view 10 to saving substantial amount of costs and time and 11 enabling those creditors to benefit from early 12 distributions. That involved exercising their power to 13 compromise. Any compromise involves give and take on 14 both sides, in circumstances where the creditor was 15 receiving the benefit of an early distribution and 16 receiving the advantage of knowing precisely where it 17 stood in terms of its financial relationship with LBIE, 18 and where the price for that was the broad and unlimited 19 reciprocal release of all possible claims against LBIE 20 or by LBIE. 21 Now, that exercise or that conduct is undoubtedly 22 within the duties of the administrators and within the 23 purposes of administration. I'll not repeat the 24 submissions I made in opening to that effect. 25 The second point is that it is nonsense to suggest</p> <p style="text-align: center;">Page 117</p>	<p>1 MR ZACAROLI: Yes. 2 MR JUSTICE DAVID RICHARDS: So it doesn't help creditors 3 with an entitlement to statutory interest that some 4 creditors have released currency conversion claims 5 because we haven't got there. 6 MR ZACAROLI: My Lord, when the -- I'm going back to the 7 time the releases were entered into and asking what were 8 the administrators then doing. At that stage, we didn't 9 know whether there would be a surplus -- 10 MR JUSTICE DAVID RICHARDS: In which case none of this would 11 be relevant of course. 12 MR ZACAROLI: My Lord says none of this would be relevant. 13 What were they doing? It's very important to have this 14 in mind. They did not have in mind specifically 15 non-provable claims to interest or currency conversion 16 claims. What they were doing was agreeing releases of 17 all possible claims -- 18 MR JUSTICE DAVID RICHARDS: Sorry, we're trying to identify 19 who benefits from this. 20 MR ZACAROLI: Yes. 21 MR JUSTICE DAVID RICHARDS: Okay. It doesn't seem to me 22 that creditors in their capacity as creditors with 23 proved claims benefit, because their claims have to be 24 quantified, assets realised, proceeds distributed to 25 them pari passu until they get 100 per cent.</p> <p style="text-align: center;">Page 119</p>
<p>1 the administrators did this, they were trying to 2 minimise claims, so as to benefit shareholders. 3 MR JUSTICE DAVID RICHARDS: Well, this slightly goes back 4 perhaps to something Lord Justice Lewison says in his 5 judgment in waterfall 1. Your point is, well, it would 6 benefit the subordinated creditors, presumably? 7 MR ZACAROLI: No. Partly. It might benefit the unsecured 8 creditors. It might benefit creditors with a right to 9 statutory interest. It might benefit -- 10 MR JUSTICE DAVID RICHARDS: How? 11 MR ZACAROLI: Because -- I made this point in opening -- it 12 all depends on the financial state of the company. What 13 are its assets and what are its liabilities, or the 14 estate, at any particular point in time? So the release 15 by a creditor of its claims, one creditor, may mean 16 there are more assets available to pay the claims of 17 other creditors. 18 MR JUSTICE DAVID RICHARDS: We're talking about statutory 19 interest, are we? 20 MR ZACAROLI: We're simply talking about the release of 21 claims. This is what the administrators were doing, 22 they were releasing claims, whether known or unknown. 23 MR JUSTICE DAVID RICHARDS: Given the waterfall, having paid 24 the proved claims in full, provided for them in full, we 25 get to statutory interest.</p> <p style="text-align: center;">Page 118</p>	<p>1 MR ZACAROLI: Yes. 2 MR JUSTICE DAVID RICHARDS: So it doesn't matter. What 3 follows doesn't matter, does it? 4 MR ZACAROLI: What follows doesn't matter -- 5 MR JUSTICE DAVID RICHARDS: To them. 6 MR ZACAROLI: What I'm quibbling with is who benefits from 7 the word -- my Lord used the word "this". 8 MR JUSTICE DAVID RICHARDS: I just want to carry on. The 9 next lot are statutory interest. So what do you say, 10 how is there a benefit to people with statutory 11 interest? 12 MR ZACAROLI: My Lord, I may be at cross-purposes. I'm not 13 suggesting that the release of currency conversion 14 claims -- 15 MR JUSTICE DAVID RICHARDS: Assists them. 16 MR ZACAROLI: Assists them. That's not my point. 17 MR JUSTICE DAVID RICHARDS: You're not saying that, no. 18 MR ZACAROLI: The point is that the administrators were 19 releasing any and all unknown claims of the creditors. 20 At the time they entered into the CDDs they were not 21 releasing currency conversion claims, they were not 22 releasing non-provable claims to interest, they were 23 releasing any claims the creditors might have. The 24 question who benefits from the exercise of that 25 compromise power to release any claims depends entirely</p> <p style="text-align: center;">Page 120</p>

<p>1 upon where one is in terms of assets and liabilities.  2 That's the point I'm making. And it goes back to my  3 point at the beginning. It's fundamentally the wrong  4 question to ask who benefits from release of currency  5 conversion claims because that wasn't what they were  6 doing, they were releasing any claims.  7 One can't construe -- I'll come on to this perhaps  8 later -- a release entered into of all claims back in,  9 say, 2010 when one didn't know what the state of the  10 estate would be by reference to what we now know the  11 position to be.  12 So that's the first point. Just as an aside, yes,  13 the administrators or a liquidator has a quasi-judicial  14 role in determining whether to permit or reject claims,  15 but there is no case which goes as far -- and those  16 cases cited don't go as far as to suggest that when the  17 administrators are trying to compromise claims, exercise  18 their power of compromise with a particular creditor,  19 they're exercising any quasi-judicial function.  20 MR JUSTICE DAVID RICHARDS: No, what they're doing is  21 exercising statutory functions.  22 MR ZACAROLI: Yes.  23 MR JUSTICE DAVID RICHARDS: They're not acting in their own  24 commercial self-interest.  25 MR ZACAROLI: Of course.</p> <p style="text-align: center;">Page 121</p>	<p>1 MR JUSTICE DAVID RICHARDS: Absolutely.  2 MR ZACAROLI: My Lord, going back to the second underpinning  3 point, which was the one at page 131, line 20:  4 "The purpose of the CRA did not require creditors to  5 give up potentially valuable rights which they had in  6 the event of a surplus."  7 And he goes on to say they could have achieved what  8 the administrators wanted to achieve without such claims  9 being released.  10 The purpose of the CRA and the CDD undoubtedly  11 required creditors to give up valuable rights. That's  12 an obvious statement given the releases. Ie claims they  13 may have had but for the CDD and may have been able to  14 assert. That is an essential part of the quid pro quo  15 of any compromise.  16 The SCG accept that the effect of the release is to  17 release both provable and non-provable claims, and that  18 was stated yesterday by Mr Dicker and repeated today.  19 There's a slight nuance on that today, which was: yes,  20 but the non-provable claims that are being given up are,  21 as it were, adjuncts to other provable claims.  22 MR JUSTICE DAVID RICHARDS: Which are being given up, yes.  23 MR ZACAROLI: Yes. I'll come back to that when I deal with  24 the submission made today, but in short we say there is  25 no basis for carving up the releases that one sees</p> <p style="text-align: center;">Page 123</p>
<p>1 MR JUSTICE DAVID RICHARDS: That's the point there.  2 MR ZACAROLI: Their duty in doing that is to allow only  3 proper claims, and the words that appear in those cases  4 are "proper claims". So to the extent a claim is being  5 advanced, they need to ensure that it is proper and they  6 are fully entitled to compromise claims that are being  7 made, with give and take on both sides, to arrive at  8 a number. That's entirely within their functions.  9 MR JUSTICE DAVID RICHARDS: Absolutely.  10 MR ZACAROLI: In so doing they're not looking out for the  11 interests of the counterparty to that contract.  12 MR JUSTICE DAVID RICHARDS: No, but they're not like an  13 ordinary commercial party who is seeking simply to  14 advance its own interests within the bounds of the law.  15 In other words, you can drive as hard a bargain as you  16 possibly could as an ordinary commercial counterparty;  17 it wouldn't be necessarily proper for an office-holder  18 to do that. It all depends what one's talking about.  19 I don't think the position is analogous between an  20 ordinary commercial party and an office-holder.  21 MR ZACAROLI: I don't suggest it is, but I don't say the  22 difference is relevant to the exercise undertaken here  23 because, as office-holders, they owe a duty to the  24 estate to ensure that any points that can be taken  25 properly against someone asserting a claim can be taken.</p> <p style="text-align: center;">Page 122</p>	<p>1 in the documents as between provable claims and  2 non-provable claims, on the other hand. So let's say  3 there's claim 1 and claims 2 to 10 in my learned  4 friend's example and one of those claims 2 to 10 is  5 an entirely non-provable claim of some other type.  6 MR JUSTICE DAVID RICHARDS: I think he was taking a provable  7 claim in his example.  8 MR ZACAROLI: He was. I'm suggesting -- let's say there is  9 a claim 11, which is a non-provable claim.  10 MR JUSTICE DAVID RICHARDS: You wouldn't dispute his  11 proposition that if you release a provable claim, you  12 also release the claims for interest and currency  13 conversion claims that stem from that. I appreciate  14 you'd say they've gone anyway, but you wouldn't dispute  15 that part?  16 MR ZACAROLI: No. In other words, he accepts the release  17 goes beyond provable claims to non-provable claims.  18 MR JUSTICE DAVID RICHARDS: But in terms of -- if you take  19 a claim which is a wholly independent and entirely  20 non-provable claim, I didn't understand Mr Dicker to  21 advance a case on that. He said, well, basically it's  22 difficult to do it in the abstract, to take a concrete  23 example. He really adopted no position on that either  24 way.  25 MR ZACAROLI: From which I take --</p> <p style="text-align: center;">Page 124</p>

<p>1 MR JUSTICE DAVID RICHARDS: I don't think you can take it --</p> <p>2 he says it's not a point that arises.</p> <p>3 MR ZACAROLI: No. So no positive case perhaps is being</p> <p>4 asserted against me. I make a positive case in response</p> <p>5 that you cannot carve up the releases that appear in</p> <p>6 CDDs, for example, between claims that would otherwise</p> <p>7 have been provable or not provable. That is not</p> <p>8 a permissible carving out. There is nothing in the</p> <p>9 language which enables that to be done. Now, no</p> <p>10 positive case against me is made on that, and I'll come</p> <p>11 to deal with that perhaps in more detail later on.</p> <p>12 That's our basic proposition.</p> <p>13 If that's right, then the addition of the words in</p> <p>14 this second underpinning point, which is "the purposes</p> <p>15 did not require creditors to give up potentially</p> <p>16 valuable rights which they had in the event of</p> <p>17 a surplus" takes us nowhere. Because if one accepts</p> <p>18 that non-provable claims are being released, those</p> <p>19 claims could only ever be assertible against surplus, so</p> <p>20 the acceptance that non-provable claims, or the</p> <p>21 conclusion, if it's not accepted, that non-provable</p> <p>22 claims are not released by the terms of the CDDs,</p> <p>23 necessarily means that that concept of purpose didn't</p> <p>24 require the release of valuable rights against the</p> <p>25 surplus is irrelevant.</p> <p style="text-align: center;">Page 125</p>	<p>1 in the sense that the particular claims now asserted</p> <p>2 were not in contemplation. But that's irrelevant since</p> <p>3 the release of any non-contemplated claim by definition</p> <p>4 is inadvertent in that sense. It always will be.</p> <p>5 But it's no reason to deny the reason that -- the</p> <p>6 language its plain meaning.</p> <p>7 The second point here is a factual one. It's not</p> <p>8 true to say that no one envisaged the possibility of</p> <p>9 a surplus in relation to actually the majority of CDDs</p> <p>10 that were entered into. The evidence here is in three</p> <p>11 different places but we'll piece it together. First of</p> <p>12 all, the statement of agreed facts at bundle 1, tab 18,</p> <p>13 paragraph 16:</p> <p>14 "From early 2012, the possibility of a surplus was</p> <p>15 being discussed in the market."</p> <p>16 So the possibility was out there from the beginning</p> <p>17 of 2012. Then if we look at the dates on which CDDs</p> <p>18 were entered into, and for that we need to go to</p> <p>19 bundle 2, the witness statements, tab 2. It's Mr Lomas'</p> <p>20 tenth witness statement, paragraph 68. Paragraph 66</p> <p>21 tells us the same thing about the surplus being</p> <p>22 discussed from early 2012. That gave rise to the</p> <p>23 statutory interest language question. At paragraph 68</p> <p>24 you'll see in the last sentence:</p> <p>25 "The first CDD incorporating an express reference to</p> <p style="text-align: center;">Page 127</p>
<p>1 They're giving up valuable rights against the</p> <p>2 estate. It doesn't matter at which point in the</p> <p>3 waterfall those rights might have been respected. Nor</p> <p>4 does it achieve anything to say that the purposes could</p> <p>5 have been achieved by a different document or</p> <p>6 a different agreement, which didn't have that effect.</p> <p>7 So for example, yes, it may be the purposes could have</p> <p>8 been achieved by a document which didn't release</p> <p>9 a currency conversion claim and we know that when</p> <p>10 currency conversion claims arose, many CDDs were entered</p> <p>11 into which did carve out that. But that's again</p> <p>12 a completely impermissible approach to construing the</p> <p>13 documents entered into at the time.</p> <p>14 The fact that you could enter into a different</p> <p>15 agreement that might have achieved reasonably a similar</p> <p>16 result has no relevance at all to the question of what</p> <p>17 does this agreement mean.</p> <p>18 As to the third point, which is at page 132, line 9,</p> <p>19 beginning at line 9, that is the releases were</p> <p>20 inadvertent, no one envisaged the possibility of</p> <p>21 a surplus. There are two points in response to that.</p> <p>22 The first is the release of non-contemplated claims was</p> <p>23 clearly deliberate and the wording is beyond doubt</p> <p>24 in the releases. No one could have misunderstood that</p> <p>25 language. So inadvertence here can only be being used</p> <p style="text-align: center;">Page 126</p>	<p>1 statutory interest was executed on 28 June 2012."</p> <p>2 So roughly six months after the possibility of</p> <p>3 a surplus was out there in the market.</p> <p>4 Then the final reference is in tab 4, Mr Lomas' 11th</p> <p>5 witness statement, paragraph 64, which contains a table</p> <p>6 of CDDs entered into by value and number of different</p> <p>7 types.</p> <p>8 MR JUSTICE DAVID RICHARDS: Sorry, where is that?</p> <p>9 MR ZACAROLI: Tab 4, page 23, which is part of paragraph 64.</p> <p>10 You'll see in the table there the first block is</p> <p>11 CDDs with no language, dealing with either statutory</p> <p>12 interest or currency conversion. The second block is</p> <p>13 CDDs with statutory interest language but without</p> <p>14 currency conversion language; and the last block is both</p> <p>15 forms of preservation language.</p> <p>16 If you just look at the far right column, CDDs</p> <p>17 entered into by value, 1.2 billion plus 2.2 billion,</p> <p>18 which is 3.3 billion, were entered into before any</p> <p>19 statutory interest language was included, which means</p> <p>20 that a total of 6.5 billion by value were entered into</p> <p>21 afterwards. That means 6.5 billion by value of CDDs</p> <p>22 were entered into after June 2012. The point being most</p> <p>23 of them, and there will have been more because of the</p> <p>24 period between January and June 2012, most of them were</p> <p>25 entered into after the discussions about a surplus were</p> <p style="text-align: center;">Page 128</p>



<p>1 happening in the market. So it was at least 2 contemplated. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR ZACAROLI: The fourth underpinning point was at page 133 5 of yesterday's transcript, line 4: 6 "No sensible reason has been provided why the 7 creditors should now be taken to have released claims to 8 statutory interest and currency conversion claims." 9 And he poses the question why should a creditor with 10 a right to interest in the event of a surplus have 11 agreed to release any contractual right to interest, and 12 similarly why would someone with a currency conversion 13 claim have agreed to release that. That is, we say, 14 fundamentally the wrong question. You cannot assess the 15 construction of a release clause in general terms of 16 uncontemplated claims by reference to whether the 17 parties would, had they thought about it at the time, 18 have released one particular claim that is now 19 contemplated. One very good reason for that is you must 20 construe a contract against its matrix at the time, and 21 by definition these claims do not form part of the 22 matrix. 23 The only valid question is, looking at the 24 circumstances in which the contract was entered into, is 25 there any ground for limiting what is an apparently  Page 129</p>	<p>1 MR JUSTICE DAVID RICHARDS: I think it'd be very difficult 2 to read this agreement as not releasing all claims 3 capable of proof. 4 MR ZACAROLI: Yes. 5 MR JUSTICE DAVID RICHARDS: Which goes slightly wider 6 than -- well, it does go wider than that. 7 MR ZACAROLI: Of course it goes wider than that, yes. I'm 8 not suggesting it's limited. 9 MR JUSTICE DAVID RICHARDS: I appreciate that. 10 MR ZACAROLI: On any view, it is that, claims arising out of 11 the creditor agreement, because both of the claims in 12 issue in this application are claims that arise out of 13 the creditor agreement. Now, the distinction is they're 14 not provable as opposed to provable. That's not a valid 15 distinction we say you can draw on the document. 16 Dealing just briefly with that point, again I'm not 17 going to repeat what I said in opening but just to 18 remind my Lord of the three or perhaps four points as to 19 why the release in clause 2.1.1, whichever one it is, 20 that release cannot be limited to provable claims. 21 First of all, it is worth turning it up to remind 22 ourselves of this. Perhaps we can look at the language 23 in tab 7, which is where I started. My Lord, the first 24 point is the timing point that, in 2.3, the claims that 25 are released are not limited to claims in existence  Page 131</p>
<p>1 limitless release by, for example, reference to the 2 subject matter of the agreement? And this goes back to 3 the tree roots point of Lord Nicholls in BCCI v Ali. We 4 maintain the point that I made in opening that the terms 5 of this release, no matter -- actually, no doubt with 6 the words of the House of Lords in BCCI v Ali in mind, 7 do go wide enough to release tree roots claims. That's 8 our first point. 9 But even if we are wrong about that, therefore even 10 if it's permissible on this broad wording to narrow it 11 by reference to the subject matter, if you asked 12 yourself what is the subject matter of these releases, 13 well, you've got at the one extreme the peripheral 14 claims like tree roots claims. At the centre you have 15 what is undoubtedly covered by the release, and what is 16 undoubtedly covered by this release clause is any claim 17 arising out of the creditor agreement. It goes much 18 wider than that, we would say, but that's certainly 19 included because it's expressly referred to. 20 My Lord probably remembers the wording, I can take 21 my Lord to it, but "whether or not arising under the 22 creditor agreement" is wording in each of the release 23 clauses. So in any view, anything arising out of the 24 creditor agreement is released save insofar as it's the 25 admitted claim amount.  Page 130</p>	<p>1 at the date of administration because it includes claims 2 coming into existence at some time in the future, which 3 on any view could not be provable. 4 The second point was -- 5 MR JUSTICE DAVID RICHARDS: Give me one moment, sorry. 6 (Pause). 7 Let's just have a look at that. 8 MR ZACAROLI: It's four lines from the end of 2.3 -- three 9 lines: 10 "Whether arising out of the creditor agreements or 11 not, whether in existence now or coming into existence 12 at some time in the future." 13 (Pause). 14 Similar wording appears slightly higher up in the 15 fifth line. It's in parenthesis towards the end of the 16 fifth line: 17 "Including those which arise hereafter upon a change 18 in the relevant law." 19 MR JUSTICE DAVID RICHARDS: That I think is the wording 20 included in the light of BCCI v Ali. That was what 21 I had in mind when I said that. 22 MR ZACAROLI: I suspect the language, whether in 23 contemplation of the creditor or not, was also added 24 in the light of that. 25 MR JUSTICE DAVID RICHARDS: Maybe.  Page 132</p>

<p>1 MR ZACAROLI: So that's the first point. The second point 2 is that it includes a release of all proprietary claims, 3 very broadly defined, and that's page 3. Well, pages 2 4 to 3 is the definition of claim, including proprietary 5 claim defined broadly at pages 3 to 4. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR ZACAROLI: The third was the mutuality point, or the 8 reciprocity point perhaps, because it's not about 9 set-off, but about reciprocity. The release given by 10 the company is in similarly unlimited terms including 11 proprietary claims and future claims. There is no basis 12 whatsoever for limiting that to claims which might have 13 been provable in the bankruptcy or insolvency or 14 whatever other process of a creditor anywhere in the 15 world. So that reinforces the point that the releases 16 is not of just provable claims both ways. 17 And the fourth point I made was that this 18 contemplates the claim being admitted for the purposes 19 of a scheme of arrangement, and excluding anything else, 20 and of course the definition of claim for a scheme of 21 arrangement is much broader, it includes matters beyond 22 provable debts. That's in the definition of admitted 23 claim at page 2. 24 MR JUSTICE DAVID RICHARDS: We had this discussion before. 25 As you'll gather, I have some difficulty with that.</p> <p style="text-align: center;">Page 133</p>	<p>1 a foreign currency released by the CRA? And the second 2 question, which is whether the creditor had a sterling 3 right or a yen or euro right, does the conversion of 4 that claim into dollars for the purposes of the CRA 5 create a currency conversion claim? And they are 6 different questions and must be kept separate. 7 My learned friend says that the euro creditor, for 8 example, has the same currency conversion claim as the 9 US dollar creditor and since we accept that a US dollar 10 creditor still has its currency conversion claim, which 11 we do under the CRA, it must follow that the euro 12 creditor also keeps its currency conversion claim. But 13 that, we say, is to elide the two different issues. 14 So far as the euro creditor is concerned, the reason 15 it does not have a currency conversion claim in the 16 sense of being entitled to claim for the numbers of euro 17 which it didn't receive under its contractual 18 entitlement from the statutory process once converted 19 back into euros, the reason it doesn't have that claim 20 is because it doesn't have any subsisting entitlement to 21 be paid in euros. And that is quite simply the 22 consequence of clause 4.2.3 of the CRA, which releases 23 all claims in respect of any financial contracts. 24 We don't for this argument, or for any of our 25 arguments on the CRA, go so far as to say that the CRA</p> <p style="text-align: center;">Page 135</p>
<p>1 MR ZACAROLI: This isn't the time -- my Lord has my 2 submissions. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR ZACAROLI: The first three reasons stand up on their own 5 So there is no basis, we say, for distinguishing between 6 provable and non-provable claims. This was a release, 7 intended to be of general and unlimited scope. 8 As my learned friend accepts -- no, I won't continue 9 that sentence. 10 I'll come back to the particular arguments 11 in relation to the admitted claims CDD and agreed claims 12 CDD later on in the order my learned friend took his 13 submissions. But those are my responses to the opening 14 underpinning points. It's very important, I say, to 15 correct those points because they do underpin the 16 approach to construction, and the key point is one 17 should not be construing a document entered into in 18 unlimited release terms by reference to the types of 19 claim which it's now discovered have been released. 20 Turning then to the submissions in relation to the 21 CRA. My learned friend Mr Dicker wrapped up the two 22 different issues raised by issue 34 and 38 in relation 23 to the CRA as one. And we submit it's very important to 24 keep those issues distinct from each other. The first 25 is: is an entitlement of a creditor to be paid in</p> <p style="text-align: center;">Page 134</p>	<p>1 provides entirely new claims in the sense of a new 2 claim, in a sense, any different from any other 3 compromise of rights. To the extent the rights have 4 been compromised, they are gone, as with any compromise. 5 To the extent they survive in the amount agreed to be 6 paid under the compromise agreement, then we accept that 7 they continue. And that's why the US dollar creditor 8 does not lose its entitlement to be paid in US dollars 9 that it always had. 10 But the euro creditor does lose that entitlement by 11 4.2.3 because all that it gets coming out of the CRA is 12 the net financial claim, whose rights and attributes are 13 defined entirely by the CRA, and one of those rights and 14 attributes is it's payable in dollars. 15 Now, the second question, which is issue 38, is best 16 first tested by reference to a sterling creditor. The 17 evidence suggests that there may be very small numbers 18 of any creditor with a foreign currency claim other than 19 dollars, but it's an issue that has been raised and 20 therefore we're dealing with it. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR ZACAROLI: So if my Lord will make the assumption that 23 there's a creditor with an underlying claim in sterling 24 and that claim is then compromised by the CRA, does that 25 creditor have a currency conversion claim in the sense</p> <p style="text-align: center;">Page 136</p>

<p>1 of being entitled to complain at the end of the 2 statutory distribution process when it gets paid 3 sterling that it hasn't got the full amount of dollars 4 which the CRA said it would be paid? 5 The reason we say that creditor does not have such 6 a claim is that the conversion into US dollars under the 7 CRA is for limited purposes. Those purposes are the 8 calculation mechanisms and netting processes implemented 9 within the CRA. My learned friend Mr Dicker pointed out 10 that it's not just to create the net financial claim 11 that that netting process takes effect, there may be 12 a further, as he called it, interim step when the net 13 financial claim can itself be offset or used as an 14 offset against non-financial liabilities, and for that 15 purpose it still needs to be in dollars. But the point 16 is, whatever comes out of the CRA process at the end as 17 a claim in favour of the creditor, necessarily has to be 18 converted into sterling because it's a claim which 19 qualifies for distribution in a winding-up. That's the 20 definition of ascertained claim. 21 I will show my Lord the references again. 22 Ascertained claim is defined at page 443. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR ZACAROLI: So the point is that the purpose of the 25 conversion is for offsetting purposes defined in the</p> <p style="text-align: center;">Page 137</p>	<p>1 creditor's right? To receive a sterling amount in 2 a distribution? 3 MR ZACAROLI: Yes. 4 MR JUSTICE DAVID RICHARDS: So why isn't that true of a US 5 dollar creditor? 6 MR ZACAROLI: Well, it is true of a US dollar creditor. 7 MR JUSTICE DAVID RICHARDS: Why does a US dollar creditor 8 have anything other than that? 9 MR ZACAROLI: They don't under the CRA. 10 MR JUSTICE DAVID RICHARDS: I thought you said they did. 11 MR ZACAROLI: No, but they had an existing right to be paid 12 in dollars. 13 MR JUSTICE DAVID RICHARDS: Yes, but it's gone, hasn't it? 14 MR ZACAROLI: Well, that's ... 15 MR JUSTICE DAVID RICHARDS: How do you say the euro 16 creditor's right to be paid in euros has gone, but the 17 US dollar creditor's right to be paid in US dollars 18 hasn't gone? 19 MR ZACAROLI: Because in any compromise, to the extent that 20 claims are released forever they're gone, but to the 21 extent that they are released but then reappear in the 22 rights that you're given under the compromise, the true 23 analysis is they're not new claims but they're 24 a continuation of the existing claim. You had an 25 existing right to be paid in dollars. Your close-out</p> <p style="text-align: center;">Page 139</p>
<p>1 CRA, but if after that process has run its course there 2 is then a net claim owing to the creditor, that's to 3 become an ascertained claim in a following distribution, 4 for which purpose it would necessarily be converted back 5 into sterling. 6 MR JUSTICE DAVID RICHARDS: So if you're a sterling 7 creditor, what are you accorded under the CRA? 8 MR ZACAROLI: You're accorded a right to have your close-out 9 amount calculated in accordance with the agreement, the 10 mechanism of the agreement. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR ZACAROLI: The right to have that determined -- to 13 determine your net contractual position. 14 MR JUSTICE DAVID RICHARDS: Yes. 15 MR ZACAROLI: All in dollars because the close-out amounts 16 are all to be converted into dollars. 17 MR JUSTICE DAVID RICHARDS: From sterling? 18 MR ZACAROLI: From sterling into dollars. Then to produce 19 a net financial claim, if that's a positive number, 20 which assuming there is no further offset becomes your 21 ascertained claim in a subsequent distribution. 22 MR JUSTICE DAVID RICHARDS: Right. 23 MR ZACAROLI: In a liquidation or administration, or 24 a scheme. 25 MR JUSTICE DAVID RICHARDS: At that point, what is the</p> <p style="text-align: center;">Page 138</p>	<p>1 amount is calculated in dollars -- 2 MR JUSTICE DAVID RICHARDS: It has been replaced with a 3 right to be paid in dollars. 4 MR ZACAROLI: Yes. 5 MR JUSTICE DAVID RICHARDS: You have given up your 6 contractual claim to be paid in dollars. 7 MR ZACAROLI: Yes. 8 MR JUSTICE DAVID RICHARDS: You now have a right to be paid 9 in dollars, do you? 10 MR ZACAROLI: Well, you do. 11 MR JUSTICE DAVID RICHARDS: Why doesn't the euro creditor 12 have that right? 13 MR ZACAROLI: The euro creditor does have a right to be paid 14 in dollars, yes. 15 MR JUSTICE DAVID RICHARDS: So why doesn't he have 16 a currency conversion claim? 17 MR ZACAROLI: Because the right given to the creditor who 18 didn't already have a right to be paid in dollars, so 19 the new right that's given to a euro creditor or 20 sterling creditor is for limited purposes. 21 MR JUSTICE DAVID RICHARDS: Why isn't it for limited 22 purposes for the dollar creditor? 23 MR ZACAROLI: The continuation of that right is for limited 24 purposes. 25 MR JUSTICE DAVID RICHARDS: Why does he have a currency</p> <p style="text-align: center;">Page 140</p>

<p>1 conversion claim?</p> <p>2 MR ZACAROLI: Why does he?</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>4 MR ZACAROLI: I am arguing against myself.</p> <p>5 MR JUSTICE DAVID RICHARDS: Well, it is your case.</p> <p>6 MR ZACAROLI: We don't go that far, is how I put it. We</p> <p>7 don't go that far because we accept that although it's</p> <p>8 described as a --</p> <p>9 MR JUSTICE DAVID RICHARDS: I thought it was part of your</p> <p>10 case that they do have that claim. They do have</p> <p>11 a currency conversion claim.</p> <p>12 MR ZACAROLI: Well --</p> <p>13 MR JUSTICE DAVID RICHARDS: You may have good reasons for</p> <p>14 that.</p> <p>15 MR ZACAROLI: Well, I don't make a positive case about that.</p> <p>16 MR JUSTICE DAVID RICHARDS: I'd understood you to do so.</p> <p>17 MR ZACAROLI: No, we'd never advanced a positive case about</p> <p>18 that. We accept that they don't have a currency</p> <p>19 conversion claim for the reasons I'm elaborating.</p> <p>20 MR JUSTICE DAVID RICHARDS: No, you accept --</p> <p>21 MR ZACAROLI: Sorry, they do have a currency conversion</p> <p>22 claim.</p> <p>23 MR JUSTICE DAVID RICHARDS: I don't at the moment understand</p> <p>24 how you square the position as you describe it</p> <p>25 in relation to the euro creditor, on the one hand, and</p> <p style="text-align: center;">Page 141</p>	<p>1 MR JUSTICE DAVID RICHARDS: What is the source of his right</p> <p>2 to be paid in dollars?</p> <p>3 MR ZACAROLI: His underlying contractual entitlement.</p> <p>4 MR JUSTICE DAVID RICHARDS: Why does the euro creditor lose</p> <p>5 it?</p> <p>6 MR ZACAROLI: Because under this agreement the euro creditor</p> <p>7 loses any rights -- the creditor loses its right to be</p> <p>8 paid in euros and that right is not continued in the</p> <p>9 rights given by the CRA. It's a question of</p> <p>10 continuation of rights. So like any compromise, if one</p> <p>11 goes away from the language of the CRA for a moment</p> <p>12 because the language of release and new claims -- that's</p> <p>13 why I say in substance these aren't new claims, they're</p> <p>14 continuations of the old claim compromised. So any</p> <p>15 creditor who came into a compromise with a US dollar</p> <p>16 right has not had its US dollar right compromised by the</p> <p>17 CRA, but a creditor who came into this with a euro</p> <p>18 entitlement has had that claim compromised by the CRA.</p> <p>19 MR JUSTICE DAVID RICHARDS: I see.</p> <p>20 MR ZACAROLI: My Lord raised a question that perhaps it's</p> <p>21 best to deal with at this stage about whether rule 2.86</p> <p>22 is mandatory and what relevance that has. This probably</p> <p>23 affects the CDDs argument more directly. We say the</p> <p>24 rule is mandatory in the sense that dividends can only</p> <p>25 be paid on proved debts once converted into sterling.</p> <p style="text-align: center;">Page 143</p>
<p>1 the dollar creditor on the other.</p> <p>2 MR ZACAROLI: If I can go over it again if I may.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, please.</p> <p>4 MR ZACAROLI: The dollar creditor comes into this process</p> <p>5 with an entitlement to be paid in dollars. We say on</p> <p>6 a proper analysis of what the CRA does to that claim, it</p> <p>7 allows that right to be paid in dollars to continue.</p> <p>8 MR JUSTICE DAVID RICHARDS: But why do you say that if you</p> <p>9 say that the euro creditor only gets a right to be paid</p> <p>10 in sterling?</p> <p>11 MR ZACAROLI: Because the dollar creditor's existing right</p> <p>12 was always to be paid in dollars. It came into this</p> <p>13 process with a right to be paid in dollars, and it's the</p> <p>14 fact that that original contractual right to be paid in</p> <p>15 dollars is not respected --</p> <p>16 MR JUSTICE DAVID RICHARDS: But his right to be paid in</p> <p>17 dollars is a contractual right, which, by a parity of</p> <p>18 reasoning with your submissions on euro creditors, he</p> <p>19 loses.</p> <p>20 MR ZACAROLI: That's where I part company with my Lord</p> <p>21 because we say he doesn't lose that right to be paid in</p> <p>22 dollars.</p> <p>23 MR JUSTICE DAVID RICHARDS: He retains the contractual right</p> <p>24 to be paid in dollars?</p> <p>25 MR ZACAROLI: In substance, yes.</p> <p style="text-align: center;">Page 142</p>	<p>1 But that cannot prevent and does not prevent a creditor</p> <p>2 agreeing to release its right to be paid in a foreign</p> <p>3 currency in exchange for a right in sterling or any</p> <p>4 other currency in advance of its claim being submitted</p> <p>5 to a process for the purposes of a distribution.</p> <p>6 So take the CDD. Take a dollar creditor who enters</p> <p>7 into a CDD. The fact that rule 2.86 is mandatory does</p> <p>8 not prevent the creditor and the administrators agreeing</p> <p>9 that that claim, which was a dollar claim, is to be</p> <p>10 compromised by a payment of a sterling sum, which sum</p> <p>11 will then be admitted for the purposes of proof. That</p> <p>12 doesn't involve any contradiction defend the mandatory</p> <p>13 nature of rule 2.86.</p> <p>14 My Lord, the other point on the CRA, in fact the</p> <p>15 main point in terms of economic value on the CRA, is</p> <p>16 non-provable claims to interest. This morning --</p> <p>17 my Lord won't have a transcript yet, but I can give you</p> <p>18 the reference. I assume the pages stay the same.</p> <p>19 MR JUSTICE DAVID RICHARDS: Roughly.</p> <p>20 MR ZACAROLI: Page 21 [draft], lines 5 to 8. My learned</p> <p>21 friend Mr Dicker said in relation to clause 25.1 of the</p> <p>22 CRA:</p> <p>23 "The net financial claim accrues interest in</p> <p>24 accordance with rule 2.88 of the Insolvency Rules. You</p> <p>25 don't get more than that, you get what you would get</p> <p style="text-align: center;">Page 144</p>

<p>1 under rule 2.88."</p> <p>2 Which at that point appeared to be an acceptance</p> <p>3 that as a matter of contract the only right which the</p> <p>4 net financial claim carried so far as interest is</p> <p>5 concerned is a right under 2.88. We would agree with</p> <p>6 that. As I made clear this morning, we don't contend</p> <p>7 that under the CRA the statutory right to interest is</p> <p>8 cut down in any way. You have the full remit, the full</p> <p>9 range of rights under 2.88, including the reflection of</p> <p>10 your otherwise contractual rights. However, that is the</p> <p>11 only right you have coming out of the CRA. I don't</p> <p>12 think my Lord was presented with any argument as to how</p> <p>13 one could construe, as a matter of language, clause 25.1</p> <p>14 in any other way.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR ZACAROLI: The argument that my learned friend advanced</p> <p>17 was either they are right on issue 2 and therefore Bower</p> <p>18 v Marris is incorporated within rule 2.88, but, if not,</p> <p>19 they haven't lost the right to appropriate under the</p> <p>20 Bower v Marris principle in respect of whatever right to</p> <p>21 interest comes out of the net financial claim or the</p> <p>22 CRA.</p> <p>23 The principal response to that is that the right</p> <p>24 under Bower v Marris is wholly dependent upon interest</p> <p>25 continuing to accrue under a contract or other</p> <p style="text-align: center;">Page 145</p>	<p>1 MR JUSTICE DAVID RICHARDS: Very well. 10.30 tomorrow</p> <p>2 morning. I've got a hearing at 9.30, which I suspect is</p> <p>3 listed at the moment here. I may try and get it in</p> <p>4 another court, but I apologise in advance if you're all</p> <p>5 kept outside or I run over 10.30, but we'll sit at 10.30</p> <p>6 or as soon after that as we can.</p> <p>7 (4.18 pm)</p> <p>8 (The hearing adjourned until 10.30 am the following day)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 147</p>
<p>1 pre-insolvency right as it were in the background whilst</p> <p>2 the insolvency runs its course. That is the foundation</p> <p>3 for the reason we've developed at length in issue 2</p> <p>4 under the right in Bower v Marris. So without</p> <p>5 a contractual right to interest ticking along in the</p> <p>6 background, there is no scope for Bower v Marris to</p> <p>7 apply at all. So if Bower v Marris doesn't apply under</p> <p>8 rule 2.88, then it's gone.</p> <p>9 My learned friend didn't deal with, and I assume</p> <p>10 therefore accepts, that any other possibility has been</p> <p>11 released, didn't deal with, for example, the argument</p> <p>12 advanced in relation to issue 2 or issue 39 that we</p> <p>13 dealt with back in February about other non-provable</p> <p>14 rights to interest. For example, on the assumption that</p> <p>15 under rule 2.88 compounding is only for the period</p> <p>16 within which the debt is outstanding. If there was</p> <p>17 a contractual right to compound beyond that date, my</p> <p>18 learned friend advanced no argument as to how that can</p> <p>19 possibly survive. Well, of course it can't because your</p> <p>20 rights are limited to what you get under rule 2.88, so</p> <p>21 there are potentially other non-provable claims to</p> <p>22 interest which would undoubtedly be released or taken</p> <p>23 away by the operation of the CRA.</p> <p>24 My Lord, is that a convenient moment? I have quite</p> <p>25 a bit -- it's more than a few minutes to go.</p> <p style="text-align: center;">Page 146</p>	<p style="text-align: center;">I N D E X</p> <p>1</p> <p>2</p> <p>3 Submissions by MR DICKER (continued) .....1</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 148</p>

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