Wednesday, 20 May 2015

(10.30 am)

Submissions by MR DICKER (continued)

MR DICKER: My Lord, I was dealing with currency conversion claims under the CRA and I had just finished dealing with the argument that essentially the net financial claim only exists for the purposes of receiving a dividend from the estate.

There's just one additional point I wanted to make before turning to Wentworth's and the administrators' arguments. That is to pick up the position in relation to the NTA individuals under the CRA.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: As your Lordship knows, our position in relation to this is that although they were permitted to sign the CRA, it was very much a subsidiary aspect, and the first point we make is drawing your Lordship's attention back to the conditions for any NTA acceptance, which your Lordship will find in schedule 1 to the CRA, that's volume 3, page 480.

It's paragraph 9 of schedule 1:

"The form of acceptance submitted by an NTA offeree to the company should be subject to the following condition [the NTA condition]."

9.1.1:

"One of the following events having occurred."

And those events are effectively ultimately a decision not to have either a scheme of arrangement or a CVA, or the court holding for one reason or another either a scheme or a CVA cannot take place. So it's essentially a negative. If there was a scheme or a CVA, then the whole NTA process would simply be irrelevant.

MR JUSTICE DAVID RICHARDS: Yes. I see.

MR DICKER: And 9.2:

"Any form of acceptance submitted by an NTA offeree shall not be valid and effective unless and until the NTA condition is satisfied in the absolute opinion of the company."

MR JUSTICE DAVID RICHARDS: So was this the condition? I mean ... Was there any other condition?

MR DICKER: I don't believe so.

MR JUSTICE DAVID RICHARDS: Because I thought Mr Trower told me that the CRA did not become unconditional and therefore didn't bind(?) NTA signatories.

MR DICKER: Well, I assume --

MR JUSTICE DAVID RICHARDS: Maybe -- sorry, forgive me, go on.

MR DICKER: I assume that was because the NTA condition --

MR JUSTICE DAVID RICHARDS: Well, I'm just looking for some elucidation on that because none of (i) to (iv)

occurred. Possibly (v) occurred, I don't know.

MR DICKER: Well, one certainly got to a stage which presumably the administrator decided not to promise date.

MR JUSTICE DAVID RICHARDS: That's what I'm wondering. They would have to notify the NTA offerees.

MR DICKER: That's right, and I think that's the piece of evidence that --

MR JUSTICE DAVID RICHARDS: What one deduces from this is so far as the NTA signatories were concerned, the CRA was there for the purposes of the scheme only, not for any distribution in the administration or subsequent liquidation. I had assumed, I am afraid wrongly, the condition was something to do with a percentage signing up.

MR DICKER: My Lord, as I understand it, the percentage related to the TAs --

MR JUSTICE DAVID RICHARDS: Well, that I understand.

MR DICKER: And so far as the NTAs were concerned it was conditional on the NTA condition being satisfied.

MR JUSTICE DAVID RICHARDS: So it was a prelude, it was part of the machinery for a scheme or a CVA.

MR DICKER: That would be one way of looking at it. One starts with the CRA --

MR JUSTICE DAVID RICHARDS: You say it would be one way of

looking at it but is there actually any other way of looking at it?

MR DICKER: No. Well, save this, there may still be circumstances in which, assuming -- it's probably wrong because if the NTA is satisfied, then presumably there would be a scheme or a CVA and that's how it would be dealt with.

MR JUSTICE DAVID RICHARDS: Mr Trower will no doubt tell me at some point how the condition failed. I'd just like to have that.

MR DICKER: That was the first point. The second point is if your Lordship goes back to page 333, it's clause 10 of the CRA itself, the bottom of 333. My learned friend Mr Trower took your Lordship to this. Clause 10 at the bottom:

"Priorities of the company under this agreement. The company may, in its absolute discretion ..."

And then:

"(i) determine the asset claims ... in respect of TA signatories first, prior to determining the net contractual positions of the NTA signatories;

"(ii) deal with the disputes from TA signatories first, prior to those of NTA signatories."

Et cetera. So even if one got to the stage of having the NTA condition satisfied, the priority, as one

would expect, is dealing with trust assets first.
The third point is that we were informed by the administrators overnight, and no doubt Mr Trower can confirm this, that only 60 NTA offerees submitted a form of acceptance. And we're told that none ultimately became signatories. Presumably because the NTA condition wasn't satisfied. But we're not told -- and it may not matter -- whether any of the NTA signatories who submitted offers actually had their claims ascertained.
The fourth point is a small one, but just to make good a point I made to your Lordship yesterday. There is one sentence in the evidence that suggests that at least some creditors may have found it difficult trying to sign up to the NTA. If your Lordship goes to bundle 2, tab 11, it's the second witness statement of Ms Browning. Paragraph 8, she says:
"Mr Pearson appears to agree the principal objective of the CRA was to expedite the return of trust assets."
Then she says it's essential to calculate a client's net contractual position. Then it's just the last sentence where -- two sentences:
"In support of the view this was the principal objective of the CRA, I am aware that certain funds were not able to accede because they did not have trust

assets."
That's not developed, I can't take it any further, but one might not be surprised if the administrators' emphasis on dealing with TA signatories first effectively discouraged NTA signatories from bothering to submit or try and become signatories to the CRA.
Can I just go back? I think I may have said yes to your Lordship when in fact I should have said no. It's the NTA condition, which is bundle 3, page 480. We have an NTA condition, it's:
"One of the following events having occurred."
And the event is --
MR JUSTICE DAVID RICHARDS: Yes, it's the other way round from the way I thought. It's actually not for a scheme. That's the point. Yes, sorry. I read it too quickly.
MR DICKER: My Lord, I was wrong too.
MR JUSTICE DAVID RICHARDS: I follow. It's designed for there not to be a scheme, okay. Right, thank you.
MR DICKER: So when one thinks about the position of NTA signatories, one starts with the idea that the CRA is primarily concerned with returning trust assets. One knows the calculation mechanism one needs to do to achieve that. What the administrators appear, my learned friend Mr Trower said yesterday, to have had in mind at this stage at least was the possibility of

a scheme or a CVA. And it's only if effectively you don't have a scheme or a CVA, the fallback position is then effectively agreement of the claims of an NTA signatory, which can be then fed into a distribution process.
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: It's for that reason, given we say it comes so low in the scheme of things, it would obviously be wrong to construe the CRA effectively by reference to this as opposed to primarily its principal purpose, being to return trust assets.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: My Lord, that's that point. Then turning to Wentworth's position in relation to currency conversion claims under the CRA. Its position, as we understand it, is that if your claim is originally denominated in US dollars, you have a currency conversion claim still. But if it wasn't, you don't. In other words, everyone else loses any currency conversion claim which they otherwise have had, but do not get a US dollar claim giving rise to a currency conversion claim in exchange.
Now, we say that has some obviously odd consequences. Assume a creditor whose claim was denominated not in US dollars, but say in euros or Swiss francs, those currencies also appreciated against

sterling. Indeed, the Swiss franc rather more as a matter of fact than US dollars. On Wentworth's case those creditors would lose their currency conversion claim, they wouldn't get a currency conversion claim as a result of exchanging essentially their old claim for a new US dollar denominated claim.
We say that doesn't make an enormous amount of sense under the terms of the CRA. How do you give up your old claim save in exchange for a new claim denominated in US dollars?
Now, Wentworth's answer appears to be that the reason why they do not get currency conversion claims in US dollars is because it's a necessary attribute of the dollar claim agreed under the CRA that it must be converted back into sterling. That was my learned friend Mr Zacaroli's submission, day 2, page 109, line 19 to page 110, line 3.
If that's right, one may ask, why isn't exactly the same point capable of being made for those creditors who had underlying claims in US dollars, but on my learned friend's submissions gave them up for a US dollar claim under the CRA? Why can't you say equally in relation to them, well, a necessary attribute of the US dollar claim that they obtained under the CRA, just like everyone else, was also that it had to be converted back into

sterling? In other words, if what's significant, if what causes the euro and the Swiss franc creditors not to have a currency conversion claim is that although they get a US dollar claim, it needs to be converted back into sterling, why isn't that equally true of US dollar creditors who acquire a new US dollar claim? There's simply an inconsistency there, and the explanation doesn't make sense.

So we say there really are only two possibilities. The first of which is the CRA released all old claims and gave everybody a new claim denominated in US dollars, or it did not because, for example, one concludes the exercise was just for administrative convenience, a way of working out what the net position was, in which event everyone should be able to rely on the underlying currency of entitlement.

Wentworth's position in relation to the euro and Swiss franc creditors is effectively that they lost their old claims, they didn't get in exchange a claim which the CRA apparently gave them. We say that just doesn't make any sense.

So far as Wentworth's argument that the reason why the euro and yen creditors, Swiss franc creditors, don't get a currency conversion claim is because the claim they get must be converted back into sterling, I have

essentially dealt with that already.

The mere fact your net financial claim may in due course be fed into a distribution mechanism cannot deprive you of a currency conversion claim, and one can see that from Wentworth's own approach to creditors whose claims were originally denominated in US dollars. So that's Wentworth's position. We say suggesting that US dollar creditors have a currency conversion claim, which they accept and we agree with, but that somehow the euro, the Swiss franc and the yen creditors lose any currency conversion claims they would have had and don't get in exchange a US dollar claim, doesn't appear to make sense under the terms of the CRA.

The administrators' position we say is even more surprising. Their position, as we understand it, is the CRA deprived all creditors --

MR JUSTICE DAVID RICHARDS: To be fair to Mr Trower and the administrators, I think it's unfair to describe it as the administrators' position. I think that the administrators and Mr Trower feel they are duty-bound to advance their submission because no one else is. I just want to make that clear.

MR DICKER: My Lord, I'm happy to proceed on that basis. I described it as their position because it's set out in their position paper as their position.

MR JUSTICE DAVID RICHARDS: I think Mr Trower's made their position clear!

MR DICKER: So far as the argument proffered to your Lordship by the administrators is concerned, the argument is that the CRA deprived all creditors of their underlying right to payment in a particular currency and instead effectively gave them a right solely to payment in sterling. So they've lost their currency conversion claims.

We say that's wrong for the following reasons. Firstly, the CRA is expressed to give you a new claim denominated in US dollars. Secondly, there is no express reference to sterling anywhere in the CRA. Thirdly, the CRA does not even contain a distribution mechanism which provides for such claims to be converted into sterling. The nearest you get is 4.4.2, stating that creditors would have an ascertained claim for such amount as determined, and as your Lordship knows, the ascertained claim is something which could subsequently be fed into a subsequent distribution mechanism.

My Lord, but even assuming, even if it were correct to read the CRA as if it incorporated by reference effectively a distribution mechanism in accordance with the Insolvency Act and Rules, why would that mean creditors had released any currency conversion claim

they would otherwise have had? Why wouldn't that, effectively, incorporation by reference operate in exactly the same way as the Insolvency Act and Rules? In other words, in accordance with the effect of rule 2.86, ie converted for the purposes of proof only.

So if the underlying scheme doesn't deprive you of a currency conversion claim, why should a cross-reference in the CRA, even assuming that that's how one construes it, operate to do so?

So far as the background materials are concerned, our submission is a short one. There's nothing in the circular, the reader's guide or any of the other materials that suggests that the CRA was intended to have the effect for which either Wentworth or the administrators contend. Your Lordship's already seen the references. There are numerous references to the CRA giving you a new claim, there are numerous references to claims under the CRA being denominated in US dollars. There's absolutely no suggestion anywhere, take the majority creditors, the US dollar denominated creditors, that they would be giving up a currency conversion claim by entering into the CRA.

MR JUSTICE DAVID RICHARDS: I take it that rule 2.86 is mandatory? It's not something that creditors and administrators can contract out? Is that right or not?

MR DICKER: My Lord, it is certainly a mandatory rule. One could imagine a scheme varying creditors' rights under the rules, although, as your Lordship said yesterday, effectively questions of class and fairness would then depend critically on creditors' underlying rights, and for these purposes their underlying rights would include reference to 2.86.

MR JUSTICE DAVID RICHARDS: This is the difficulty I have with the whole idea of the new claim. I still have difficulty understanding how, if I have a yen claim at the date of administration, this can by a subsequent contract be converted into a dollar claim, which is then converted into sterling for the purposes of proof. The rule, I think, applies on the basis that you convert the yen claim into sterling. And I don't see how a new right or obligation, new right created by a new contract post-administration, can give rise to a provable debt, unless it's simply a compromise of an existing right, in which case that's a very different question. But I don't think a compromise could involve a departure from rule 2.86.

MR DICKER: My Lord, two points. Firstly, obviously, from the perspective of the Senior Creditor Group what is critical is the question of whether or not those whose claims were originally denominated in US dollars gave up

a currency conversion claim which they otherwise would have had. If your Lordship is right and effectively one can't have a new claim in a full sense, and you have to look back to your underlying rights, then plainly their currency conversion claim is protected.

The only way one could reach a different conclusion is if what one effectively said was the valuation that was being done pursuant to the CRA was effectively a valuation and a compromise of creditors' claims, but for whatever reason the appropriate currency in which to express the quantified claim was, and the agreement between the parties was, that it would be US dollars as opposed to --

MR JUSTICE DAVID RICHARDS: Yes, I see that.

MR DICKER: My Lord, in the context of the CRA, where one's focusing essentially on returning trust assets rather than simply on the question of proof, where one needs a common currency to ensure that everyone has effectively a pro rata share of the trust assets, one can just about see why that might be an appropriate course. Now, obviously, your Lordship's absolutely right, when one comes to the CDDs, if, as is common ground between the parties, those were essentially intended as a speedier and more final proof mechanism, I absolutely agree with your Lordship, it's much harder

to see how those could have resulted effectively in creditors restating their claims in some other currency, giving rise to rights which they otherwise wouldn't have had.

So there may conceivably be a distinction in this respect between the CRA on the one hand and the CDDs, driven essentially because they have slightly different purposes and arise in slightly different contexts.

MR JUSTICE DAVID RICHARDS: I see that because for the purposes of distribution of trust assets, clearly the Insolvency Rules don't apply. You're not concerned with those. So as you rightly say, you could have some quite different approach to the calculation of claims and so on for that purpose.

MR DICKER: And if one tries to imagine how the administrators may have been thinking at the time, they may have been thinking that given the majority of the assets were in US dollars, the majority of the claims were in US dollars, they may not have even thought there were any non-US dollar claimants at all, as your Lordship has seen from the reference in the surplus proposal I showed your Lordship yesterday. In that context, it may not be so surprising if for the purposes of distributing, making sure everyone gets a fair share of the trust assets, this approach was taken.

What we certainly do agree with your Lordship on is that sort of analysis, which may be applicable in a trust context, obviously breaks down entirely when one comes to thinking about all we're doing is proving in a quicker and more final way. You would not expect in the latter context, as your Lordship said, a departure from the effect of rule 2.86.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So that's currency conversion claims. Can I turn to statutory interest under the CRA? My Lord, as your Lordship knows, the Senior Creditor Group's position is that signatories under the CRA are entitled to interest from the date of administration in accordance with their underlying contractual rights or at the Judgments Act rate if that is greater.

We say the starting point, again, is the purpose of the CRA, to ascertain claims for the purposes of returning trust assets. There's no reason why the need to determine the net balance at the relevant time should have affected creditors' rights in respect of interest that would otherwise have accrued, continued to accrue in the future. In other words, to return trust assets you obviously had to take a time, identify the net contractual position at that time to make sure you knew whether the creditor was a debtor or a creditor of LBIE,

to make sure it got a fair share of the trust assets. That process does not require any alteration to parties' rights in respect of interest for the future. It's just striking a balance at that date.

Now, in looking at how the CRA deals with interest, we say one needs to look at interest at two separate stages. The first stage concerns determining the close-out amount, ie as part of the valuation process. The second stage concerns interest on the net financial claim, which is the outcome of that valuation process.

So two exercises are going on here. The first is working out what the net position is, close-out amount leading to the net contractual position. That's one exercise. That produces a net financial claim, the second issue concerns interest on that net financial claim. Your Lordship needs to look at both.

So far as interest as part of the close-out amount is concerned, if your Lordship again takes up the CRA, bundle 3, and starts with clause 21.2. 21.2, again, your Lordship's seen this. 21.2.1:

"Subject to the other provisions of this clause --

MR JUSTICE DAVID RICHARDS: Sorry, it's?

MR DICKER: 21.2.1. Page 353.

MR JUSTICE DAVID RICHARDS: I was looking in the summary. Yes.

MR DICKER: 21.2.1:

"Subject to the other provisions of this clause 21, in respect of each financial contract the close-out amount shall be determined in accordance with the relevant contractual valuation provisions as modified and supplemented by the overriding valuation provisions."

So starting with the contractual valuation provisions, going up, 21.1:

"In respect of each financial contract, contractual valuation provisions shall be any terms in such financial contract which provide for the calculation of an amount or amounts payable by one party to the other as a result of the termination of such financial contract."

And that can obviously include a provision for interest.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: In other words, when calculating the close-out amount, obviously part of the calculation of the net position may include interest to which one or other party is entitled.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: That's obviously subject to the overriding valuation provisions, and your Lordship has those at

20.4, and the relevant one is 20.4.7 on page 352:

"In determining the close-out amount in respect of a financial contract, no interest shall accrue on any unpaid liability of the company from the administration date, save to the extent that such interest would accrue under rule 2.88 of the Insolvency Rules."

So in determining the close-out amount, you effectively start simply with what the parties are entitled to, the overriding provision to the extent it operates at all caps that at what you would have received in accordance with rule 2.88.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Now, so far, there is absolutely nothing to suggest that in determining the close-out amount, you ignore the parties' contractual rights to interest. Indeed, it would be commercially extraordinary if, when you take the net balance, you ignored the parties' contractual rights to interest. What this does is basically say you take them into account, the only restriction imposed by 20.4.7 is they can't be more than you would have got under rule 2.88.

So nothing here which in any way suggests that creditors are limited to, for example, just the Judgments Act rate. This is plainly intended to cover every contractual right which the party had, whether

that right is expressed in terms of a percentage, compounding, or indeed the ability to say that a payment he's received in the past, ie prior to the close-out amount being calculated, was a sum which he was entitled to appropriate first to interest.

That's determination of the close-out amount. The other stage obviously is when you get to interest on the net financial claim. That's dealt with, again as your Lordship knows, separately in 25.1. It's the last line, 25.1, on page 362:

"For the avoidance of doubt no interest shall accrue on any net financial claim, save to the extent provided in rule 2.88 of the Insolvency Rules."

MR JUSTICE DAVID RICHARDS: To go over rather old ground, the close-out amounts are determined in accordance with 20.1, subject to the overriding valuation which you have shown me.

MR DICKER: Yes.

MR JUSTICE DAVID RICHARDS: If you have more than one contract, there's a netting off that goes on, that's under some other clause, that you've got the close-out amount, and then that produces a net contractual position, which, if it's a positive number, is a net financial claim?

MR DICKER: Yes. And that net financial claim accrues

interest, although it's worded using the language:
"For the avoidance of doubt, no interest shall accrue on any net financial claim save to the extent provided in rule 2.88."
That net financial claim accrues interest in accordance with rule 2.88 of the Insolvency Rules. You don't get more than that, you get what you would get under rule 2.88.
MR JUSTICE DAVID RICHARDS: I'm finding it a bit puzzling really, because we get interest accruing under rule 2.88 coming in twice, once in the close-out amount and then in the net financial claim. So how do these mesh together?
MR DICKER: Plainly, one can't have double counting, so to the extent your interest is taken into account in determining close-out amount and the net contractual position, the interest you would be entitled to on the result of that, ie the net financial claim, can only run from essentially that.
MR JUSTICE DAVID RICHARDS: The date of that determination. But if the net financial claim is being ascertained in part for the purposes of proof in a distribution amongst unsecured creditors, it is including an impermissible element. That's to say post-administration interest. Because that comes in under the determination of the

close-out amount, doesn't it?
MR DICKER: Yes, and presumably the draftsman's thinking in that respect was -- there's two separate issues, one of which is how much are you entitled to, and obviously there's a second issue, which is in what circumstances are you entitled to payment of that back from LBIE.
You need to do both because for the purposes of working out how much trust assets a party was entitled to --
MR JUSTICE DAVID RICHARDS: Well, I don't have any difficulty about the trust asset aspect of this because it seems to me that's in a sense an open field. The difficulty I have is just in understanding how this works in relation to a distribution in the administration.
MR DICKER: The answer in a sense comes back in our submission to a point I made previously. There isn't a distribution mechanism in the CRA.
MR JUSTICE DAVID RICHARDS: I suppose if the matter which is concerning me has substance, and it may be that it's wrong for some reason, you would say, well, that supports your approach to it, that this isn't concerned with distributions, fixing amounts for distributions?
MR DICKER: Yes, but in our submission in a sense there isn't an issue here. What one is doing is quantifying

a sum. Now, the basic approach to quantification, as you would expect in the trust context, is everything is included.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: When you get to the stage of a subsequent distribution because there isn't a payment mechanism for unsecured claims in the CRA, when you come to a subsequent distribution obviously the circumstances in which you'll be entitled to payment of post-insolvency interest will be determined by the rules governing their distribution mechanism.
MR JUSTICE DAVID RICHARDS: Yes. So it may be because of some provisions which I don't have in mind at the moment, this calculation of close-out amount does not feed into the ascertainment of a provable debt.
MR DICKER: It does so in the sense that it feeds into the determination of the net ascertained claim.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: And the net ascertained claim can subsequently be fed into a distribution mechanism.
MR JUSTICE DAVID RICHARDS: Without any modification to it?
MR DICKER: Well, presumably what the draftsman had in mind was -- in a sense that's dealt with by 20.4.7 and the last sentence of 25.1.
MR JUSTICE DAVID RICHARDS: 25?

MR DICKER: 20.4.7, your Lordship's seen, and 25.1. In other words ...
MR JUSTICE DAVID RICHARDS: Just go back to the close-out amount. Supposing you have a contract which automatically terminated on 15 September, so what has to be determined is a close-out amount as at that date, and the non-defaulting party is entitled to calculate its loss, which it does, it comes in at $1 million. And that is then applied -- let's assume that that can be done for the purposes of this agreement -- but subject to the overriding valuation provisions, one of which is 20.4.7, which says that no interest will accrue on that million dollars from the administration date save to the extent that such interest would accrue under rule 2.88 of the Insolvency Rules.
So my question then is: well, does any interest accrue on that million dollars under 2.88, to which I think your answer is yes, interest at either the judgment rate or the contractual rate if higher.
MR DICKER: That's what you would certainly assume the parties intended so far as determining net position for the return of trust assets was concerned.
MR JUSTICE DAVID RICHARDS: Yes. But it would not produce an amount for which the creditor could prove?
MR DICKER: No. No, certainly --

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It's fair to say that -- I mean, the CRA, I think, as everyone acknowledges, is a very complicated document, no doubt because it needed to deal with a very complicated series of issues. I think the draftsman did, if I may say, remarkably well in achieving what he did. There are certainly, as your Lordship saw yesterday, some aspects of it which aren't entirely easy to understand. The new claim is one. The reference I showed your Lordship, for example, in clause 33 to LBIE effectively being able to pursue a counterparty by reference to the underlying currency is another.
MR JUSTICE DAVID RICHARDS: Mr Dicker, I think what I'm interested in understanding is whether, if under the terms of the CRA, if the net financial claim becomes -- whatever the expression is -- an ascertained ... I've forgotten what the term is now.
MR DICKER: An ascertained claim.
MR JUSTICE DAVID RICHARDS: Just show me the link, just remind me -- I appreciate I've seen it -- how does a net financial claim become an ascertained claim? What is the provision that does that? Well, I suppose it's ... I mean, actually, 25.1 tells us that the net contractual provision will constitute an ascertained unsecured claim in the winding-up. Then is there something else that

actually --
MR DICKER: There is, as I showed your Lordship yesterday, 405, 60.1.5.
MR JUSTICE DAVID RICHARDS: "If it exceeds ...", yes, you have that set-off. Then, "Shall become an ascertained claim".
Everyone's telling you 62. Yes, there it is.
MR DICKER: And there is a similar provision in 60.2.4.
MR JUSTICE DAVID RICHARDS: Anyway, it's not really for you to provide the answer to this, but I'm raising the point so others can in due course.
MR DICKER: And our point, as your Lordship knows, in relation to the CRA is straightforward. One has determination of a close-out amount. You wouldn't expect as part of that determination the creditors to be deprived of contract rights to interest and to be limited simply to Judgments Act rate interest. There is no logic in determining the net position for the purposes of returning trust assets, to say: I'll determine the net position but I'm only going to give you interest in determining the close-out amount at the Judgments Act rate rather than the contractual rate. That's our short submission in relation to that.
We say, similarly, when the close-out position ultimately results in the net financial claim, and the

net financial claim says you get interest in accordance with rule 2.88, similarly no logic in saying: what you get on your net financial claim is only Judgments Act rate as opposed to contractual interest as well.
In that respect, we do say it's important that 25.1 refers to rule 2.88 as a whole. 2.88 obviously includes 2.88.9, which entitles you to the greater of the Judgments Act rate and rate applicable apart from the administration. And we say that for the purposes of interest -- effectively, in determining the amount of interest under 2.88.9, when you have the reference to the rate applicable to the debt apart from the administration, to determine that you need to look at the rate payable pursuant to the relevant underlying financial contract or contracts.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: And there's no difficulty in doing so. That was the rate applicable at the point when the CRA was entered into. It's the rate which has just been taken into account in determining the close-out amount and it's the rate that would have applied if the administration order had never been made.
Now, we say the reference simply to 2.88 makes no sense if the draftsman intended you wouldn't get interest at the greater amount, you'd simply get

Judgments Act rate interest. Now, the point that's made against us is that that doesn't work because although your right to statutory interest is preserved, when you come to apply rule 2.88 .9 and you ask which is the greater of the Judgments Act rate and the rate applicable to the debt apart from administration, it has to be, so the argument goes, the Judgments Act rate because there is no longer an underlying financial contract; and the submission effectively has to be it's impossible to look back therefore to the underlying financial contract to give you the relevant rate.
So although the draftsman appears to have given you statutory interest in its full sense, actually, because you've given away, you've released the contract which contains the rate to which you're contractually entitled, actually, so the argument goes, under 2.88.9, it can only ever be Judgments Act rate. We say that's plainly not what the draftsman intended. There is no such conceptual problem and one can see that plainly from other provisions in the CRA. For example, provisions dealing with the obligation of a signatory to pay interest to LBIE, in other words the other side of the coin.
Just to show your Lordship how this works, if your Lordship goes to clause 25.2, page 362:

"A net contractual position in respect of a signatory expressed as a negative number will represent an amount due and owing by that signatory to the company. Interest shall accrue daily in respect of such amount from the administration date on any gross uncollateralised liability and be calculated as the net financial interest amount."

Net financial interest amount is dealt with in 25.3.1:

"A net financial interest amount in respect of any date for which it is required to be determined is an amount determined by the company that is equal to the amount of gross uncollateralised liability interest."

Now, again, following the definitions, if your Lordship goes to the right-hand page, 25.3.2:

"The gross uncollateralised liability interest shall be an amount of interest on the gross uncollateralised liability calculated on the basis at the then prevailing applicable rate from the administration date until the date on which such gross uncollateralised liability is reduced to zero."

And then in (iii), effectively the point of the various provisions I have been showing your Lordship:

"The applicable rate means a simple rate of interest equal to the lesser of (a) US dollar LIBOR plus 1 per

cent, and (b) [and this is the relevant bit] the highest rate of interest applicable to any sum due from that signatory to the company where the signatory is not the defaulting party, as specified in any financial contract between that signatory and the company."

So the long and short of it is the draftsman has had no difficulty when he's been looking at the other side of the coin in talking about interest owed by the signatory to LBIE, defining that by reference to rates of interest under a financial contract between that signatory and the company. Although on Wentworth's argument, LBIE, just like the signatory, released all its rights and obligations under the old financial contracts.

So if Wentworth's argument is right, it's difficult to see how the draftsman could have logically included this provision in 25.3. We say there's absolutely no difficulty when you're looking at 2.88 and you're asking what is the rate applicable to the debt apart from the administration and saying, well, this is essentially a quantification and compromise of your underlying claims. It is, of course, the amount of interest you were entitled to under your underlying claims.

MR ZACAROLI: My Lord, I hesitate to interrupt. Can I just make it clear, that is not our case. That wasn't the

case I advanced to my Lord yesterday. It's not the case in our skeleton. We've accepted on the CRA that the right to statutory interest includes the right under 2.88.9 to the contractual rate if higher than the Judgments Act rate. Our only case on interest and the CRA is you don't get more than 2.88 entitles you to, so the non-provable claim if it exists has gone.

MR JUSTICE DAVID RICHARDS: So I think this is issue 38, isn't it?

MR ZACAROLI: 35.

MR JUSTICE DAVID RICHARDS: That arises on the CDDs, not on the CRA.

MR ZACAROLI: On some of the CDDs. My learned friend Mr Trower I think does make this argument.

MR JUSTICE DAVID RICHARDS: He does? Right.

MR TROWER: My Lord, it was raised by Mr Zacaroli originally in his position paper and we thought your Lordship, with respect, ought to decide it, even though it was no longer being argued by Wentworth.

MR JUSTICE DAVID RICHARDS: Thank you, right.

MR DICKER: Your Lordship's quite right and I apologise to my learned friend. The point I've just been addressing is the submission or an argument made by the administrators and was the position taken by Wentworth. So I've dealt with that.

As my learned friend has just pointed out, Wentworth's position in relation to interest has changed. It did originally take the same line as the administrators are now arguing and saying you were limited to Judgments Act rate. He now accepts under the CRA, you are entitled to interest at Judgments Act rate or contractual rate of interest. The only thing you lose, according to Wentworth, is any non-provable claim in relation to interest.

The reason they say that, if your Lordship goes to their skeleton argument, is in paragraph 171. They say:

"In light of the express preservation of rights under rule 2.88, 7 to 9, in the CRA, Wentworth does not pursue this argument in relation to those agreements."

Now, obviously, the CRA doesn't in terms refer to 2.88, 7 to 9, but it does refer to rule 2.88. So Wentworth's position is, as my learned friend indicated, under the CRA that the reference to rule 2.88 is sufficient to preserve contractual and Judgments Act rate rights, they take a different line in relation to the CDDs. In relation to the CRA, their point is you nevertheless have lost all non-provable claims to interest and, obviously, the critical aspect of that now, in the light of the stance taken on part A, is a right to appropriate in accordance with the rule in

Bower v Marris.

As we understand it, Wentworth's position therefore is that it hopes to succeed on essentially two points. First of all, to have persuaded your Lordship in the context of part A that the rule in Bower v Marris did not survive the introduction of rule 2.88, and secondly that if under part A you would therefore have a non-provable claim for the interest that you would have received but as a result haven't received, you've released that by entering into the CRA.

We say it would be bizarre to conclude that parties to the CRA intended that creditors would preserve their right to interest at the higher of the Judgments Act rate and contractual rights, but to release and effectively to release only their right to appropriate any payments first to the payment of interest. In the context of the CRA, bearing in mind the purpose of the CRA, we say there is no sensible commercial reason why that distinction is one that they would have drawn. In answer to that, we say two things. Firstly, not wishing to reargue part A, but our submission is Bower v Marris survived the introduction of rule 2.88, and we say the approach of the Court of Appeal is strongly supportive of that.

The second point however for present purposes is

even if the rule in Bower v Marris isn't part of rule 2.88, creditor can still rely on it as giving rise to a non-provable claim, and he has not given up that right by entering into the CRA. My learned friend's argument appears to proceed on the basis that the right of appropriation is effectively a right which you had under your original financial contract, which you have given up and you have got a new claim instead.

The assumption he makes, which we say is wrong, is even assuming you have given up in the full sense your old claim and acquired an entirely new claim, his assumption is that for some reason that new claim doesn't carry the same right to appropriate first to payment as interest as any other contractual claim would carry. So we say when you get a net financial claim under the agreement and you agree with -- and the agreement, taking my learned friend's approach, is effectively a new claim which you have against LBIE, which carries interest, we say there is no reason why that new claim doesn't give you a contractual right to appropriate any sums you receive, first to the payment of interest, and secondly to the payment of principal. There is no reason why your new claim should operate in any way differently from any other claim you might have.

MR JUSTICE DAVID RICHARDS: The bit I don't understand about

that submission is that if one's treating this as a new claim arising under the CRA, the interest to which you are entitled from the date of administration is that which would accrue under rule 2.88. If Bower v Marris applies to 2.88, you have the benefit of it. If it doesn't, you don't.

MR DICKER: It involves drawing a distinction between on the one hand a right to interest, which is essentially the distinction that my learned friend sought to draw on the last occasion between going back to percentage rate or whether it's compounded or not, and treating Bower v Marris as essentially something different, not to do with the quantification of your claim to interest, but simply a right to appropriate.

My Lord, there are two ways of regarding Bower v Marris, either it's part of your right to interest, which we say it's preserved by rule 2.88, or it's something different. If it's something different, in other words simply a right to receive a payment, when you receive it to appropriate it first to payment of interest and for some reason you don't regard it as to do with the quantification of the amount of interest you're receiving, then there is no reason why you can't treat your net financial claim in the same way as any creditor would be entitled to treat it.

Just stepping back. So far as the CRA is concerned, bearing in mind, as I said, its purpose, it would be very odd indeed, we say, if the consequence of entering into the CRA concerning with distribution of trust property was to have this collateral effect. You maintain your right to interest but for some reason you've given up the right which you otherwise would have had, which would have subsisted as a non-provable claim, we say, to appropriate any payments received first to interest.

One answer to that, as your Lordship has indicated from time to time, if one doesn't treat the net financial claim as in all respects an entirely new animal and one is effectively entitled to look back at the underlying position and regard this simply as a quantification of the underlying position, if that's how one views it, why should a creditor who has simply quantified his underlying position, particularly one who does so for the purposes of getting trust asset back, suddenly find that the process of that quantification means he loses a non-provable claim essentially to say: if the administration hadn't happened, I would ultimately have received X pounds because I would have had a right to appropriate first to interest. I haven't received X pounds, I've received something less, I am

therefore entitled to the balance of that claim as a non-provable claim. How on earth could the parties to the CRA have intended, given its context, the party creditor to have given up that right?

So we say under the CRA you're entitled to interest at the higher of the Judgments Act rate and rate applicable to the debt apart from the administration. We say, obviously in accordance with our submissions on part A, built into that is effectively the right to appropriate in accordance with the rule in Bower v Marris. Alternatively, under part A if that's not right, you'd have a non-provable claim with a shortfall and there's absolutely nothing in the CRA which indicates the creditors intended to give up that right which they otherwise would have had.

My Lord, I should probably just show your Lordship one other provision of the CRA. It deals with the converse position, and I do so for completeness rather than anything. It's 25.4. Again, this is the mirror position. It's dealing with net financial liabilities. 25.4:

"Any reduction of net financial liabilities should first be deemed to reduce the portion comprising any net financial interest amount until that has been reduced in full and then the proportion not comprising any net

financial interest amount."

So certainly from the other way round, LBIE appears to be able to continue to rely on the right to appropriate. Again, to the extent that these are properly to be regarded as effectively mirror images of each other. It would be surprising if the position were different for creditors.

My Lord, then finally, just some references to the background materials. We do say that if our submissions are incorrect and the CRA has the effect for which either the administrators or Wentworth contend, that is a surprising and unfortunate result, given the content of the background materials, showing the purpose and genesis of the CRA.

Obviously, the starting point, we say, was the CRA was originally devised by the administrators and devised primarily to enable them to comply with their duty to return trust assets. My learned friend Mr Trower mentioned that there was certainly strong encouragement by administrators to signatories to enter into it. Can I just show your Lordship a few references in that respect?

If your Lordship takes up bundle 6, page 334. Doing this as quickly as I can, 334 is a client assets update, 5 October 2009. It's on the right-hand page, 335, the

second paragraph, last sentence:

"Joint administrators believe that this contractual solution, which includes appropriate terms from the drafts scheme, will balance all parties' interests, and if widely supported will be a robust alternative to the scheme."

357, which forms part of an update meeting in October 2009. Your Lordship has that three lines down under the heading "Contractual solution":

"No class issues, no jurisdiction issues, no restrictions on terms. Must be fair to unsecured creditors."

Obviously, we say an approach which required creditors to give up part of their claims to interest, it would be difficult to square with that.

377 is slides for a meeting with trust asset clients in December 2009. If your Lordship goes to 381, it's the third bullet and the third key message:

"CRA is balanced, composite solution for trust asset claimants."

And it identifies the benefits.

If your Lordship then goes on in that to 423, benefits to signatories. I don't need to, I think, go through the list, but they're set out on 423.

425, position of non-signatories. These are the

disadvantages of not taking part in the CRA. And the conclusion, 427, last bullet point on the page headed "Conclusion":

"The best available solution, your support essential."

So absolutely no suggestion anywhere that one consequence necessary or otherwise was giving up rights which you would otherwise have had in relation to interest or currency conversion claims.

My Lord, similarly the covering letter, just going back to 218. Sorry, your Lordship needs bundle 3, not bundle 6. Again, your Lordship's seen these, so I can just remind your Lordship of them. Page 219, paragraph 5, it's the last sentence on that page where they say:

"For this and other reasons outlined, the administrators are also of the opinion that the agreement is in the best interests of the creditors of the company as a whole."

And in paragraph 8 under the heading "Conclusion", they're of the opinion that the agreement represents the most efficient method of returning trust assets to those clients with ownership claims to them, for the reasons set out in this letter.

My Lord, as I say, no indication there at all that

they may be giving up rights to interest or currency conversion claims in that sentence. My Lord, I have two further short points in relation to the CRA. I wonder whether it would be convenient just to deal with those first?

MR JUSTICE DAVID RICHARDS: And then take a break, certainly.

MR DICKER: The next point is the position of signatories in this respect. My Lord, obviously their position was that after the court held it didn't have jurisdiction to sanction the scheme of arrangement, this was effectively the only process being offered to them for the return of their trust assets, certainly within any sort of reasonable period.

Whilst it's undoubtedly true, as my learned friend Mr Trower says, the administrators could not have forced signatories to enter into the CRA, the commercial reality is that they really only had one option. The downside of not doing so, as the administrators pointed out in their own materials, was likely to be disadvantageous to them.

There is an issue -- your Lordship asked a question about the extent to which unsecured creditors' views formed part of the process of devising the CRA. Can I just show your Lordship one reference in Mr Pearson's

witness statement in that respect, which I don't think your Lordship has seen. It's bundle 2, tab 7, paragraph 42.

One can't, I think, draw too firm a conclusion from this, but if your Lordship looks at paragraph 42, Mr Pearson says:

"The contribution of the creditor representatives to the draft scheme and the CRA through their participation in the working groups, not only in respect of the key terms, but also at a granular level in respect of the operation effect of particular provisions. Creditor representatives also contributed to the way in which the structure and effect of the draft scheme, then the CRA, was presented to trust asset creditors and facilitated the communication of feedback from trust asset creditors over the course of its development."

The focus, not surprisingly, is in relation to trust asset creditors.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, the final point is this. It is said the CRA was a compromise with advantages and disadvantages for creditors and there's nothing surprising in that context in them agreeing to give up currency conversion claims or claims to interest. It's plain that the CRA was, of course, a compromise, but we

say claims to contractual interest or currency conversion claims didn't form part of that compromise. There was no reason why the position of creditors in the event of a surplus needed to form part of this compromise. It wasn't necessary to deal with those issues to determine the net balance as at the relevant date and to identify who is entitled to the return of trust assets. And given that no one, it appears, had a surplus in mind, there is no reason to assume that anyone thought about it.

My Lord, certainly so far as the administrators' position is concerned, compromise would not have been a, in our submission, fair or balanced one in the sense that or to the extent that it would have involved some creditors giving up valuable rights but not others. Take, for example, the position of a currency creditor with a currency conversion claim. If the effect of the CRA was, as the administrators contend, "He gave up a currency conversion claim", that would be a detriment to him and it would be a detriment to him not borne equally by all creditors in any sense at all.

My Lord, that was all in relation to the CRA. That would now be a convenient moment.

MR JUSTICE DAVID RICHARDS: Certainly. I'll rise for five minutes.

(11.53 am)

(A short break)

(12.00 pm)

MR DICKER: Can I turn now to deal with the CDDs?

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: As your Lordship knows, there are a large number of different forms of CDDs, although our case is they all had essentially the same effect. Non-released rights in respect of statutory interest or currency conversion claims.

My Lord, a few preliminary points before looking at the three main types of CDDs. The first, as I've already submitted, we say that when one construed CDDs, one should do so by assuming that the administrators intended to devise agreements that were consistent with their functions and duties, which did not result in creditors giving up potentially valuable rights in the event of a surplus, which they did not need to give up, and for which they did not receive any additional consideration and which did not result in creditors being treated unequally for no good or sufficient reason.

Only one point in relation to the law. Your Lordship asked me about the duty of an administrator in relation to the admission of claims.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: And my description of that duty as being quasi-judicial. Can I show your Lordship two authorities in that respect? They're both in bundle 1A, the first is at tab 29. It's a decision of Mr Justice Etherton as he then was in Menastar Finance Ltd. And the relevant passage begins at paragraph 43 under the heading "the law". Mr Justice Etherton says:
"... a long line of authority going back to the 19th Century establishing the principle that on making a winding-up order or a bankruptcy order in the case of both personal and corporate insolvency, considering whether to admit a creditor's proof based on a judgment debt, the court can in appropriate circumstances go behind the judgment and see whether the debt is truly due."
44:
"The power of a liquidator is in this respect no different from that of the court itself since the liquidator, in deciding whether to accept or reject a creditor's proof in whole or in part, is acting in a quasi-judicial capacity."
And then a reference to Tanning Research Laboratories v O'Brien:
"His statutory duty is to ensure the company's

property is collected in and applied in satisfaction of its liabilities pari passu, among its proper creditors."
I think that's all I need to show your Lordship from that.
The other decision I was going to show your Lordship was the Tanning Research Laboratories case referred to by Mr Justice Etherton, which your Lordship will see at tab 23. It's a decision of the High Court of Australia. The first judgment delivered by Justice Brennan and Dawson begins at 335. I wanted to pick it up at 338 at the bottom if your Lordship has that.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Again, in the circumstances, in the context of going behind judgments, but at 338 it says:
"In determining whether to admit or reject a proof of debt a liquidator has been said to act in a quasi-judicial capacity according to standards no less than the standards of a court or judge. This description of the liquidator's functions reflects his duty to distribute the assets in his hands or under his control among the persons truly entitled. That duty was stated by Viscount Simonds in Government of India v Taylor.".
And the quote --
MR JUSTICE DAVID RICHARDS: I have read that.

MR DICKER: -- "I can see it is the duty of the liquidator to discharge ..."
Then in contrast, it may be worth your Lordship just looking at 340, the last paragraph on the page:
"If the liquidator in performing his function of considering the admissibility of proofs of debt decides to reject a proof, the ordinary remedy of the person claiming to be admitted as a creditor is to apply to the court to reverse or modify the decision."
And then over the page, four lines down, a contrast is drawn between the liquidator adjudicating on a proof and then dealing with an appeal against his adjudication. Four lines down, the judgment says:
"In such proceeding a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity. He is cast in the role of an adversary defending the assets available for distribution against a liability, which according to the view he formed when acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground which the company might have defended the claim had it been sued by the creditor."
So the contrast between the adjudication for proof, which is a quasi-judicial duty. In other words, the

role of the liquidator at that stage is not to try and reduce the proof to the minimum, let alone to persuade the creditor to give up his rights, it's to give him the amount to which he is properly entitled, and obviously the position changes in the event that the liquidator, having paid his adjudication, is then faced with dealing with an appeal. At that point it's no longer quasi-judicial, he is entitled to make whatever arguments he considers appropriate.
MR JUSTICE DAVID RICHARDS: But he is required to act fairly in conducting the litigation, is how the paragraph ends.
MR DICKER: Yes. And your Lordship's absolutely right, even at that stage, he's obviously still subject to the general duties of a litigant and, more importantly, his position as an officer of the court. But that is not obviously quite the same as acting quasi-judicially.
MR JUSTICE DAVID RICHARDS: No, no, clearly. Agreed. Thank you.
MR DICKER: So when construing the CDDs, we say that your Lordship needs to start by construing them against the assumption that what the administrators were trying to do, albeit through what may have been a quicker, speedier, more final process, was nevertheless a process intended to enable them to comply with their quasi-judicial duty to give creditors sums to which they

were properly entitled.
The next point is that all the CDDs, we say, had a common purpose intended to provide a speedier and more final mechanism for agreeing and proving claims so as to enable the administrators to make an earlier distribution.
My Lord, can I just remind your Lordship in this context of one paragraph in the statement of agreed facts? If your Lordship has that.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: It's paragraph 63.
MR JUSTICE DAVID RICHARDS: So this is tab 18.
MR DICKER: Paragraph 63:
"The primary purpose of the CDD is stated by the joint administrators to be to provide an efficient process for agreeing the amount of a creditor's claim, such that distributions could be expedited."
And then there's a reference to Mr Lomas' tenth statement at 48. My Lord, there are echoes of the same point elsewhere in the statement of facts.
Your Lordship may just like to note in the introductory part dealing with the CDDs, paragraph 53.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The last sentence:
"The administrators intended to use CDDs, amongst

other things, to streamline the process of creditors agreeing the valuation of their claim amounts to enable them to make distributions in respect of these claims."
And then the same reference to paragraph 47 and 48 of Mr Lomas' tenth statement. Can I show your Lordship two other paragraphs of Mr Lomas' tenth statement, which is in bundle 2, tab 2. It's paragraphs 33 and 34 if your Lordship would just glance at those. (Pause).
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: I have obviously already explained how, in our submission, one should view the process essentially as a speedier and more final process of agreeing claims for the purposes of distributions in respect of proved debts. And achieving finality in the sense that a creditor chooses what claims he wishes to make, he has agreed and admitted for proof, and the finality is essentially him agreeing that he won't challenge the adjudication and submit an amended proof or a new proof, and to the extent that he chose not to advance claims for whatever reason, then obviously to release those.
There are obviously differences between the various CDDs, but, as your Lordship knows and your Lordship will see in more detail in a moment, the differences between them and the reason why one was used rather than another had nothing to do with whether a creditor should have

a right to interest or a currency conversion claim in the event of a surplus. The differences between them were driven by other things entirely. We say those other things cannot sensibly have led the parties to intend that, for example, under an agreed claims CDD denominated in US dollars they would have a currency conversion claim, but under an admitted claims CDD denominated after conversion into sterling for the purposes of proof in sterling, they would not.
My Lord, so far as the releases in the CDDs are concerned, we say the fact they're very broadly worded is irrelevant for the simple reason that they did not concern the claim which was agreed and admitted for proof and for those purposes converted into sterling. Going back to the example I gave right at the start of my submissions, between claim 1 on the one hand and claims 2 to 10 on the other, releases may be very broadly worded, but one thing it's obvious they were not intended to deal with is the very claim which the creditor is advancing, which the liquidators are adjudicating on pursuant to their quasi-judicial duty and which is then agreed and converted into sterling for the purposes of proof.
It is, in our submission, wrong to approach the releases as if they were in some way intended to affect

everything. By definition, they're not. They say in terms they're not to deal with the agreed claims. It's effectively everything else that is being released.
So reference and repeated reference to the breadth of the language of the releases is, with the greatest respect, we say, simply beside the point. It's not dealing with the claims which are being advanced, agreed and admitted.
Again, I've already made the point the CDD process did not require creditors to give up claims in the event of a surplus to get earlier distributions in respect of their proved debts. There was no logical reason why that was necessary simply to get an earlier distribution in respect of your proved debt. Issues in relation to the surplus would only need to be addressed if and when there turned out to be a surplus. And you're not going to slow down distributions in respect of proved debts by preserving claims which would only arise and only need to be dealt with if a surplus did arise; and obviously it's important in this context that at the times the CDDs were originally developed, no one appears to have been anticipating a surplus.
My Lord, turning to the first of the CDDs, we say the right place to start is with the agreed claims CDDs because they were the first form of CDDs which were

devised. They started to be used from 30 November 2010 onwards. The example your Lordship I think has been working from is bundle 11, tab 1A.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Before going to the wording, again your Lordship needs to understand the context and the way in which the process worked. So far as the context is concerned, the agreed claims CDDs, as your Lordship knows, were devised in circumstances where there was a real uncertainty as to whether particular creditors had client money claims or not. And it was obviously vitally important the agreed claims CDD process didn't prejudice any client money claim that might exist, particularly important given that a client money claim could potentially enable the credit to recover 100 per cent of his claim when at that stage obviously no one was anticipating -- appears to have been anticipating a surplus in LBIE's unsecured estate.

My Lord, one also needs to bear in mind again the majority of LBIE's assets were denominated in US dollars and certainly if the creditors' underlying claim was in US dollars, he would want to maintain that claim in US dollars so as to preserve his right to a proportionate share of any client money. Put another way, there is no reason why the process of an agreed claims CDD would

in the amount agreed between LBIE and the creditor, and (2) for the agreed claim to become an admitted claim, admitted for unsecured dividends in administration upon either ..."

And then the two conditions are summarised. Your Lordship can see that reflected in the agreed claims CDD itself, if your Lordship would then turn ...

MR JUSTICE DAVID RICHARDS: Which do we want? The CDD?

MR DICKER: Yes. I'm sure your Lordship finds you have every bundle open.

MR JUSTICE DAVID RICHARDS: Yes, thank you.

MR DICKER: Bundle 11, tab 1A. One has, if your Lordship goes to clause 2 and 3, the two stages. 2 is dealing with claims agreement, so that's what I have called stage 1. Clause 3 is dealing with entitlement to an admitted claim. 3.1:

"Save as set out in clause 3.2 and 3.3 below, the agreed claim shall not be accepted in whole or in part as an admitted claim."

And your Lordship was shown these provisions before. Essentially either you have to have given up your client money claim, alternatively it needs to be determined before you have an admitted claim, and in the event that you have an admitted claim, it's the agreed claim being converted to pounds sterling at the exchange rate.

have involved him taking on a currency exposure on his client money claim which he didn't previously have.

Two short references to the CASS rules. If your Lordship takes up bundle 3 of the authorities, the first is tab 13 and it's CASS 7. The two paragraphs I wanted to show your Lordship were on page 24. It's paragraph 8 towards the bottom of page 24. I don't think the detail matters. Paragraph 8 towards the bottom of page 24:

"A firm should calculate the individual client balance using the contract value of any client purchases or sales."

As one would expect. At paragraph 7 above it says:

"The individual client balance for each client should be calculated in accordance with the table."

I don't think I need take your Lordship through the detail. The short point is, as one would expect, client money claims are ascertained in accordance with your contractual rights, and one of those rights is the currency in which your claim is denominated.

The agreed claims CDD essentially involved a two-stage process. Your Lordship will see this reflected in the statement of agreed facts, again tab 18. Paragraph 17, the statement of agreed facts:

"Agreed claims CDD provided (1) for an agreed claim

Now, before looking in a little more detail at that, just so your Lordship understands the process by which each stage was conducted, starting with stage 1, agreement, what happened was firstly creditors were required to submit a proof of debt, complying with the Insolvency Act and Rules, on LBIE's claim portal. And I think your Lordship's seen this before. That's referred to in the fifth progress report, for example, if your Lordship takes bundle 8, tab 1. It's page 29. It's at the top of the left-hand column at 29 under the heading "LBIE determination":

"In order to be eligible for receipt of a LBIE determination, the administrators require that the relevant creditor has submitted a proof of debt that is compliant with UK insolvency legislation."

And as Mr Garvey explains in his witness statement, obviously what that required was for creditors to submit their claims in the currency of their underlying entitlement because that was the claim that they were entitled to advance. So we have a claim that has proof, which has to be compliant with the Insolvency Rules, and obviously a proof which is submitted in the currency of the creditor's underlying entitlement.

The second point is the administrators then make an offer of a single amount, which the creditors claim is

agreed. And again, this offer was usually in the currency of the underlying entitlement. This isn't controversial. If your Lordship goes back to the statement of agreed facts at tab 18, it's paragraph 58 on page 11:

"It was generally the case that LBIE would communicate the LBIE determination in the currency of the creditor's underlying entitlement."

And then the exception was:

"To the extent the creditor's underlying entitlements were denominated in more than one currency and the currency in which the largest element of the aggregate claim was denominated."

The basic principle is that you submit a claim in your underlying currency, the administrators look at it, they make an offer, again generally in your underlying currency. Now, that offer, as your Lordship knows, was not intended to be a matter for negotiation.

Your Lordship will see that at paragraph 56:

"Creditors were advised the LBIE determination was not intended to be a matter for negotiation ... entitled either to accept or reject it."

Then the next stage is:

"If the LBIE determination was accepted, the agreement would be formalised in a CDD, provided the

other terms are accepted by the creditor."

That, as your Lordship will see from paragraph 72, resulted, so far as agreed claims CDDs are concerned, in agreed claims predominantly denominated in a foreign currency. Less frequently in sterling. So you prove in respect of your underlying currency, you have an offer in respect of your underlying currency, a determination, and that reflected in the agreed claim.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, going back to the provisions of the agreed claims CDD itself, bundle 11, tab 1A. Recital B:

"Consideration of the company and the creditor agreeing the creditor's claims against the company under the creditor agreement are limited to the agreed claim amount. The company and the creditor wish to release and discharge each other [et cetera]."

My Lord, my learned friend Mr Zacaroli referred your Lordship and made submissions in relation to recitals in some of the CDDs. Your Lordship ought to be aware that the wording is not always the same. I'll show your Lordship certainly some in relation to CRA CDDs in the bundle. There are examples in relation to other types as well, where this recital also refers to dividends from LBIE. So a recital is not always expressed simply in these terms, your Lordship will see

that later.

Then, again, just dealing with stage 1, definition of agreed claim:

"The creditor's claim ... against the company under and in connection with the creditor agreement, including for the avoidance of doubt any client money claim arising under or in connection with the creditor agreement, but excluding any trust asset claims."

The agreed claim amount, although it's blanked out for some reason in this copy, it's for this form in US dollars. It doesn't really matter. Obviously, agreed claims amounts would simply reflect the underlying currency.

And then 2.1, your Lordship has seen, it's an agreed claim:

"... shall be limited to the agreed claim amount [ie the US dollar sum] and shall constitute the creditor's entire claim against the company and, save in respect thereof ..."

And then effectively releases of everything else.

So obviously, no conversion into sterling at this stage. Offer, ascertainment -- rather, ascertainment, offer, determination, all in the currency of underlying entitlement. So one can take the example of a US creditor who ends up with an agreed claim amount in US

dollars.

Now, stage 2 involves the subsequent admission of that agreed claim as an admitted claim, and your Lordship saw clause 3 a moment ago. Just to pick up a couple of points which we emphasise. Where your agreed claim does become an admitted claim, what happens is that it's then converted to pounds sterling at the exchange rate. One sees that both in 3.2.1, at the end of 3.2.2, and also right at the bottom of the page. So it doesn't matter why it's not eligible as an admitted claim, whether it is because you released your client money claim or it's been determined. At that stage is becomes an admitted claim converted to pounds sterling at the exchange rate.

The exchange rate, again, as your Lordship has seen, previously defined, page 4:

"[It is] the 'official exchange rate' set out in rule 2.86(2) of the Insolvency Rules which for the purpose of converting US dollars to pounds sterling shall mean the following exchange rate ..."

Again, I'm not quite sure why that's been blanked out:

"... and, for the purpose of converting the currencies specified in appendix C ... to pounds sterling shall mean the rates set out in appendix C

thereof."
So one has an exchange rate, we say pursuant to rule 2.86.2.
Again, going back to definition of admitted claim at page 2:
"The claim of a creditor of the company which qualifies for dividends pursuant to the Insolvency Rules and the Insolvency Act, or if applicable as amended or replaced pursuant to the terms of a scheme of arrangement or a company voluntary arrangement."
We say the natural construction of this is, not surprisingly, when you get to the stage of admitting your claim, it's being admitted to proof, it's converted pursuant to rule 2.86 with all the consequences that would normally have, and it qualifies for dividends pursuant to the Insolvency Rules or Act, again as any other claim admitted to proof in the ordinary way would
My Lord, that, we say, is plain and obvious from the terms of the CDD. It was also set out very clearly, as your Lordship saw, by the administrators in various of their creditors' reports. Reminding your Lordship of one example, it's the fourth report, bundle 5, tab 1. It's page 35 of the bundle, page 33 of the report. Section 6.2:
"Currency matters and dividends prospects."

And my learned friend Mr Zacaroli showed you this.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Just emphasising the bottom left-hand column, the last paragraph:
"Accordingly, applying rule 2.86, and general principles of UK insolvency law, all unsecured creditors' claims, including any unsecured claims relating to CRA signatories, are to be converted into sterling as at 15 September 2008 for the purposes of having a proven claim against LBIE."
On the right-hand column, the last two paragraphs:
"To assist creditors, the claims portal contains relevant exchange rates as at 15 September and automatically converts non-sterling denominations."
And:
"In order to be able to determine the entitlements of creditors to share in the estate, all claims must be expressed in a single common currency and currency translation must be calculated at a relevant date."
My Lord, obviously that sentence is only explicable in the context of a provable claim, ie in the event of an insolvent estate rather than dealing with a surplus. Otherwise, the reference to a share doesn't make sense and the statement that "all claims must be expressed in a single common currency and currency translation must

be calculated at a common date" is obviously what the cases say is the purpose of converting in that situation.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: So we say the effect of an agreed claim CDD is perfectly straightforward. The creditor is entitled to statutory interest on any currency conversion claim in respect of his agreed and admitted claim, just as he would if he had proved for that claim in the ordinary way. That is exactly what you would expect given the general purpose of the process, namely to provide a quicker and more final process for proving claims to enable early distributions to be made.
Now turning to the administrators and Wentworth's positions. As we understand it, the administrators, certainly in their position papers, agree with the Senior Creditor Group in relation to statutory interest. Wentworth's position is that the creditor is entitled to statutory interest on its agreed and admitted claim, but it says such right is limited to interest at the Judgments Act rate because any contractual right to interest has been released.
So you enter into a CDD and you are thereby to be taken as having agreed that you will have interest at the Judgments Act rate, but giving up any contractual

right to interest. We say, given the purpose of the CDDs, this consequence makes no sense. Why would creditors have wanted to give up contractual rights to interest and limit themselves to interest at Judgments Act rate?
Your Lordship also knows that this consequence, if this is a consequence of an agreed CDD, is different from Wentworth's case in relation to the CRA. Its position now in relation to the CRA is that you keep your right to interest at the Judgments Act rate, the higher of the Judgments Act rate and the rate applicable for the debt apart from the administration. But they say when you come to an agreed claims CDD, the position is different. At this stage you only get your Judgments Act rate. My Lord, again, we say that's not something that was ever suggested in any of the background materials setting out the genesis and the purpose of these documents.
So there's that distinction to be drawn between the agreed claims CDD on the one hand and CRA on the other, so far as Wentworth is concerned, which we say makes no sense. But there's also a distinction, we say, to be drawn between Wentworth's approach to these CDDs and subsequent agreed claims CDDs, which contained preservation language.

Now, just showing your Lordship two paragraphs from Wentworth's skeleton. If your Lordship could go to paragraph 60. They say:

"So far as the language expressly preserving claims to statutory interest is concerned, nothing turns on it because it is not Wentworth's case that rights to statutory interest have been waived under any form of CDD."

If one then goes on to paragraph 171, which your Lordship saw earlier, so far as Wentworth's latest position is concerned in 171 they say:

"In the light of the express preservation of rights under 2.88, 7 to 9, in the CRA, and in the later CDDs with statutory interest preservation language, Wentworth does not pursue this argument in relation to those agreements. The express reference to sub-rule 9 can only be explained on the basis the parties intended to preserve the contractual rate that would have applied apart from administration."

My Lord, I have already made the point, certainly so far as the CRA is concerned, there isn't express reference to rule 2.88 .9, simply to rule 2.88. But the point here is that on Wentworth's case, although the preservation language is expressed as being for the avoidance of doubt, and also in paragraph 60 Wentworth

said nothing turns on it, actually an enormous amount does turn on it because under the ordinary agreed CDD without preservation language, according to them, you only get Judgments Act rate interest, but if you include the preservation language, you get the higher of Judgments Act rate and contractual interest.

Again, we say that's certainly not what the draftsmen of the later CDDs appear to have understood because if it had been, they wouldn't have used the language without -- for the avoidance of doubt.

We also say that there is no conceptual difficulty in giving effect to an intention of the parties to preserve their right to interest at the greater of the Judgments Act rate or the rate applicable to the debt under the contract. There's no conceptual difficulty referring back to the underlying financial agreement, which is the subject matter of the proof, and one indeed can see that from the definition of "agreed claim" itself, bundle 11, tab 1A:

"Creditors' claim (or claims, as the case may be) against the company under and in connection with the creditor agreement."

So when one comes to ask what is the rate applicable to the debt apart from the administration, perfectly natural to look at the relevant creditor agreement

expressly referred to in the definition of "agreed claim", and when one gets to the definition of "admitted claim", one's told it's a claim of the company and qualifies for dividends pursuant to the Insolvency Rules and the Insolvency Act, absolutely no reason to conclude that it doesn't qualify for dividends and entitle the creditor to interest in accordance with the Insolvency Rules and Insolvency Act, just as any other proved debt would. Certainly absolutely no suggestion that creditors, by going through this process, would somehow be losing rights as they went along.

My Lord, that's interest. Turning to Wentworth's position in relation to currency conversion claims.

MR JUSTICE DAVID RICHARDS: I put to Mr Zacaroli the wording of 2.88, that the rate of interest is the greater of judgment rate and the rate applicable to the debt apart from the administration, and I think Mr Zacaroli said that that was a point that could be made. I'm not sure he said anything else. Do you have anything to say about that?

MR DICKER: My Lord, yes. The way the arguments work and the way they diverge, I think, are as follows. This is a speedier proof process for making earlier distributions. One ends up with an admitted claim. My learned friend says that because it qualifies for

dividends pursuant to the Insolvency Rules, although there isn't an express reference to 2.88, nevertheless that's a sufficient indication to entitle creditors to statutory interest. But, he says, when you get to 2.88 -- it's rather like the argument under the CRA -- when you get to rule 2.88 and you get to 2.88.9, you can't give any meaning to part of it, you can't give any meaning to the reference to the rate applicable to the debt apart from the administration, because he says the earlier part of the CDD has basically given up that earlier agreement.

We say that's simply not right. We are with him so far as plainly this entitles creditors to interest in accordance with rule 2.88. We are with him that it plainly entitles them to interest under 2.88.9. The question is, is there then any conceptual difficulty in giving meaning to the reference to the rate applicable to the debt? Answer: not. The agreement itself refers back to the underlying agreement. What is the difficulty in saying at that stage the relevant rate is simply the rate under the agreement in respect of which you have proved?

MR JUSTICE DAVID RICHARDS: The right that arises under 2.88.9 is not a contractual right, it's a statutory right. You have a statutory right to interest at one of

two rates, whichever is the greater. And the second rate to which you are statutorily entitled is the rate applicable to the debt apart from the administration, ie what rate would you get if there wasn't an administration? Answer: the rate under the contract which exists apart from the administration.

It doesn't really matter in that sense what has happened to the contract. It's not saying the rate applicable as at some date during the administration under the contract; it's saying assume no administration, what rate would you be entitled to, whether under a judgment, under a contract, under some statutory provision other than Judgments Act or whatever.

MR DICKER: My Lord, yes, and we agree with your Lordship. There are two ways, in a sense, you can approach 2.88.9.

MR JUSTICE DAVID RICHARDS: In other words, this is not an argument that depends upon construing the CDD at all.

MR DICKER: No. If 2.88.9 does, as your Lordship says, give you the right of interest which you would have received had there been no administration, in a sense, as your Lordship said, I think, earlier, if there had been no administration we wouldn't have had the CDDs, the contracts would still be in existence and that's what you'd get. In a sense I suppose I'm assuming -- going

a little further along the lines of my learned friends.

MR JUSTICE DAVID RICHARDS: I understand that. You're meeting Mr Zacaroli's argument, I fully understand that.

MR DICKER: But if one were to read 2.88.9 as effectively the draftsman saying: look, all I'm doing here is two things, first of all giving you a right which you otherwise wouldn't have to interest at the Judgments Act rate, or, alternatively, simply saying, almost incorporation by reference, you can have whatever to which you were otherwise contractually entitled.

MR JUSTICE DAVID RICHARDS: Well, not even just contractually. To what you were otherwise entitled.

MR DICKER: Absolutely. Even if one were to go that far, in other words say that the draftsman was basically asking what is it to which you were otherwise contractually entitled, we say there's still no difficulty in giving sensible meaning to that. This is just a simple proof of debt form. But certainly if your Lordship -- on your Lordship's approach in relation to 2.88.9, which, as your Lordship knows, was our primary case in relation to part A, then that issue doesn't arise.

Turning to currency conversion claims, and again dealing with the administrators' and Wentworth's positions, the administrators' position I can deal with very shortly because, as we understand it, they don't

have one. So far as Wentworth is concerned, again it's a very short point. We say that the agreed claims CDD can't conceivably have resulted in a release of a currency conversion claim. Plainly, it didn't happen at stage 1 because that gives you an agreed claim amount in US dollars, assuming your underlying claim is in US dollars, and it doesn't happen at stage 2 either because stage 2 does convert your claim into sterling, but converts it into sterling for the purposes of proof, and one can see that, as I showed your Lordship, from the definition of exchange rate, and that's confirmed by again, for example, the extract from the fourth progress report I showed your Lordship.

The conversion that is going on here is simply the conversion required by the rules. It is a conversion pursuant to the rules. It would be wholly artificial to regard this agreement as essentially the parties saying to themselves, "No, no, we're not just converting pursuant to rule 2.86 in the sense that converted for the purposes of proof, we're doing something more. We're converting at a rate that happens to be the official exchange rate, but we're not simply limiting the consequences of that to the consequences which would normally occur under rule -- conversion under 2.86, we're making a conversion irrevocably for all purposes

with the result that you lose your currency conversion claim".

My Lord, if that's what the parties had intended, doing that by reference to an exchange rate defined in terms of the foreign exchange rate under 2.86 in the way it's done, the draftsman would never have dreamt of doing it in that way.

It is interesting, we say, to compare Wentworth's position on currency conversion claims with its position in relation to statutory interest. I mentioned to your Lordship the position in relation to statutory interest is that although there's no express reference to rule 2.88, nevertheless because the admitted claim is referred to as a claim entitling you to dividends in accordance with the Act and rules, that is enough to bring in a right to interest under 2.88. In other words, taking a slightly more purposive construction, perhaps a less extremely literal construction, that's good enough.

We say why on earth can't one take exactly the same approach in relation to currency conversion claims? There is no difficulty in construing all of this as merely being a conversion in the ordinary way for the purposes of proof with all the consequences that would result and no other.

MR JUSTICE DAVID RICHARDS: 2 o'clock.
(1.00 pm)
(The Short Adjournment)
(2.00 pm)
MR DICKER: I was dealing with agreed claims CDDs, I dealt with statutory interest and currency conversion claims. I was just going to add a couple of words in relation to the right of appropriation.

We say essentially the same analysis applies to any other aspects of the creditor's claim in respect of which it has proved and which is agreed and admitted, including his right to appropriate any payment first to interest and then to principal. And we say essentially that he hasn't lost such a claim if he would not have lost such a claim through the ordinary proof process.

Now, as your Lordship knows, there are two possible outcomes in our submission, depending on your Lordship's judgment on part A: either it's within rule 2.88, and it therefore ranks along with statutory interest, or it's not, in which case it's a non-provable claim, but there's absolutely no reason to attribute to creditors entering into an agreed claims CDD the intention to abandon such rights. Particularly if one bears in mind part of the context was agreeing their claim for the purposes of a client money claim.

So far as the releases are concerned, again I can deal with that very shortly. They don't affect the position. Three essential points, if your Lordship goes to bundle 11, tab 1A. My Lord, the first point is the obvious one, that clause 2.1 limits the agreed claim to the agreed claim amount, which shall constitute the creditor's entire claim. And the releases apply to everything else.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: So the first point one essentially has to do is identify what is within the scope and what is preserved. And if this process is essentially a speedy proof process, what is preserved is effectively an agreed claim converted into sterling for the purposes of proof, which one would expect to operate in just the same way as any other claim admitted to proof in the ordinary way, save only that the creditor can't subsequently turn round and say, "I dispute the administrator's adjudication, I want to submit a supplemental proof", or" I want to amend my proof".

The second point is connected with that and the second point is -- emphasised in BCCI v Ali -- the context in which any release is agreed is absolutely vital. It is very common for draftsmen to draft releases extremely broadly, having a particular thing in

mind and not focusing on the potential consequences of the breadth of language which they use. My Lord, it's the tree roots example your Lordship gave.

Before you get beguiled, if that's the right word, before one gets beguiled by the width of the release language, you have to do what Lord Bingham said, which is put yourself in context and to work out what the context was within which that broad release would be granted. And we say perfectly plain what was going on here, going back to my analogy of claim 1 on the one hand, and claims 2 to 10 on the other, the releases had nothing to do with the proof in respect of claim 1 or the consequences of proving, albeit in a quicker and, in the respect I've explained, more final way, so far as that is concerned.

My Lord, the third point is again echoing a point of your Lordship's. If one gets to the stage, as it were, of construing the text of the release, we say it is perfectly plain one can't construe it absolutely literally. Again, there is the general example, the tree roots example. More specifically, as I think my learned friend Mr Zacaroli accepted, there is also in line 3 of 2.1.1 the reference to:

"Releasing and forever discharging from any and all losses, costs, charges, expenses, claims, including all

claims to interest."

Now, your Lordship asked whether or not you can waive a right to statutory interest, and the answer to that must plainly be yes, you can. If one was to take an excessively literal approach to clause 1.1, you would conclude therefore you had given up a right to statutory interest. As your Lordship knows, that's not the position for which Wentworth contends. There may be disagreement about the scope of the right that's effectively maintained, but you can't construe this entirely literally.

My Lord, that's all I was going to say in relation to the release provisions. One final and probably peripheral point concerns the benefit of the transfer provision.

MR JUSTICE DAVID RICHARDS: Can I just go back to 2.1? I fully understand your primary submission, which is that the release does not release the agreed claim and what flows from the approval for the agreed claim. But just looking at it more broadly, and you've mentioned the tree roots and certainly implied that, in your submission, the tree roots claim would not be within the release, how do you construe the -- leaving aside for a moment what I take to be your primary submission about proof 1 is not affected, how do you construe this

release? How far does it go in relation to other claims? If it doesn't include the tree roots claim, what is the limit of the release?
MR DICKER: My Lord --
MR JUSTICE DAVID RICHARDS: In other words, I think you're saying to me -- you're submitting that the post-administration tree roots claim, or let's say flood claim, is not released. Whichever way it was, I suppose, so Lehman's offices flood the offices of a creditor below. The creditor has not released its claim for nuisance or negligence arising from that.
MR DICKER: It's quite difficult to provide a clear answer to your Lordship's question because in a sense until one knows what the other claim is, you can assess whether or not it formed part of what the draftsmen had in mind, the context they were thinking of --
MR JUSTICE DAVID RICHARDS: In your submission, does the release go further than provable claims?
MR DICKER: Again, subject to the overarching context point -- take claims 2 to 10.
MR JUSTICE DAVID RICHARDS: Which are all provable claims.
MR DICKER: Well, they're all claims capable of proof. There may be potentially non-provable elements of those claims as well. Assume claim 2 was a US dollar claim, for example.

MR JUSTICE DAVID RICHARDS: It would make no sense to say, "I've released claim 2 but preserved some -- what would by then be theoretical exchange loss"?
MR DICKER: Absolutely. What goes is the claim.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: Not merely the provable part of it. That's why right at the start of my submissions I drew the distinction not between provable and non-provable, the submission was not that provable claims go, but all non-provable claims survive. The distinction was between claim 1 on the one hand, and claims 2 to 10 on the other.
MR JUSTICE DAVID RICHARDS: Yes, I follow.
MR DICKER: So how far does clause 2 go in relation to claims 2 to 10? If claims 2 to 10 are pretty much the same sort of claim as claim 1, if I can put it as generally as that, then they'd go.
MR JUSTICE DAVID RICHARDS: If it's a provable claim goes and any claim that is dependent on the proveable claim goes.
MR DICKER: Yes. We say there is an ambit beyond which clause 2 may not have been intended to go, whether it's tree roots or flooding or fraud claims or whatever. There may be claims which for one reason or another aren't extinguished by clause 2. As I say, that's not

the issue before your Lordship. It's quite difficult to express the dividing line between the two without knowing what the claim is, what the context is, and then having a look at the language in that context.
MR JUSTICE DAVID RICHARDS: Yes, I see. Okay, thank you.
MR DICKER: My Lord, perhaps my third point can best be expressed -- I mean for the purposes of today -- as essentially supporting my first and second points. In other words, there is some textual support, so one says -- the first point is the releases don't cover the agreed claim at all, and there is an issue about what is the agreed claim, what is it that survives. And the second point is, well, if you look to the context, what survives is essentially whatever you would have had, had that claim been proved for in the ordinary way, subject only to the fact you can't re-open the adjudication.
And the third point is if one wants some textual support for that, when one looks, for example, at the exclusion of all claims for interest, if one was to take a different construction and say somehow this release was cutting across the agreed claim and what was being preserved by way of the agreed claim, you can't approach the release literally because you then run into the problem that that's actually not even consistent with Wentworth's own position. What's preserved on their

submissions as part of the agreed claim includes a right to interest. So either one says the releases just don't cover that, which, as your Lordship says, is our primary submission, or the second connected submission is when you look at the releases, the language of them, it can't mean that because otherwise it doesn't make sense, it doesn't make sense to read it literally in that way.
One may say -- Mr Fisher, to try and provide your Lordship with a slightly clearer potential answer to the ambit of the releases -- one possibility might be if the claims simply weren't ever eligible for proof, if the different claims weren't ever the sort of claims which are eligible for proof, ignoring distinctions caused by cases like Re Dynamics or Lines Brothers as to whether particular bits get shunted off as non-provable, then maybe they haven't been released.
I'm not putting that forward necessarily as the answer to the overall ambit. I think the position may well be one can't sensibly try and form a view on that without having a particular claim and context in mind.
MR JUSTICE DAVID RICHARDS: Right.
MR DICKER: My Lord, a small point, finally, on agreed claims CDDs. There is reference in the evidence to one particular benefit that creditors are said to have received under the CDDs, and that's the benefit of the

transfer provisions.
On our submissions, as your Lordship knows, this is irrelevant because this agreement is not properly viewed as effectively a bargain between creditors in the sense that they've effectively agreed to exchange currency conversion claims or claims for interest in exchange for the benefit of a transfer provision. One is simply not the quid pro quo for the other.
My Lord, dealing with the benefit of the provisions, therefore, in our submission doesn't arise, but can I just add this: your Lordship remarked the benefit of claims are generally assignable even absent agreement by the administrators. That's rule 2.104. Obviously, there may be contracts that prohibit assignment without agreement.
MR JUSTICE DAVID RICHARDS: It's the right to the dividend that you can assign.
MR DICKER: Yes.
MR JUSTICE DAVID RICHARDS: So you won't be in breach of contract, a non-assignable contract, by assigning the right to the dividend. That's, I think, the theory. Interestingly, here, I see, this is 4.2, this seems to reverse the position, because 4.2 says that subject to 4.1, the creditor may not transfer the whole or part of its right to receive a dividend.

Curious.
MR DICKER: One of the points I was going to make is that when this was first introduced, my instructions are that the need for the administrators to consent to any transfer actually raised certain concerns in the market, and that was raised with the administrators. The administrators' response: this was to enable them to comply with anti-money laundering legislation, effectively knowing to whom the payment would be made
MR JUSTICE DAVID RICHARDS: I see.
MR DICKER: But your Lordship's noted the point that this isn't simply building on additional rights over and above the right that you would otherwise have to the extent you would have it under rule 2.104, sub-rule 1. More importantly, the additional benefit so far as creditors were concerned logically flowed from having the administrators agree their claims. Obviously, once a claim was agreed, it's easier to sell because the purchaser knows what he's getting.
MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The benefit therefore came from the LBIE determination, not from a CDD containing extensive releases. So to the extent that there was a benefit, that wasn't, as it were, a quid pro quo for providing the releases, except indirectly, the benefit was

effectively being able to sell once the administrators had determined the amount of the claim. But as I say, none of this, in our submission, matters because none of this can sensibly be regarded as a quid pro quo or the price for giving up claims, statutory interest or currency conversion claims.
My Lord, can I then turn to deal with admitted claims CDDs? Again, taking essentially the same structure to my submissions. Starting with a few points about the chronology, then looking at the process involved, and then turning to the admitted claims CDD itself.
So far as the chronology is concerned, as your Lordship knows, admitted claims CDDs were introduced in around April 2011, so some time after the first agreed claims CDD. We say there are three important points to note about the relationship between the two types of documents, in other words which was used. The first point is there is no sharp dividing line in time between when an agreed claims CDD has been used and when an admitted claims CDD has been used, save that admitted claims CDDs were only introduced in April 2011. That's a cumbersome way of saying that from April 2011 onwards, there was a period in which both types of CDDs were in use.

MR JUSTICE DAVID RICHARDS: Yes.
MR DICKER: The second point is admitted claims CDDs were used when the administrators considered that there was little or no possibility of a creditor having a client money claim. So they depended on whether the administrators thought there might be a client money claim or not. And the words" little or no possibility", which I take from the statement of agreed facts, paragraph 74, indicate that the answer to that question was not necessarily clear-cut.
Thirdly, the choice between the two forms had nothing to do with whether creditors should retain claims to statutory interest or currency conversion claims or not. It's the obverse of the client money claim point; the choice between them depended on the administrators' view as to whether you might have a client money claim or not.
That leads to this submission in relation to Wentworth's case. Wentworth's case is that an admitted claims CDD has a different effect from an agreed claims CDD. Wentworth's position is that in relation to an agreed claims CDD, if your underlying claim was denominated in, say, for example, US dollars, and your agreed claim was in US dollars, then you'd keep a currency conversion claim. Under an admitted claims

CDD, not so. Somehow by entering into that document rather than an agreed claims CDD, you've lost your currency conversion claim.

We say no sensible reason has been given to why the choice of which agreement you entered into should have that result. And no sensible reason has been given as to why, in particular, the administrators adjudicating on a proof might have wanted to treat creditors unequally in this way. In other words, depending entirely on the irrelevant fact of whether the administrators thought you had a client money claim or not, saying to one creditor "here's an agreed claims CDD, that will preserve a currency conversion claim", saying to another "here's an admitted claims CDD, this won't".

Looking at it from the creditor's perspective, we also say, why would a creditor have been willing to enter into an admitted claims CDD if this was the case? By the time admitted claims CDDs were in circulation, as your Lordship knows, sterling had depreciated against the US dollar. Of course, the exchange rate difference hadn't been realised at that stage. Why would the creditor have agreed to enter into an admitted claims CDD if he was told that the consequence of this wasn't merely converting his claim into sterling for the

purposes of proof, but was effectively converting it to sterling for all purposes at an exchange rate that was now two years old, which exchange rate was much worse for him than today's exchange rate?

That creditor would obviously have been giving up real potential value in that situation, and we say absolutely no reason to assume that that's what he would have intended to do or should be taken to have done.

MR JUSTICE DAVID RICHARDS: Is there anywhere in evidence -- I might find it quite useful to see just some sort of column as to the changing dollar/sterling exchange rate over the relevant period at, let's say, quarterly intervals or something. It would be interesting to see something like that.

MR TROWER: I don't think there's anything in the evidence.

MR DICKER: Mr Copley contains a general statement that actually most currencies appreciated against sterling during this period, but you don't have the details. I'm sure --

MR TROWER: We can easily put something together.

MR JUSTICE DAVID RICHARDS: I don't want anyone to go to any great trouble, but it's quite interesting, and possibly if I could see -- let me get this right -- what £1 million would buy you in terms of dollars.

MR TROWER: We can easily put that together.

MR JUSTICE DAVID RICHARDS: I'm surprised that over this period the euro has appreciated against sterling. Is that right? It entirely depends what period you take for the euro, I suspect.

MR DICKER: My Lord, yes. It may be that Mr Copley's brief summary hides some fluctuations over the period. Certainly, US dollars --

MR JUSTICE DAVID RICHARDS: US dollars, the position is clear, isn't it?

MR DICKER: It is.

MR JUSTICE DAVID RICHARDS: That's fine.

MR DICKER: My Lord, so the first point I've made in relation to admitted claims CDDs is the reason for their introduction had nothing to do with giving up claims of this sort, it was to do with whether you had a client money claim or not.

The second point is, subject to that point the basic purpose of an admitted claims CDD was obviously the same as an agreed claims CDD, namely for the purposes of speeding up proof to enable early distributions to be made.

So far as the process involved in an admitted claims CDD is concerned, it's essentially, with one difference, the same as the process for an agreed claims CDD. Firstly, as with an agreed claims CDD, creditors were

required to submit proofs of debt, complying with the Insolvency Act and Rules. And obviously, they needed to do so in the currency of their underlying entitlement, given that was the claim which they had.

Secondly, as with agreed claims CDDs, LBIE communicated its determination in the currency of the underlying entitlement. My Lord, again, all of this is reflected in the statement of agreed facts and I have shown your Lordship, I think, some of the paragraphs, but just one specific paragraph on the last point in relation to admitted claims CDDs. If your Lordship goes to the statement of agreed facts at tab 18, it's paragraph 75.

So 75:

"Under an admitted claims CDD, if the currency of a creditor's claim against LBIE was other than sterling, joint administrators would determine the amount of that claim in the currency of the underlying obligation and then convert the claim into sterling pursuant to 2.86, express the amount of the creditor's admitted claim in the admitted claims CDD in sterling."

And as 75 indicates, assuming that the administrators' determination was accepted, it would be formalised in an admitted claims CDD, and that showed the amount of the determination in sterling, converted

pursuant to rule 2.86. And my Lord, we say conversion pursuant to 2.86(1), whether done as a matter of contract or otherwise, has precisely the effect you would expect.

MR JUSTICE DAVID RICHARDS: Does the agreement itself say anything about this process?

MR DICKER: It doesn't because in a sense it comes at the end of it. As I said, it's set out, summarised certainly in the statement of agreed facts, and your Lordship has seen references to it in some of the progress reports, particularly the fourth. It's also dealt with -- perhaps I can just show your Lordship Mr Garvey's --

MR JUSTICE DAVID RICHARDS: I raise it partly because -- Mr Zacaroli objects to the admission of this part of Mr Garvey's evidence on this part of the argument. That's what the statement of agreed facts states. There hasn't been any submissions from anyone yet on admissibility. I don't know where we are on that. This might be helpful. Mr Zacaroli?

MR ZACAROLI: My Lord, as I understand the point my learned friend is making, that there was a conversion of these claims into sterling in the light of rule 2.86 before the admitted claims CDD was entered into, one gets that, and I accept that, from the fourth progress report.

That's clearly stated in the fourth. I took my Lord to that in opening.

MR JUSTICE DAVID RICHARDS: What was the date of the fourth progress report, is it after April 2011?

MR ZACAROLI: I believe so.

MR JUSTICE DAVID RICHARDS: Anyway, it's telling us how this process is working?

MR ZACAROLI: No, it's explaining what the proposal is.

MR JUSTICE DAVID RICHARDS: I see.

MR ZACAROLI: It's before the process, so it's telling you what's going to happen.

MR JUSTICE DAVID RICHARDS: I see. So that would be probably on any footing admissible.

MR DICKER: I accept that.

MR ZACAROLI: It's put out to all creditors.

MR DICKER: And we say in a sense, there's nothing uncontroversial in any of this. In fact, it was all reflected in the statement of agreed facts.

MR JUSTICE DAVID RICHARDS: I know, but there are these caveats throughout the statement of agreed facts. That's the point I'm mentioning now.

MR DICKER: And I was going to go on and say that none of what I've said to your Lordship should be controversial. I made the point that the creditor had to submit a proof of debt complying with the rules and the Act.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: That was plainly the position stated by the administrator in their progress reports, so that's what one starts with. The next point is of course if they're going to submit a complying proof, it has to be for claims that they have. If you have a claim in US dollars, you need to submit a proof in US dollars. That's the next point. The next point is the administrators essentially determine the claim by reference to the US dollar amount. That's the statement of agreed facts. And the final point is, how do we get to sterling? We get to sterling because there's a conversion pursuant to rule 2.86.

Now, my Lord, where we appear to get to is, essentially, what is the nature of the conversion pursuant to rule 2.86? We say it does no more than a conversion under 2.8 6 in relation to any claim. Wentworth, just so your Lordship knows, objected at one stage to statements, for example, like that in paragraph 75 of the statement of agreed facts, referring to conversion into sterling pursuant to 2.86. You can see that if you go to the statement of disputed facts, which is at tab 21.

It's part 1, Wentworth's alleged facts, and then paragraph 9.

MR JUSTICE DAVID RICHARDS: I'm a bit puzzled. Which tab are we in?

MR DICKER: Tab 21.

MR JUSTICE DAVID RICHARDS: The oddity is, I go from 8 to 10. Are you looking at a different ... This is Wentworth's statement of additional facts.

MR DICKER: Ah, okay. Then the point may not be a subsisting one. Can I show your Lordship, because I think it encapsulates quite neatly the issue between us? The only reference I will show you in bundle 9, if your Lordship goes to correspondence at tab 29.

It's at page 225. Tab 29, page 225. There's an e-mail exchange. Essentially, the dispute was about the wording of the relevant paragraph in the statement of agreed facts. The first e-mail at the top of the page is from Freshfields, my instructing solicitors, and it essentially records the final position, but the last line:

"On 27 April 2015 Wentworth made clear by letter that it considers the words 'pursuant to' should read 'using the same official rate as under'."

So at one stage what Wentworth were contending was that the statement of agreed facts shouldn't read "conversion pursuant to rule 2.86" --

MR JUSTICE DAVID RICHARDS: Sorry, it's the paragraph in the

statement of agreed facts, it's paragraph ...
MR DICKER: My Lord, you'll see, it's paragraph 75, and your Lordship will see that -- perhaps I should have started at the bottom of this e-mail chain.
MR JUSTICE DAVID RICHARDS: Okay. I'll just make a note here to refer to this letter, the Freshfields e-mail.
MR DICKER: And the e-mail chain starts and confirms we're dealing with paragraph 75 in the e-mail at page 226.
MR JUSTICE DAVID RICHARDS: Okay. I think the only point I'm really raising is this: you've referred to this paragraph of the statement of agreed facts and maybe others which are marked with an objection to admissibility on the construction. What I don't want to find is without submissions that I find I'm not quite clear what these --
MR DICKER: I understand your Lordship's position in relation to admissibility and I've addressed that. The point I was making was a slightly different one, which is we say the conversion is essentially pursuant to rule 2.86. In other words, it does what any conversion pursuant to rule 2.86 does.
Now, Wentworth's position initially was that they weren't happy to have the statement of agreed facts worded in that way. What they were happy to agree to was that it should say not that it's "pursuant to", but

that "using the same official rate as under". So the difference between us appears to be whether it's pursuant to 2.86, in the sense it does whatever a conversion under 2.86 would do, or is simply an agreement to convert at a rate that happens to be the same as the official rate, but which has totally different consequences because it's a conversion for all purposes and for all times.
My Lord, I thought that continued to be reflected in the latest version of the statement of disputed facts. I understand it wasn't, so Wentworth obviously ended up taking out that dispute. But that, as your Lordship's seen from the correspondence, was the issue between the parties. And we say the answer is perfectly clear. It's pursuant to 2.86.
MR JUSTICE DAVID RICHARDS: There is an anterior question because if you go back to the statement of agreed facts and look at -- so paragraph 75 is at the bottom of page 14, but then if you go to the top of page 15 you'll see some words in italics and in square brackets. So there's an issue, as I understand it, about the relevance and hence admissibility of this evidence to the issues of construction of the agreements, which is what we are on. That's my reading of it. I suppose I need to understand Mr Zacaroli's ... I've taken it

really that it is as stated here, its relevance is not ... That there is an objection to reliance. Mr Zacaroli?
MR ZACAROLI: The position is as follows. We don't object to the form of paragraph 75. My understanding is that the objection at the top of page 15 is in relation to other parts of Mr Garvey's evidence.
MR JUSTICE DAVID RICHARDS: Oh, I see.
MR ZACAROLI: So to the statement in paragraph 75, although there was a dispute about whether it had ever been agreed, that's no longer the case. At least we're not pursuing that dispute.
MR JUSTICE DAVID RICHARDS: Okay. Is that the only place in this -- it may be the only place. No, there are other places where ... There are a number of paragraphs where you're recorded as objecting to the relevance of ... While accepting the factual accuracy, I understand that, you're objecting to the relevance -- well, the wording is slightly different now I come to look at it, but I guess it comes down to the same point.
In some cases, such as paragraph 27, paragraph 49, it's expressed in terms to be an objection to admissibility for the purposes of construction. The objection here is put in relation to relevance, as is 58 and 75. That's it.

MR ZACAROLI: My Lord, my understanding is that we don't object to the statements being accepted as agreed facts that appear in this statement.
MR JUSTICE DAVID RICHARDS: Correct.
MR ZACAROLI: Can I take instructions about whether --
MR JUSTICE DAVID RICHARDS: Whether that evidence is admissible on the issue of construction.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: Which is what we're on at the moment.
MR ZACAROLI: Yes, I will confirm that. For the moment, my Lord can proceed on the basis it is admissible. I'm not taking that point at the moment.
MR JUSTICE DAVID RICHARDS: In relation to all the cases where there are square bracketed words, you're not objecting?
MR ZACAROLI: That's my understanding, but I will clarify that with those behind me.
MR JUSTICE DAVID RICHARDS: Thank you.
MR DICKER: That's very helpful.
Just to repeat the point, we say the admitted claims CDDs effectively -- that the process was in substance exactly the same for an agreed claims CDD in the sense you submit your proof in the underlying currency, the administrators look at it, determine it in the

underlying currency. If it's acceptable to a creditor, it's then converted into sterling, and the disagreement between the two of us appears to be whether it's converted, as we say, pursuant to 2.86 or, as Wentworth appeared to say, simply at a rate that happens to equal the official rate.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: Then turning to interest and currency conversion claims, our submissions in relation to interest are identical to those that we made in relation to the agreed claims CDD, the same point is made by Wentworth in relation to these, and the answers that we give are the same.

In relation to currency conversion claims, similarly, Wentworth says to the extent its a claim in sterling you have given up any currency conversion claim, and our short answer is, as your Lordship well knows, no, because it's only converted for the purposes of proof. It's true that it's not done in a two-stage process in the way that it was under the agreed claims CDD. It didn't need to be because there wasn't a client money issue, so you didn't need to separate out the two stages in the way that you did for an agreed claims CDD. So when you came to express the figures, you could simply cut to the chase, carry out your conversion and

give the converted sum.

But when you read reference to the admitted claim and you see a sterling sum, one needs to construe that as effectively "an admitted claim (converted pursuant to rule 2.86) for the purposes of proof", because that's essentially what's going on here.

Wentworth's position, we say, elevates form over substance and ignores the context. The logic of its position is that if the admitted claims CDD had in one document recorded the agreed claim in the foreign currency and then had another clause saying it is converted into sterling for the purposes of proof, on their analysis you would still have a currency conversion claim. Their argument essentially is that because you skip step 1, there's no need for it in this case, and simply record the figure after conversion pursuant to 86, that makes all the difference. We say that can't possibly be the case.

Now, my learned friend mentioned a situation in which you have a mixture of claims denominated in different underlying currencies. And where the agreed claim is expressed in the currency of the majority of the claims -- your Lordship's seen the reference in the statement of agreed facts -- it is generally in the currency of the underlying entitlement, save where

there's multiple claims.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, we say Wentworth's position again can't be right. Take the example of a euro or yen creditor. So far as they are concerned, this agreement is effectively taking away with one hand but not giving back with the other, if I can put it that way. They're losing any existing currency conversion claim they have despite the fact that the provision is -- but they're not getting anything in exchange. It's simply being converted under an admitted claims CDD into sterling.

We say this doesn't raise any issue at all. Again, if one bears in mind that all this is simply conversion for the purposes of proof. If one gets to a stage where the underlying entitlements are relevant, you simply disaggregate the amount of the admitted claim into its underlying constituent parts and you work out the currency conversion claim in respect of each underlying constituent part. And that actually is precisely, as I recall, what the parties' common position was in relation to question 37, as part of part A. In other words, where you have blended, you have one proof of debt, which effectively involves a number of underlying claims. If it becomes necessary for currency conversion purposes, you disaggregate them.

My Lord, non-provable claims, in particular Bower v Marris. Our submissions are exactly the same. Your rights in respect of the rule in Bower v Marris ought to be exactly the same as the rights you would have had if you had proved in the ordinary way. And again, so far as the releases are concerned, our submissions are also the same as they are for agreed claims CDDs.

So far as CRA CDDs are concerned, again just starting with the context. Creditors who entered into the CRA, as your Lordship knows, are entitled to payment of a net financial claim expressed in US dollars. The CRA provided a complete mechanism for the quantification of claims arising under financial contracts. So to that extent it wasn't actually necessary for a CRA creditor, one might have thought, to enter into a CDD. His claim had already been quantified under the CRA.

The position appears to be that the administrators adopted a policy of requesting signatories to enter into CDDs because they considered that a CDD provided a more straightforward and less time-consuming way of documenting the claim than the CRA.

Just so your Lordship has the paragraph, it's in the statement of agreed facts, tab 18. Bundle 1, tab 18. It's paragraph 79:

"A CDD is generally considered by the joint

administrators to be a more straightforward and less time-consuming way of documenting the unsecured claim than issuing the various notices required under the CRA. Creditors could also transfer their claims pursuant to the transfer notice appended to the CDD."

So the only reason for creditors who were signatories to the CRA entering into the CDD was apparently, it's easier, you don't have to provide the same notices under the CRA.

My Lord, I'm not sure why the existing notices under the CRA were thought to be particularly onerous. This appears to be a relatively innocuous alternative.

As your Lordship knows, there are also a variety of different kinds of CRA CDDs. Agreed claims CDD is an admitted claims CDD in particular. Our submission is that they all had, surprisingly, the same effect. Wentworth's position is, again not surprisingly, that the distinction they draw between admitted claims CDDs and agreed claims CDDs is reflected in the different kinds of CRA CDDs. If it's a CRA, if it's an agreed CRA CDD, you keep your currency conversion claim. If it's an admitted CRA CDD, you don't.

We say that can't be what the parties sensibly intended. If the signatory to the CRA has already had his claim determined and if he is told by the

administrators "I would like you to enter into a CRA CDD because it's easier, we don't need to deal with as many notices", and if the administrator says, depending on whether he thinks they have a client money claim or not, "Here's an admitted or here's an agreed CRA CDD", the last thing in the world, in our submission, a creditor would have expected is that which he signs would determine whether or not he gives up any currency conversion claim he might have. Simply on Wentworth's case, we say, it's commercially inexplicable.

My Lord, we deal in our skeleton argument with two types of CRA CDDs, the first referred to as the standard CRA CDD and the second Wentworth's CRA CDD. Can I just show your Lordship a couple of provisions in relation to the first, so the standard CRA CDD, which is bundle 11, tab 15.

Your Lordship's seen these, so I can deal with this very quickly. Starting with clause 2, 2.1.1:

"The creditor's aggregate net financial claim shall be limited to, and in an amount equal to, the net financial claim amount and shall constitute the creditor's entire claim against the company."

2.1.3:

"The creditor's net financial claim in an amount equal to the net financial claim amount shall constitute

an ascertained claim and shall qualify for dividends from the estate of the company available to its unsecured creditors pursuant to the Insolvency Rules and the Act or a scheme of arrangement or CVA."

And then releases in broadly similar terms in 2.1.4.

The definition of net financial claim amount, your Lordship has at the top of page 4, and it is to the same effect as definitions your Lordship has seen previously. It's converted into sterling and we're told that it's the value of the net financial claim converted to pounds sterling at the official exchange rate set out in rule 2.86, sub-rule 2, of the Insolvency Rules, and the rate is given. So exactly the same is going on here as was going on in relation to ordinary agreed and admitted claims CDDs.

The only additional point is that not all definitions are contained in this agreement. For example, net financial claim requires you to go to the CRA and the requirement to do so appears in clause 1.2.1:

"Terms used but not defined in this deed shall have the meanings given to them in the CRA."

Now, I won't take your Lordship back to the CRA, your Lordship's seen it probably more often than you need to, but the short point is that when you go back

into the CRA and you go back through the net financial claim and you get to the net contractual position, the net contractual position is the sum of close-out amounts, and close-out amounts are effectively the position in relation to the underlying financial contracts. So to the extent it matters, this definition of net financial claim amount ultimately through the CRA refers back to the underlying contracts in respect of which the proof was agreed and admitted.

We also in the skeleton deal with a CRA CDD Wentworth referred to in the attachment to their position paper. I'll just show your Lordship the paragraphs, I don't think I need to say anything more. It's paragraphs 183 to 185 of our skeleton argument. 183 to 185. Can I just perhaps draw your Lordship's attention to one small point? Again for what it's worth, 185, sub-paragraph 3. This essentially is a slight difference from the document your Lordship has just seen:

"In addition to recording the minimum net financial claim in sterling, along the words being the value of the net financial claim converted [et cetera], the Wentworth CRA CDD also identifies the claims admitted as an ascertained claim in appendix 1, all of which are shown in US dollars."

The Wentworth CRA CDD is at bundle 11, tab 21, and pages 24 and 25 contain appendix 1, and your Lordship can see the only bits that aren't blanked out in the middle under the heading "Currency". It's all US dollars.

So releases under the CRA CDDs. My Lord, as my learned friend mentioned, they come in different forms. There are releases which are in similar terms to those your Lordship has already seen. There are also releases which are narrower in scope, and my learned friend Mr Zacaroli dealt also with those. Can I just briefly respond?

If your Lordship goes to bundle 11, tab 17.

My Lord, as I understand the way the argument went, you need to look at clause 2.1.3 --

MR JUSTICE DAVID RICHARDS: Just to say, I don't think Mr Zacaroli took me to this. Is there an almost identical version?

MR ZACAROLI: I took you to tab 21, which I believe is the same narrow release.

MR JUSTICE DAVID RICHARDS: I see.

MR DICKER: I think one can do it, and I probably should do it, by reference to tab 21. My Lord, if your Lordship goes to clause 2, 2.1.4, and the important provision, as I understand it, is (v):

"The creditor hereby irrevocably releases and discharges the certain excluded claims."

So one has to go back to the definition of "certain excluded claims". That's on page 2:

"B, claims referred to in paragraph 4 of the definition of excluded claims. To the extent that those claims arise as a consequence of the company and the creditor entering into this deed."

My Lord, as I understand the argument, it's that if you have a currency conversion claim under the CRA, you are irrevocably giving up that claim because it's a claim which falls within the definition of certain excluded claims, which you are giving up because the consequence of entering into this agreement is that a claim arises as a consequence of the company and the creditor entering into this deed.

MR JUSTICE DAVID RICHARDS: That's right, yes.

MR DICKER: My Lord, in our submission, that's a wholly, if I may say, artificial construction with a strong element of circularity. A creditor under the CRA, if he does have a currency conversion claim, to say that he's to be treated as having released it because in some way he gets it under this agreement and promptly releases it, I have to say I even find difficulty following the logic, but there we are.

My Lord, that's currency conversion claims. We make the same submissions in relation to non-provable claims, in particular the right to appropriate payments in accordance with the rule in Bower v Marris.

Then one very short point concerns at the later stage, one gets CDDs with preservation language. Now, as we understand Wentworth's position, it is that you have rights to statutory interest, both Judgments Act rate interest or contractual, whichever is the greater, but what you have apparently given up, as far as one can see the only thing one has given up in relation to your claim, so far as interest is concerned, is the right to appropriate in accordance with the rule in Bower v Marris. Again, for similar reasons, we say that cannot have been the intention of the draftsmen. What they plainly intended, having realised that this issue arose, was to insert language in the CDDs designed to protect creditors. And in our submission, it's plain that what the draftsmen intended to do was not draw a distinction between preserving claims so far as statutory interest were concerned, but not preserving non-provable claims resulting from the rule in Bower v Marris, assuming it's not within 2.88 and a credit is limited to that rule.

So that's all in relation to the different types of CDDs. My Lord, can I then deal briefly with the

circumstances in which -- make a few points in relation to the evidence dealing with the circumstances in which they were entered into, the purpose and genesis.

Again, just as we submitted in relation to the CRA, we say it would be extremely surprising, and one might add unfortunate, if the effect of the CDDs was to have released claims to statutory interest or currency conversion claims. Again, the structure of the submission is similar to the CRA. CDDs devised and recommended to creditors by the administrators. I'll just show your Lordship one reference out of a number. If your Lordship goes to bundle 4A, page 375.

It's just the last paragraph in the right-hand column, the last sentence:

"Such an approach is likely to result in an equitable and relatively consistent approach to claims determination and resolution."

Creditors were also told that if they wanted a dividend, they needed to enter into a CDD. That was stated in relation to the various dividends -- again just giving your Lordship one reference -- in bundle 9, tab 26. Tab 26, "First interim dividend" and:

"The below FAQs relate to the 4 May general creditor update regarding the first interim dividend [et cetera]."

The relevant paragraph is over the page, paragraph 6:

"What is the process for participating in the first interim dividend?

"Answer: to be considered eligible to participate in the first interim dividend. To the extent they have not already done so, creditors must (a) submit a proof of debt; (b) have their claim assessed by LBIE; (c) execute a claims determination deed or similar agreement issued by LBIE and any ancillary documentation as determined by the administrators."

So if you wanted an interim dividend, you were told you had to enter into a CDD.

And as your Lordship knows, creditors were also told the documents were non-negotiable and that there would be likely to be considerable downsides to any creditor who decided not to enter into a CDD. Your Lordship has seen the references in the evidence where the administrators claim the downside -- the obvious downside is that if you don't participate and you don't get an interim dividend, and it turns out that there is no surplus, then you are not going to be compensated for the time, value and money which you would suffer before your claim is eventually admitted and eventually eligible for dividends. So there was a real price to be

paid for creditors who didn't participate in this process. If you didn't think there would be a surplus, you would be losing money every single day. They were also told if they wanted to negotiate their claims under a bilateral basis they could, but, as the administrators explained, it was likely to be much more time-consuming and expensive and the administrators may well end up looking rather more closely.

So although Wentworth says creditors have a choice, that of course is true in the sense they couldn't be forced to enter into this agreement, these documents, but they had a really commercial incentive for doing so.

My Lord, I had one final point before sitting down.

MR JUSTICE DAVID RICHARDS: We might as well continue, I think.

MR DICKER: It'll take me a couple of minutes, but not long. It's this: I've dealt with the various forms of CDD and in respect of many of them, they were entered into by the administrators and creditors before it appears anyone thought a surplus was possible or, as far as the evidence goes, there was any discussion about currency conversion claims. But there came a time at which both of those things, slightly different times, came on to the radar.

We say effectively, although the boundaries of this

are as a matter of fact not entirely clear, this potentially raises additional issues. Just to explain why, take the stage when the administrators became aware of the possibility the documents might have the effect of releasing such -- I'm sorry, take the stage when the administrators became aware of the possibility of a surplus and of the question of whether or not these documents might release your claim to interest.

The administrators' reaction at that stage was to say they considered it was unnecessary to insert language to preserve a creditor's right to statutory interest. Mr Lomas deals with that in his witness statement.

Now, the consequence of that was that some CDDs were entered into in the period between the administrators becoming aware of the possibility of a surplus, the issue about the effect of the releases, and saying they didn't think they had any effect on the one hand and, on the other hand, actually producing revised standard forms containing preservation language.

MR JUSTICE DAVID RICHARDS: Yes.

MR DICKER: My Lord, we say whatever the position may be in relation to any other CDDs, saying that a creditor who enters into a CDD having been told by the administrator they don't think preservation language is

necessary because their interest claim is also preserved, concluding that those CDDs nevertheless release claims to interest would be the most extraordinary result.

Now, there's a similar point in relation to currency conversion claims, although as a matter of fact it operates in a slightly different way. There came a stage at which LBIE identified the possibility of a currency conversion claim. The administrators' reaction in that respect was in March 2003. Mr Copley refused to change the documents at that stage. His view was he didn't want to create different documents and affect creditors in different ways. So the administrators' reaction was "we are not going to change the documents, we want consistency".

Between March 2013 and when preservation language was eventually issued in October 2013, again there were creditors who entered into the CDDs without preservation language in circumstances where the administrators realised there was an issue, were refusing to change the CDDs but were saying to creditors, as they said in relation to every distribution, "If you want an interim distribution you have to enter into a CDD."

My Lord, again, we say similarly it would be extraordinary if those agreements had the effects for

which Wentworth contend. I say the boundaries of these two categories may not be clear and if it ever became relevant, it may be necessary to investigate further. We say ultimately it doesn't matter because the same answer applies in relation to all CDDs. But if that wasn't right then your Lordship would need to deal with these.

So finally, as your Lordship knows, so far as the CRA is concerned, we say it preserved creditors' claims to statutory interest in both kinds. It entitled signatories to a right to payment in US dollars, or at least it didn't deprive those whose underlying claims were in US dollars to a currency conversion claim, and it also entitled -- certainly creditors didn't give up any rights they may have pursuant to the rule in Bower v Marris, and we say similarly in relation to all the different kinds of CDDs.

My Lord, unless I can help your Lordship further.

MR JUSTICE DAVID RICHARDS: Thank you very much, Mr Dicker. I'll rise for five minutes.

(3.22 pm)

(A short break)

(3.27 pm)

Reply by MR ZACAROLI

MR ZACAROLI: My Lord, a preliminary point about

terminology. My learned friend Mr Dicker's submissions, not surprisingly, were replete with the concept of giving up currency conversion claims as if their currency conversion claim is some freestanding claim that exists.

It's not of course, and the way we put our case in relation to releases is very important in this respect. The currency conversion claim, so-called, and I have made this point in opening, is merely the right to be paid the remains of your contractual rights which are not satisfied out of the insolvency process. It's not a freestanding claim, it's just a reversion to your contractual rights.

With that preliminary point, can I now turn to the way my learned friend introduces four, he called them background points but I think they're probably more likely called underpinning points, he started off with yesterday. Does my Lord have the transcript for yesterday?

MR JUSTICE DAVID RICHARDS: I do, yes.

MR ZACAROLI: I'm going to take my Lord to each of the four points, they're all in the same place, and then deal with them in turn. It begins on page 129 of the transcript for yesterday.

I start with these because these points were made

then but came back on some occasions as underpinning the argument. So page 130 actually, the bottom left-hand corner of page 33 of the transcript. Line 10:

"My Lord, next a few general background points before I come to the CRA. Those four points are these. The first point concerns the administrators' functions and duties."

And then the crux of it is at line 23:

"Neither of those duties [which is returning assets and dealing with creditors] required or indeed permitted the administrators to try and minimise the amount recovered by beneficiaries or creditors so as to benefit shareholders."

That's the first point.

He goes on to refer to the quasi-judicial capacity in which the administrators act. The second point is page 131, line 20, he says:

"It concerns the purposes of the CRA and the CDDs. We say the purposes of those agreements did not require creditors to give up potentially valuable rights which they had in the event of a surplus."

And then he goes on to say:

"If one, for example, takes the CDDs, they could have achieved what the administrators wanted to achieve without such claims being released."

The third point is at page 132, line 9, and is:

"If such claims were nevertheless released, it's plain from the background material this was entirely inadvertent in the sense that no specific thought appears to have been given as to whether or not they should be released."

And the fourth point is page 133, beginning at line 4:

"My Lord, the fourth point is this. No sensible reason has been provided why, although the parties never consciously thought about them, creditors should nevertheless now be taken to have agreed to release claims to statutory interest and currency conversion claims. Why, for example, should any creditor with a right to interest in the event of a surplus have agreed to limit itself to interest at the Judgments Act rate and release any right to contractual interest?"

And similarly at line 17:

"Why would any creditor with a US dollar claim have agreed to release any currency conversion claims he might otherwise have had?"

Now, my general response to those four points is that they involve posing fundamentally the wrong question when one is construing the documents. Taking each of them in turn, so going back to the first point,

the crux of which is line 23 on page 130, the duties of the administrator did not require or permit them to try to minimise the amount recovered by beneficiaries or creditors so as to again benefit shareholders.

That is, we say, to mischaracterise what the administrators in fact did. First, they were not seeking to minimise the claims of creditors. What they were trying to do was to reach a final position with creditors as to their claims against LBIE, with a view to saving substantial amount of costs and time and enabling those creditors to benefit from early distributions. That involved exercising their power to compromise. Any compromise involves give and take on both sides, in circumstances where the creditor was receiving the benefit of an early distribution and receiving the advantage of knowing precisely where it stood in terms of its financial relationship with LBIE, and where the price for that was the broad and unlimited reciprocal release of all possible claims against LBIE or by LBIE.

Now, that exercise or that conduct is undoubtedly within the duties of the administrators and within the purposes of administration. I'll not repeat the submissions I made in opening to that effect.

The second point is that it is nonsense to suggest

the administrators did this, they were trying to minimise claims, so as to benefit shareholders.

MR JUSTICE DAVID RICHARDS: Well, this slightly goes back perhaps to something Lord Justice Lewison says in his judgment in waterfall 1. Your point is, well, it would benefit the subordinated creditors, presumably?

MR ZACAROLI: No. Partly. It might benefit the unsecured creditors. It might benefit creditors with a right to statutory interest. It might benefit --

MR JUSTICE DAVID RICHARDS: How?

MR ZACAROLI: Because -- I made this point in opening -- it all depends on the financial state of the company. What are its assets and what are its liabilities, or the estate, at any particular point in time? So the release by a creditor of its claims, one creditor, may mean there are more assets available to pay the claims of other creditors.

MR JUSTICE DAVID RICHARDS: We're talking about statutory interest, are we?

MR ZACAROLI: We're simply talking about the release of claims. This is what the administrators were doing, they were releasing claims, whether known or unknown.

MR JUSTICE DAVID RICHARDS: Given the waterfall, having paid the proved claims in full, provided for them in full, we get to statutory interest.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: So it doesn't help creditors with an entitlement to statutory interest that some creditors have released currency conversion claims because we haven't got there.

MR ZACAROLI: My Lord, when the -- I'm going back to the time the releases were entered into and asking what were the administrators then doing. At that stage, we didn't know whether there would be a surplus --

MR JUSTICE DAVID RICHARDS: In which case none of this would be relevant of course.

MR ZACAROLI: My Lord says none of this would be relevant. What were they doing? It's very important to have this in mind. They did not have in mind specifically non-provable claims to interest or currency conversion claims. What they were doing was agreeing releases of all possible claims --

MR JUSTICE DAVID RICHARDS: Sorry, we're trying to identify who benefits from this.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: Okay. It doesn't seem to me that creditors in their capacity as creditors with proved claims benefit, because their claims have to be quantified, assets realised, proceeds distributed to them pari passu until they get 100 per cent.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: So it doesn't matter. What follows doesn't matter, does it?

MR ZACAROLI: What follows doesn't matter --

MR JUSTICE DAVID RICHARDS: To them.

MR ZACAROLI: What I'm quibbling with is who benefits from the word -- my Lord used the word "this".

MR JUSTICE DAVID RICHARDS: I just want to carry on. The next lot are statutory interest. So what do you say, how is there a benefit to people with statutory interest?

MR ZACAROLI: My Lord, I may be at cross-purposes. I'm not suggesting that the release of currency conversion claims --

MR JUSTICE DAVID RICHARDS: Assists them.

MR ZACAROLI: Assists them. That's not my point.

MR JUSTICE DAVID RICHARDS: You're not saying that, no.

MR ZACAROLI: The point is that the administrators were releasing any and all unknown claims of the creditors. At the time they entered into the CDDs they were not releasing currency conversion claims, they were not releasing non-provable claims to interest, they were releasing any claims the creditors might have. The question who benefits from the exercise of that compromise power to release any claims depends entirely

upon where one is in terms of assets and liabilities. That's the point I'm making. And it goes back to my point at the beginning. It's fundamentally the wrong question to ask who benefits from release of currency conversion claims because that wasn't what they were doing, they were releasing any claims.

One can't construe -- I'll come on to this perhaps later -- a release entered into of all claims back in, say, 2010 when one didn't know what the state of the estate would be by reference to what we now know the position to be.

So that's the first point. Just as an aside, yes, the administrators or a liquidator has a quasi-judicial role in determining whether to permit or reject claims, but there is no case which goes as far -- and those cases cited don't go as far as to suggest that when the administrators are trying to compromise claims, exercise their power of compromise with a particular creditor, they're exercising any quasi-judicial function.

MR JUSTICE DAVID RICHARDS: No, what they're doing is exercising statutory functions.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: They're not acting in their own commercial self-interest.

MR ZACAROLI: Of course.

MR JUSTICE DAVID RICHARDS: That's the point there.

MR ZACAROLI: Their duty in doing that is to allow only proper claims, and the words that appear in those cases are "proper claims". So to the extent a claim is being advanced, they need to ensure that it is proper and they are fully entitled to compromise claims that are being made, with give and take on both sides, to arrive at a number. That's entirely within their functions.

MR JUSTICE DAVID RICHARDS: Absolutely.

MR ZACAROLI: In so doing they're not looking out for the interests of the counterparty to that contract.

MR JUSTICE DAVID RICHARDS: No, but they're not like an ordinary commercial party who is seeking simply to advance its own interests within the bounds of the law. In other words, you can drive as hard a bargain as you possibly could as an ordinary commercial counterparty; it wouldn't be necessarily proper for an office-holder to do that. It all depends what one's talking about. I don't think the position is analogous between an ordinary commercial party and an office-holder.

MR ZACAROLI: I don't suggest it is, but I don't say the difference is relevant to the exercise undertaken here because, as office-holders, they owe a duty to the estate to ensure that any points that can be taken properly against someone asserting a claim can be taken.

MR JUSTICE DAVID RICHARDS: Absolutely.

MR ZACAROLI: My Lord, going back to the second underpinning point, which was the one at page 131, line 20:

"The purpose of the CRA did not require creditors to give up potentially valuable rights which they had in the event of a surplus."

And he goes on to say they could have achieved what the administrators wanted to achieve without such claims being released.

The purpose of the CRA and the CDD undoubtedly required creditors to give up valuable rights. That's an obvious statement given the releases. Ie claims they may have had but for the CDD and may have been able to assert. That is an essential part of the quid pro quo of any compromise.

The SCG accept that the effect of the release is to release both provable and non-provable claims, and that was stated yesterday by Mr Dicker and repeated today. There's a slight nuance on that today, which was: yes, but the non-provable claims that are being given up are, as it were, adjuncts to other provable claims.

MR JUSTICE DAVID RICHARDS: Which are being given up, yes.

MR ZACAROLI: Yes. I'll come back to that when I deal with the submission made today, but in short we say there is no basis for carving up the releases that one sees

in the documents as between provable claims and non-provable claims, on the other hand. So let's say there's claim 1 and claims 2 to 10 in my learned friend's example and one of those claims 2 to 10 is an entirely non-provable claim of some other type.

MR JUSTICE DAVID RICHARDS: I think he was taking a provable claim in his example.

MR ZACAROLI: He was. I'm suggesting -- let's say there is a claim 11, which is a non-provable claim.

MR JUSTICE DAVID RICHARDS: You wouldn't dispute his proposition that if you release a provable claim, you also release the claims for interest and currency conversion claims that stem from that. I appreciate you'd say they've gone anyway, but you wouldn't dispute that part?

MR ZACAROLI: No. In other words, he accepts the release goes beyond provable claims to non-provable claims.

MR JUSTICE DAVID RICHARDS: But in terms of -- if you take a claim which is a wholly independent and entirely non-provable claim, I didn't understand Mr Dicker to advance a case on that. He said, well, basically it's difficult to do it in the abstract, to take a concrete example. He really adopted no position on that either way.

MR ZACAROLI: From which I take --

MR JUSTICE DAVID RICHARDS: I don't think you can take it -- he says it's not a point that arises.
MR ZACAROLI: No. So no positive case perhaps is being asserted against me. I make a positive case in response that you cannot carve up the releases that appear in CDDs, for example, between claims that would otherwise have been provable or not provable. That is not a permissible carving out. There is nothing in the language which enables that to be done. Now, no positive case against me is made on that, and I'll come to deal with that perhaps in more detail later on. That's our basic proposition.
If that's right, then the addition of the words in this second underpinning point, which is "the purposes did not require creditors to give up potentially valuable rights which they had in the event of a surplus" takes us nowhere. Because if one accepts that non-provable claims are being released, those claims could only ever be assertible against surplus, so the acceptance that non-provable claims, or the conclusion, if it's not accepted, that non-provable claims are not released by the terms of the CDDs, necessarily means that that concept of purpose didn't require the release of valuable rights against the surplus is irrelevant.

They're giving up valuable rights against the estate. It doesn't matter at which point in the waterfall those rights might have been respected. Nor does it achieve anything to say that the purposes could have been achieved by a different document or a different agreement, which didn't have that effect. So for example, yes, it may be the purposes could have been achieved by a document which didn't release a currency conversion claim and we know that when currency conversion claims arose, many CDDs were entered into which did carve out that. But that's again a completely impermissible approach to construing the documents entered into at the time.
The fact that you could enter into a different agreement that might have achieved reasonably a similar result has no relevance at all to the question of what does this agreement mean.
As to the third point, which is at page 132, line 9, beginning at line 9, that is the releases were inadvertent, no one envisaged the possibility of a surplus. There are two points in response to that. The first is the release of non-contemplated claims was clearly deliberate and the wording is beyond doubt in the releases. No one could have misunderstood that language. So inadvertence here can only be being used

in the sense that the particular claims now asserted were not in contemplation. But that's irrelevant since the release of any non-contemplated claim by definition is inadvertent in that sense. It always will be.
But it's no reason to deny the reason that -- the language its plain meaning.
The second point here is a factual one. It's not true to say that no one envisaged the possibility of a surplus in relation to actually the majority of CDDs that were entered into. The evidence here is in three different places but we'll piece it together. First of all, the statement of agreed facts at bundle 1, tab 18, paragraph 16:
"From early 2012, the possibility of a surplus was being discussed in the market."
So the possibility was out there from the beginning of 2012. Then if we look at the dates on which CDDs were entered into, and for that we need to go to bundle 2, the witness statements, tab 2. It's Mr Lomas' tenth witness statement, paragraph 68. Paragraph 66 tells us the same thing about the surplus being discussed from early 2012. That gave rise to the statutory interest language question. At paragraph 68 you'll see in the last sentence:
"The first CDD incorporating an express reference to

statutory interest was executed on 28 June 2012."
So roughly six months after the possibility of a surplus was out there in the market.
Then the final reference is in tab 4, Mr Lomas' 11th witness statement, paragraph 64, which contains a table of CDDs entered into by value and number of different types.
MR JUSTICE DAVID RICHARDS: Sorry, where is that?
MR ZACAROLI: Tab 4, page 23, which is part of paragraph 64.
You'll see in the table there the first block is CDDs with no language, dealing with either statutory interest or currency conversion. The second block is CDDs with statutory interest language but without currency conversion language; and the last block is both forms of preservation language.
If you just look at the far right column, CDDs entered into by value, 1.2 billion plus 2.2 billion, which is 3.3 billion, were entered into before any statutory interest language was included, which means that a total of 6.5 billion by value were entered into afterwards. That means 6.5 billion by value of CDDs were entered into after June 2012. The point being most of them, and there will have been more because of the period between January and June 2012, most of them were entered into after the discussions about a surplus were

happening in the market. So it was at least contemplated.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The fourth underpinning point was at page 133 of yesterday's transcript, line 4:
"No sensible reason has been provided why the creditors should now be taken to have released claims to statutory interest and currency conversion claims."
And he poses the question why should a creditor with a right to interest in the event of a surplus have agreed to release any contractual right to interest, and similarly why would someone with a currency conversion claim have agreed to release that. That is, we say, fundamentally the wrong question. You cannot assess the construction of a release clause in general terms of uncontemplated claims by reference to whether the parties would, had they thought about it at the time, have released one particular claim that is now contemplated. One very good reason for that is you must construe a contract against its matrix at the time, and by definition these claims do not form part of the matrix.
The only valid question is, looking at the circumstances in which the contract was entered into, is there any ground for limiting what is an apparently

limitless release by, for example, reference to the subject matter of the agreement? And this goes back to the tree roots point of Lord Nicholls in BCCI v Ali. We maintain the point that I made in opening that the terms of this release, no matter -- actually, no doubt with the words of the House of Lords in BCCI v Ali in mind, do go wide enough to release tree roots claims. That's our first point.
But even if we are wrong about that, therefore even if it's permissible on this broad wording to narrow it by reference to the subject matter, if you asked yourself what is the subject matter of these releases, well, you've got at the one extreme the peripheral claims like tree roots claims. At the centre you have what is undoubtedly covered by the release, and what is undoubtedly covered by this release clause is any claim arising out of the creditor agreement. It goes much wider than that, we would say, but that's certainly included because it's expressly referred to.
My Lord probably remembers the wording, I can take my Lord to it, but "whether or not arising under the creditor agreement" is wording in each of the release clauses. So in any view, anything arising out of the creditor agreement is released save insofar as it's the admitted claim amount.

MR JUSTICE DAVID RICHARDS: I think it'd be very difficult to read this agreement as not releasing all claims capable of proof.
MR ZACAROLI: Yes.
MR JUSTICE DAVID RICHARDS: Which goes slightly wider than -- well, it does go wider than that.
MR ZACAROLI: Of course it goes wider than that, yes. I'm not suggesting it's limited.
MR JUSTICE DAVID RICHARDS: I appreciate that.
MR ZACAROLI: On any view, it is that, claims arising out of the creditor agreement, because both of the claims in issue in this application are claims that arise out of the creditor agreement. Now, the distinction is they're not provable as opposed to provable. That's not a valid distinction we say you can draw on the document.
Dealing just briefly with that point, again I'm not going to repeat what I said in opening but just to remind my Lord of the three or perhaps four points as to why the release in clause 2.1.1, whichever one it is, that release cannot be limited to provable claims.
First of all, it is worth turning it up to remind ourselves of this. Perhaps we can look at the language in tab 7, which is where I started. My Lord, the first point is the timing point that, in 2.3, the claims that are released are not limited to claims in existence

at the date of administration because it includes claims coming into existence at some time in the future, which on any view could not be provable.
The second point was --
MR JUSTICE DAVID RICHARDS: Give me one moment, sorry. (Pause).
Let's just have a look at that.
MR ZACAROLI: It's four lines from the end of 2.3 -- three lines:
"Whether arising out of the creditor agreements or not, whether in existence now or coming into existence at some time in the future."
(Pause).
Similar wording appears slightly higher up in the fifth line. It's in parenthesis towards the end of the fifth line:
"Including those which arise hereafter upon a change in the relevant law."
MR JUSTICE DAVID RICHARDS: That I think is the wording included in the light of BCCI v Ali. That was what I had in mind when I said that.
MR ZACAROLI: I suspect the language, whether in contemplation of the creditor or not, was also added in the light of that.
MR JUSTICE DAVID RICHARDS: Maybe.

MR ZACAROLI: So that's the first point. The second point is that it includes a release of all proprietary claims, very broadly defined, and that's page 3. Well, pages 2 to 3 is the definition of claim, including proprietary claim defined broadly at pages 3 to 4.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The third was the mutuality point, or the reciprocity point perhaps, because it's not about set-off, but about reciprocity. The release given by the company is in similarly unlimited terms including proprietary claims and future claims. There is no basis whatsoever for limiting that to claims which might have been provable in the bankruptcy or insolvency or whatever other process of a creditor anywhere in the world. So that reinforces the point that the releases is not of just provable claims both ways.
And the fourth point I made was that this contemplates the claim being admitted for the purposes of a scheme of arrangement, and excluding anything else, and of course the definition of claim for a scheme of arrangement is much broader, it includes matters beyond provable debts. That's in the definition of admitted claim at page 2.
MR JUSTICE DAVID RICHARDS: We had this discussion before. As you'll gather, I have some difficulty with that.

MR ZACAROLI: This isn't the time -- my Lord has my submissions.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: The first three reasons stand up on their own. So there is no basis, we say, for distinguishing between provable and non-provable claims. This was a release, intended to be of general and unlimited scope.
As my learned friend accepts -- no, I won't continue that sentence.
I'll come back to the particular arguments in relation to the admitted claims CDD and agreed claims CDD later on in the order my learned friend took his submissions. But those are my responses to the opening underpinning points. It's very important, I say, to correct those points because they do underpin the approach to construction, and the key point is one should not be construing a document entered into in unlimited release terms by reference to the types of claim which it's now discovered have been released.
Turning then to the submissions in relation to the CRA. My learned friend Mr Dicker wrapped up the two different issues raised by issue 34 and 38 in relation to the CRA as one. And we submit it's very important to keep those issues distinct from each other. The first is: is an entitlement of a creditor to be paid in

a foreign currency released by the CRA? And the second question, which is whether the creditor had a sterling right or a yen or euro right, does the conversion of that claim into dollars for the purposes of the CRA create a currency conversion claim? And they are different questions and must be kept separate.
My learned friend says that the euro creditor, for example, has the same currency conversion claim as the US dollar creditor and since we accept that a US dollar creditor still has its currency conversion claim, which we do under the CRA, it must follow that the euro creditor also keeps its currency conversion claim. But that, we say, is to elide the two different issues.
So far as the euro creditor is concerned, the reason it does not have a currency conversion claim in the sense of being entitled to claim for the numbers of euro which it didn't receive under its contractual entitlement from the statutory process once converted back into euros, the reason it doesn't have that claim is because it doesn't have any subsisting entitlement to be paid in euros. And that is quite simply the consequence of clause 4.2.3 of the CRA, which releases all claims in respect of any financial contracts.
We don't for this argument, or for any of our arguments on the CRA, go so far as to say that the CRA

provides entirely new claims in the sense of a new claim, in a sense, any different from any other compromise of rights. To the extent the rights have been compromised, they are gone, as with any compromise. To the extent they survive in the amount agreed to be paid under the compromise agreement, then we accept that they continue. And that's why the US dollar creditor does not lose its entitlement to be paid in US dollars that it always had.
But the euro creditor does lose that entitlement by 4.2.3 because all that it gets coming out of the CRA is the net financial claim, whose rights and attributes are defined entirely by the CRA, and one of those rights and attributes is it's payable in dollars.
Now, the second question, which is issue 38, is best first tested by reference to a sterling creditor. The evidence suggests that there may be very small numbers of any creditor with a foreign currency claim other than dollars, but it's an issue that has been raised and therefore we're dealing with it.
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: So if my Lord will make the assumption that there's a creditor with an underlying claim in sterling and that claim is then compromised by the CRA, does that creditor have a currency conversion claim in the sense

of being entitled to complain at the end of the statutory distribution process when it gets paid sterling that it hasn't got the full amount of dollars which the CRA said it would be paid?

The reason we say that creditor does not have such a claim is that the conversion into US dollars under the CRA is for limited purposes. Those purposes are the calculation mechanisms and netting processes implemented within the CRA. My learned friend Mr Dicker pointed out that it's not just to create the net financial claim that that netting process takes effect, there may be a further, as he called it, interim step when the net financial claim can itself be offset or used as an offset against non-financial liabilities, and for that purpose it still needs to be in dollars. But the point is, whatever comes out of the CRA process at the end as a claim in favour of the creditor, necessarily has to be converted into sterling because it's a claim which qualifies for distribution in a winding-up. That's the definition of ascertained claim.

I will show my Lord the references again. Ascertained claim is defined at page 443.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: So the point is that the purpose of the conversion is for offsetting purposes defined in the

CRA, but if after that process has run its course there is then a net claim owing to the creditor, that's to become an ascertained claim in a following distribution, for which purpose it would necessarily be converted back into sterling.

MR JUSTICE DAVID RICHARDS: So if you're a sterling creditor, what are you accorded under the CRA?

MR ZACAROLI: You're accorded a right to have your close-out amount calculated in accordance with the agreement, the mechanism of the agreement.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The right to have that determined -- to determine your net contractual position.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: All in dollars because the close-out amounts are all to be converted into dollars.

MR JUSTICE DAVID RICHARDS: From sterling?

MR ZACAROLI: From sterling into dollars. Then to produce a net financial claim, if that's a positive number, which assuming there is no further offset becomes your ascertained claim in a subsequent distribution.

MR JUSTICE DAVID RICHARDS: Right.

MR ZACAROLI: In a liquidation or administration, or a scheme.

MR JUSTICE DAVID RICHARDS: At that point, what is the

creditor's right? To receive a sterling amount in a distribution?

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: So why isn't that true of a US dollar creditor?

MR ZACAROLI: Well, it is true of a US dollar creditor.

MR JUSTICE DAVID RICHARDS: Why does a US dollar creditor have anything other than that?

MR ZACAROLI: They don't under the CRA.

MR JUSTICE DAVID RICHARDS: I thought you said they did.

MR ZACAROLI: No, but they had an existing right to be paid in dollars.

MR JUSTICE DAVID RICHARDS: Yes, but it's gone, hasn't it?

MR ZACAROLI: Well, that's ...

MR JUSTICE DAVID RICHARDS: How do you say the euro creditor's right to be paid in euros has gone, but the US dollar creditor's right to be paid in US dollars hasn't gone?

MR ZACAROLI: Because in any compromise, to the extent that claims are released forever they're gone, but to the extent that they are released but then reappear in the rights that you're given under the compromise, the true analysis is they're not new claims but they're a continuation of the existing claim. You had an existing right to be paid in dollars. Your close-out

amount is calculated in dollars --

MR JUSTICE DAVID RICHARDS: It has been replaced with a right to be paid in dollars.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: You have given up your contractual claim to be paid in dollars.

MR ZACAROLI: Yes.

MR JUSTICE DAVID RICHARDS: You now have a right to be paid in dollars, do you?

MR ZACAROLI: Well, you do.

MR JUSTICE DAVID RICHARDS: Why doesn't the euro creditor have that right?

MR ZACAROLI: The euro creditor does have a right to be paid in dollars, yes.

MR JUSTICE DAVID RICHARDS: So why doesn't he have a currency conversion claim?

MR ZACAROLI: Because the right given to the creditor who didn't already have a right to be paid in dollars, so the new right that's given to a euro creditor or sterling creditor is for limited purposes.

MR JUSTICE DAVID RICHARDS: Why isn't it for limited purposes for the dollar creditor?

MR ZACAROLI: The continuation of that right is for limited purposes.

MR JUSTICE DAVID RICHARDS: Why does he have a currency

conversion claim?
MR ZACAROLI: Why does he?
MR JUSTICE DAVID RICHARDS: Yes.
MR ZACAROLI: I am arguing against myself.
MR JUSTICE DAVID RICHARDS: Well, it is your case.
MR ZACAROLI: We don't go that far, is how I put it. We don't go that far because we accept that although it's described as a --
MR JUSTICE DAVID RICHARDS: I thought it was part of your case that they do have that claim. They do have a currency conversion claim.
MR ZACAROLI: Well --
MR JUSTICE DAVID RICHARDS: You may have good reasons for that.
MR ZACAROLI: Well, I don't make a positive case about that.
MR JUSTICE DAVID RICHARDS: I'd understood you to do so.
MR ZACAROLI: No, we'd never advanced a positive case about that. We accept that they don't have a currency conversion claim for the reasons I'm elaborating.
MR JUSTICE DAVID RICHARDS: No, you accept --
MR ZACAROLI: Sorry, they do have a currency conversion claim.
MR JUSTICE DAVID RICHARDS: I don't at the moment understand how you square the position as you describe it in relation to the euro creditor, on the one hand, and

the dollar creditor on the other.
MR ZACAROLI: If I can go over it again if I may.
MR JUSTICE DAVID RICHARDS: Yes, please.
MR ZACAROLI: The dollar creditor comes into this process with an entitlement to be paid in dollars. We say on a proper analysis of what the CRA does to that claim, it allows that right to be paid in dollars to continue.
MR JUSTICE DAVID RICHARDS: But why do you say that if you say that the euro creditor only gets a right to be paid in sterling?
MR ZACAROLI: Because the dollar creditor's existing right was always to be paid in dollars. It came into this process with a right to be paid in dollars, and it's the fact that that original contractual right to be paid in dollars is not respected --
MR JUSTICE DAVID RICHARDS: But his right to be paid in dollars is a contractual right, which, by a parity of reasoning with your submissions on euro creditors, he loses.
MR ZACAROLI: That's where I part company with my Lord because we say he doesn't lose that right to be paid in dollars.
MR JUSTICE DAVID RICHARDS: He retains the contractual right to be paid in dollars?
MR ZACAROLI: In substance, yes.

MR JUSTICE DAVID RICHARDS: What is the source of his right to be paid in dollars?
MR ZACAROLI: His underlying contractual entitlement.
MR JUSTICE DAVID RICHARDS: Why does the euro creditor lose it?
MR ZACAROLI: Because under this agreement the euro creditor loses any rights -- the creditor loses its right to be paid in euros and that right is not continued in the rights given by the CRA. It's a question of continuation of rights. So like any compromise, if one goes away from the language of the CRA for a moment because the language of release and new claims -- that's why I say in substance these aren't new claims, they're continuations of the old claim compromised. So any creditor who came into a compromise with a US dollar right has not had its US dollar right compromised by the CRA, but a creditor who came into this with a euro entitlement has had that claim compromised by the CRA.
MR JUSTICE DAVID RICHARDS: I see.
MR ZACAROLI: My Lord raised a question that perhaps it's best to deal with at this stage about whether rule 2.86 is mandatory and what relevance that has. This probably affects the CDDs argument more directly. We say the rule is mandatory in the sense that dividends can only be paid on proved debts once converted into sterling.

But that cannot prevent and does not prevent a creditor agreeing to release its right to be paid in a foreign currency in exchange for a right in sterling or any other currency in advance of its claim being submitted to a process for the purposes of a distribution.

So take the CDD. Take a dollar creditor who enters into a CDD. The fact that rule 2.86 is mandatory does not prevent the creditor and the administrators agreeing that that claim, which was a dollar claim, is to be compromised by a payment of a sterling sum, which sum will then be admitted for the purposes of proof. That doesn't involve any contradiction defend the mandatory nature of rule 2.86.

My Lord, the other point on the CRA, in fact the main point in terms of economic value on the CRA, is non-provable claims to interest. This morning -- my Lord won't have a transcript yet, but I can give you the reference. I assume the pages stay the same.
MR JUSTICE DAVID RICHARDS: Roughly.
MR ZACAROLI: Page 21 [draft], lines 5 to 8. My learned friend Mr Dicker said in relation to clause 25.1 of the CRA:

"The net financial claim accrues interest in accordance with rule 2.88 of the Insolvency Rules. You don't get more than that, you get what you would get

under rule 2.88."

Which at that point appeared to be an acceptance that as a matter of contract the only right which the net financial claim carried so far as interest is concerned is a right under 2.88. We would agree with that. As I made clear this morning, we don't contend that under the CRA the statutory right to interest is cut down in any way. You have the full remit, the full range of rights under 2.88, including the reflection of your otherwise contractual rights. However, that is the only right you have coming out of the CRA. I don't think my Lord was presented with any argument as to how one could construe, as a matter of language, clause 25.1 in any other way.

MR JUSTICE DAVID RICHARDS: Yes.

MR ZACAROLI: The argument that my learned friend advanced was either they are right on issue 2 and therefore Bower v Marris is incorporated within rule 2.88, but, if not, they haven't lost the right to appropriate under the Bower v Marris principle in respect of whatever right to interest comes out of the net financial claim or the CRA.

The principal response to that is that the right under Bower v Marris is wholly dependent upon interest continuing to accrue under a contract or other

pre-insolvency right as it were in the background whilst the insolvency runs its course. That is the foundation for the reason we've developed at length in issue 2 under the right in Bower v Marris. So without a contractual right to interest ticking along in the background, there is no scope for Bower v Marris to apply at all. So if Bower v Marris doesn't apply under rule 2.88, then it's gone.

My learned friend didn't deal with, and I assume therefore accepts, that any other possibility has been released, didn't deal with, for example, the argument advanced in relation to issue 2 or issue 39 that we dealt with back in February about other non-provable rights to interest. For example, on the assumption that under rule 2.88 compounding is only for the period within which the debt is outstanding. If there was a contractual right to compound beyond that date, my learned friend advanced no argument as to how that can possibly survive. Well, of course it can't because your rights are limited to what you get under rule 2.88, so there are potentially other non-provable claims to interest which would undoubtedly be released or taken away by the operation of the CRA.

My Lord, is that a convenient moment? I have quite a bit -- it's more than a few minutes to go.

MR JUSTICE DAVID RICHARDS: Very well. 10.30 tomorrow morning. I've got a hearing at 9.30, which I suspect is listed at the moment here. I may try and get it in another court, but I apologise in advance if you're all kept outside or I run over 10.30, but we'll sit at 10.30 or as soon after that as we can.

(4.18 pm)

(The hearing adjourned until 10.30 am the following day)

I N D E X