IN THE HIGH COURT OF JUSTICE **No. 7942 of 2008**

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

-and-

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À.R.L

(3) HUTCHINSON INVESTORS, LLC

(4) WENTWORTH SONS SUB-DEBT S.À.R.L

(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

WATERFALL II DIRECTIONS APPLICATION (PART B)

JOINT ADMINISTRATORS' SKELETON ARGUMENT FOR TRIAL

Contents **Page**

I	Introduction		3
II	The Administration and Post-Administration Contracts		8
	(a)	The Administration and the significance of Trust Assets	8
	(b)	Purpose of the CRA	11
	(c)	Development of the CRA	13
	(d)	Implementation and operation of the CRA	15
	(e)	The Consensual Approach, Project Canada and the CDDs	18
	(f)	Objective of Project Canada and the CDDs	18
	(g)	Development of Project Canada and the CDDs	24
	(h)	Implementation and operation of the CDDs	26
	(i)	The CDD release provisions	30
	(j)	Miscellaneous points	36
	(k)	Conclusion	37
III	Issue 34		37
IV	Issue 35		39
	(a)	The CRA	40
	(b)	The CDDs	40
V	Issue 38		43
VI	Issue 36A		47
VII	Issue 9		48

I. INTRODUCTION

1. This skeleton argument is filed on behalf of the joint administrators of Lehman Brothers International (Europe) (in Administration) (the "**Administrators**") ("**LBIE**"), for the trial (the "**Part B Trial**") provided for by paragraph 8 of the directions order made on 21 November 2014 (the "**November Directions Order**") [**1/3**][1]. Further directions were given on 9 March 2015 (the "**March Directions Order**") [**1/4**] and on 21 April 2015 (the "**April Directions Order**") [**1/5**].

2. The Issues falling to be determined at the Part B Trial are Issues 9, 34, 35, 36A and 38.

3. The Issues falling to be determined at the Part B Trial relate to: (a) the construction and effect of certain post-administration contracts entered into by LBIE and its creditors (the "**Post-Administration Contracts**"), namely the claims resolution agreement (the "**CRA**")[2] and various types of claims determination deed ("**CDD**s")[3]; and (b) whether the Post-Administration Contracts should be enforced in accordance with their terms.

4. The Administrators set out (in Section II below) the background and context to these Post-Administration Contracts, before going on to set out their position in respect of each of the Issues in turn (Sections III to VII).

5. In many respects, the substantive arguments on each of the Part B Issues are advanced by the Respondents, and the Administrators take no position. However, some of the submissions made in the Respondents' skeleton arguments do not give what the Administrators consider to be appropriate emphasis to certain aspects of the conduct of the LBIE administration (the "**Administration**") or the complexity of the issues which the Administrators were seeking to resolve.

6. For this reason, the Administrators' skeleton summarises the background to the CRA and the CDDs in a manner which reflects how it is that the Administrators developed the strategies that culminated in the use of these Post-Administration Contracts in the

[1] References to the trial bundles are in the form "[**volume/tab/page**]".
[2] For the CRA Circular see [**3/209**]. The Agreement itself starts at [**3/315**].
[3] The various forms of CDD relevant to the Issues to be determined are set out in volume 11 of the trial bundle. Reference is made below in particular to: (a) the Admitted Claim CDD at [**11/7**] (the most commonly executed form of CDD); and (b) the Agreed Claim CDDs at [**11/1A**] and [**11/4**].

course of the exercise of their statutory function to manage the affairs, business and property of LBIE as efficiently as possible and in the interests of the creditors as a whole (paragraph 3(2) of Schedule B1 to the Insolvency Act 1986 (the "**1986 Act**")).

7. Amongst the express statutory powers afforded to an administrator is the power "*to make any arrangement or compromise on behalf of the company*" (paragraph 18 of schedule 1 to the 1986 Act). The Post-Administration Contracts were entered into by LBIE and the Administrators in exercise of that power.

8. In summary:

(1) In managing LBIE's affairs, business and property, the Administrators have been concerned with a number of very significant issues, two of which have been the proper application of trust property and the determination of claims under financial trading arrangements between LBIE and its creditors ("**Financial Trading Arrangements**"). Each of these issues has presented its own complex challenges.

(2) As regards trust property, the Administrators had to deal with approximately 2,000 clients who collectively held in excess of 31,000 stock lines. This issue was of uppermost concern to the very many clients of LBIE with trust property claims. Indeed, the first application for directions made by the Administrators resulted in an order from Blackburne J directing them to prioritise the return of trust assets in accordance with a protocol the Administrators had developed.

(3) It rapidly became apparent that, in order to establish a claimant's entitlement to the return of trust assets, it was necessary for any liabilities that a claimant owed to LBIE under any Financial Trading Arrangements to be ascertained and valued. Accordingly, the Administrators needed, in respect of most trust asset creditors, to resolve various connected issues such as the settlement status of pending or failed trades and the closing out and valuation of open contracts. These complex issues called out for a standardised solution which came to be reflected in the terms of the CRA.

(4) The CRA was an innovative and complex document, designed to cater for a whole host of eventualities. Although the primary purpose of the CRA was to

facilitate the return of trust assets, the calculation of the unsecured portion of a creditor's claim was a necessary and integral part of its structure and purpose.

(5) The CRA was developed by the Administrators in close consultation with certain members of two industry bodies, the Managed Funds Association ("**MFA**") and the Alternative Investment Management Association ("**AIMA**"), at various meetings in London and New York, and in negotiation with working groups whose members, many of whom were represented by legally trained representatives, contributed on both a broad and at a granular level to the development of the CRA. The working groups consisted of representatives of the Administrators, their advisers and representatives of each of the members of the creditors' committee. The CRA only became effective once a pre-determined approval threshold, which was set at a very high level, had been reached.

(6) In December 2009, the Administrators obtained the Court's permission to make distributions to general unsecured creditors. Thereafter, the Administrators' focus shifted to the resolution of unsecured claims. However, the Administrators were faced with a variety of practical difficulties, in addition to the sheer number, high value and complexity of unsecured claims, such as: (i) the considerable uncertainty surrounding creditors' client money entitlements; (ii) a reluctance on the part of creditors to submit proofs of debt sooner than was necessary; and (iii) the differing methodologies available for valuing creditors' claims.

(7) As to the complexity of the unsecured estate, by the time that notice to distribute was given, the Administrators had identified around 6,000 counterparties but they had received very few proofs of debt or valuation statements. Given the enormous number of potential creditor-specific disputes (for example as to valuation methodology or valuation dates), as well as the numerous legal issues of potential broader application, it was highly desirable for the estate as a whole for a standardised and streamlined approach to be developed to deal with unsecured claims with the objective of reducing the scope for dispute and the time and expense of bilateral claims negotiations and agreement, with the objective of accelerating distributions.

(8) Accordingly, following on from the successful implementation of the CRA, with its standardised valuation methodologies and the certainty and finality it created,

the Administrators determined to propose a process to facilitate the efficient resolution of unsecured claims as well. This led to the development of the concept of a consensual approach to determining unsecured claims and (while initially conceived as a potential scheme of arrangement) culminated some months later in the Administrators offering to compromise creditors' claims (with those compromises to be documented in CDDs). The consensual approach proceeded on the basis that LBIE would offer a creditor a single claim value representing LBIE's own valuation of the creditor's claim or claims using a standardized methodology to valuation issues and various other potential uncertainties. This amount would then be recorded in a CDD if accepted by the creditor.

(9) A standard proving process using only the steps envisaged by the Insolvency Rules would have been a much less efficient and practicable mechanism for dealing with unsecured claims, both because of the need for the claims determination process to be sufficiently flexible to take into account the uncertainty surrounding client money entitlements (as well as potential trust asset issues) and because a standard proving process would have generated much greater expense and taken a disproportionate length of time to complete given the quantum and complexity of claims being made.

(10) As with the development of the CRA, LBIE's potential stakeholders (including the working groups, the creditors' committee, representative creditors and the "aggregators" (i.e. those funds actively purchasing claims against LBIE in the secondary market)) were consulted throughout the Administrators' development of the consensual approach which culminated in LBIE entering into CDDs with creditors. The SCG, themselves aggregators, through their various affiliates together hold unsecured claims against LBIE in excess of £2.75 billion (paragraph [1] of their skeleton argument) and those creditors who sat on the Working Groups and the Unsecured Creditors' Resolution Working Group were also substantial entities with access to independent legal advice.

(11) Further, the CDD structure (which included transfer provisions that benefited those wishing to take advantage of them) was embraced by LBIE's unsecured creditors and the developing market of claims traders.

(12) The development and use of the CRA and the CDDs have made a significant contribution to the success of the Administration. They have enabled the Administrators to deal with an estate of unprecedented size and complexity with much greater efficiency than would otherwise have been the case. LBIE's (admitted) unsecured creditors have now been paid 100p in the £; Trust Asset and Client Money claimants have recovered substantially all amounts that were due to them; and the estate is projected to run a significant surplus of approximately £6-7.5bn. Viewed in context, the CRA and CDD processes resulted in substantial benefits to the estate (and thus its stakeholders).

9. An understanding of the relevant background to the Post-Administration Contracts is essential to their proper construction and to a determination of whether or not they should be enforced.

10. Pursuant to paragraph 7 of the March Directions Order and paragraph 2 of the April Directions Order, the Administrators (following consultation with the SCG and Wentworth) have filed and served the following documents:

(1) A statement of agreed facts relating to Issues 34 and 35 (the "**SAF (34/35)**") [**1/18**];

(2) A statement of agreed facts (in addition to those set out in the 34/35 SAF) relating to Issue 36A (the "**SAF (36A)**") [**1/19**]; and

(3) A statement of alleged facts disputed by one or more of the parties but contended by one or more of them to be admissible and relevant to Issues 34, 35 and 36A (the "**SDF**") [**1/24**].

11. The background set out below draws on the SAF (34/35) [**1/18**] and the SAF (36A) [**1/19**], as well as progress reports sent to LBIE's creditors over the course of the Administration and various witness statements filed on behalf of the Administrators in the course of the Waterfall II Application, in particular:

(1) The 9th witness statement filed by Mr Anthony Victor Lomas ("**Lomas 9**") [**2/1**];

(2) The 10th witness statement filed by Mr Anthony Victor Lomas ("**Lomas 10**") [**2/2**];

(3) The 7th witness statement filed by Mr Steven Pearson ("**Pearson**") [**2/7**]; and

(4) The witness statement filed by Mr Paul Copley ("**Copley**") [**2/8**].

II. THE ADMINISTRATION AND POST-ADMINISTRATION CONTRACTS

(a) The Administration and the significance of Trust Assets

12. LBIE entered administration on 15 September 2008 (SAF (34/35) at [1] [**1/18/1**]; Lomas 9 at [8]) [**2/1/2**].

13. Prior to the Administration, LBIE held in its own name or to its order on trust for clients and other parties (including affiliates) a considerable quantity of securities ("**Trust Assets**") and cash ("**Client Money**") through depositories, exchanges, clearing houses and sub-custodians (SAF (34/35) at [29] [**1/18/6**]; Pearson at [10] [**2/7/4**]). By 14 April 2009, the date of the First Progress Report, the Administrators had identified an estimated US$26.1bn of Trust Asset entitlements as well as identifying potential entitlements to Client Money of US$2.1bn (p.30) [**6/120**].

14. In exercising their functions, the Administrators have, throughout the Administration, been managing the affairs, business and property of a company, one of whose activities was to act as trustee of Trust Assets and Client Money. It also follows that, in very general terms, the conduct of the Administration, in so far as it is relevant to this Application, comprised two main parts: (i) formulating a strategy for distributing Trust Property and settling the claims of Trust Property claimants; and (ii) determining the value of creditors' claims under Financial Trading Arrangements, and distributing the

House estate. The return of Trust Assets was identified as a key priority of the Administrators from the early stages of the Administration (SAF (34/35) at [31] [**1/18/6**]; Pearson at [45] [**2/7/18**]).

15. After their appointment, the Administrators were under considerable pressure from LBIE's clients to return Trust Assets as quickly as possible as those assets were, in many cases, said to be critical to those clients' businesses. As noted previously, the first application for directions made by the Administrators in the Administration resulted in an order from Blackburne J directing them to prioritise the return of Trust Assets by implementing certain processes pending the approval by the creditors of the Administrators' proposals for achieving the purpose of administration (SAF (34/35) at [30] [**1/18/6**]; Pearson at [13] [**2/7/4-5**]). That order (the "**Trust Property Order**") was made on 7 October 2008.

16. The Administrators proceeded in accordance with the Trust Property Order. That initially consisted of returning Trust Assets to clients who could make out a special case for prioritization and who were able and willing to accept those returns on necessarily stringent conditions (SAF (34/35) at [32] [**1/18/6**]; Pearson at [15] [**2/7/5**]). However, this return process was unsatisfactory because it was time-consuming, costly and subject to uncertainties arising both from the existence of competing claims and by reason of difficulties with the scope and effectiveness of the undertakings and/or indemnities that LBIE's clients were required to give in order to participate in this process (SAF (34/35) at [33] [**1/18/6**]; Pearson at [16] [**2/7/5**]).

17. The complexity and difficulty in dealing with Trust Assets is illustrated by the fact that in excess of one hundred staff from PwC, Linklaters LLP and LBIE (as well as others) were deployed specifically to work on Trust Asset issues in the first six months of the Administration, with the sub-committee (formed pursuant to the Trust Property Order) meeting initially on a daily basis (Pearson at [17] [**2/7/5**]). The Administrators had to deal with approximately 2,000 clients who collectively held in excess of 31,000 stock lines and who put the Administrators under constant pressure to expedite the return of the Trust Assets (Pearson at [17] [**2/7/5**]).

18. Further, as well as quantifying the value of any claims LBIE had against the client so as to ensure LBIE did not return Trust Assets without protecting itself in relation to such claims, in order to return Trust Assets to a particular client, it was first necessary to resolve a number of connected factual and legal issues, for example: (a) the settlement status of pending and failed trades needed to be resolved; and (b) potential claims from other Trust Asset claimants including Lehman affiliates needed to be identified and quantified (Pearson at [18] [**2/7/6**]). In addition, there was the added complexity that certain Trust Assets were held for clients of LBIE under sub-custodian arrangements with other Lehman Brothers entities that were also in insolvency proceedings. In light of these and other complicating factors there seemed to be a significant risk that there would be a Trust Asset shortfall.

19. Ultimately, these various difficulties were resolved through the CRA, the background to which is explained in detail below.

20. It is also important to emphasise that in the early stages of the Administration, when it was not clear what the size of the distributions to creditors would ultimately be, clients were seeking to establish proprietary claims rather than having to rely on ordinary unsecured claims and the Administrators were under great pressure from clients in this respect. The Administrators had to contend, for example, with attempts to lift the statutory moratorium made by clients who wished to establish such proprietary claims: see, for example, the judgments of Morgan J in *Rab Capital Plc v LBIE* [2008] BCC 915 and of Blackburne J in *Four Private Investment Funds v LBIE* [2009] BCC 632 [**Auth 1B/38 and IB/39**].

21. The development of the CRA and the CDDs discussed below should be read against that background, and in light of the Administrators' duties and powers and, in particular:

    (1) the Administrators' duty to pursue the "purpose of administration" (see paragraph 111(1) of Schedule B1 to the IA 1986) with the objective of achieving a better result for LBIE's creditors as a whole than would be likely if it were wound up (without first being in administration) (see paragraph 3(1)(b) of Schedule B1 to the IA 1986);

(2) the Administrators' duty to perform their functions: (i) in the interests of LBIE's creditors as a whole (see paragraph 3(2) of Schedule B1 to the IA 1986); and (ii) as quickly and efficiently as is reasonably practicable (see paragraph 4 of Schedule B1 to the IA 1986); and

(3) the general power of an administrator to do anything necessary or expedient for the management of the affairs, business and property of the company (see paragraph 59(1) of Schedule B1 to the IA 1986) and the specific power contained in paragraph 18 of Schedule 1 to the IA 1986 to make any arrangement or compromise on behalf of the company.

(b) Purpose of the CRA

22. As a result of the difficulties encountered by the Administrators when seeking to return Trust Assets on a bilateral basis, they began to consider alternatives based on a defined series of methodologies for the valuation of Trust Asset claims and the allocation of any stock shortfalls (SAF (34/35) at [34] [**1/18/6-7**]; Pearson at [16] to [19]; [104] to [105] [**2/7/5-6 and 37**]). Amongst other points of complexity, it was apparent that, in order to establish a claimant's entitlement to the return of Trust Assets through a mechanism such as a scheme of arrangement, it would be necessary first for any liabilities of a claimant owed to LBIE under Financial Trading Arrangements to be ascertained in order to protect LBIE's position (and thus the position of the general creditor body) (Pearson at [20] [**2/7/6**]). That was because, without taking such a step, LBIE would be unable to exercise its rights arising pursuant to any charge or other security interest granted in favour of LBIE over the Trust Assets and thereby risk over-distributing assets (Pearson at [20] [**2/7/6**]). In short, the resolution of unsecured claims by and against Trust Asset claimants was always (and by necessity) an integral part of the Administrators' approach to resolving Trust Asset issues.

23. In determining the appropriate way forward, the Administrators did not have the benefit of the Investment Bank (Special Administration) Regulations 2011 (the "**Regulations**"). The Regulations were, in fact, enacted in response to the Administration and in recognition of the need, in the context of the collapse of an

investment bank like LBIE, to have legislation dealing not only with the unsecured claims of creditors but also with the proprietary claims of clients on whose behalf Trust Assets and Client Money are held. The content of the Regulations, including the introduction of the client asset distribution plan, was heavily informed by the LBIE Administration and the consultation the framers of the legislation had with the Administrators.

24. It was necessary, therefore, to develop systems and procedures for ensuring that Trust Assets could be returned fairly and quickly and without exposing creditors to the risk of over-distribution (and without exposing LBIE or the Administrators to the risk of liability in the event that it transpired that any Trust Assets were distributed in breach of trust).

25. In order to mitigate this risk and facilitate the return of Trust Assets, the Administrators proposed a mechanism for compromising and agreeing all claims relating to Trust Assets and Financial Trading Arrangements between LBIE and a creditor other than certain specified excluded claims (SAF (34/35) at [43] [**1/18/8**]; Pearson at [24] and [99.3] [**2/7/8 and 35**]). Contrary to the SCG's suggestion at paragraph 35 of their skeleton argument, a framework for establishing the finality of positions between LBIE and the Trust Asset claimants was required in order to enable the return of Trust Assets.

26. In those circumstances, there was an obvious justification for altering the economic substance of the relationship between LBIE and creditors. Indeed, other aspects of the economic relationship between LBIE and the CRA signatory were altered substantively under the CRA. For example, upon a creditor's accession to the CRA, the methodology for calculating the Close-Out Amount under financial contracts was substantively altered by the provisions of the CRA, in particular the Fallback Valuation Methodology provisions under Clause 23 [**3/359**].

27. It was, accordingly, an integral element of the Administrators' objective that claimants to Trust Assets would have their unsecured claims under their financial contracts with LBIE determined i.e. that the Trust Asset claimant's net financial position with LBIE (which came to be defined under the CRA as the "**Net Contractual Position**") would be quantified in order to establish whether there was an amount owing to or from LBIE

(SAF (34/35) at [44] [**1/18/8**]; Pearson at [21] and [24] [**2/7/7-8**]). As explained above, the financial contract claims were complex and of high value and, accordingly, the amount of work required to assess them was very substantial.

28. Initially the Administrators proposed a draft scheme of arrangement (the "**Draft Scheme**") to implement a process for the return of Trust Assets. Blackburne J and the Court of Appeal ultimately determined that there was no jurisdiction to approve the Draft Scheme (*Re Lehman Brothers International (Europe)* [2010] 1 BCLC 496 [**Auths 1B/43**]). As a result of that decision and the feedback received that a significant majority of Trust Asset claimants were supportive of the draft Scheme, the Administrators instead focused on developing a voluntary, multilateral mechanism for returning Trust Assets (SAF (34/35) at [35] [**1/18/7**]; Pearson at [26] to [27] [**2/7/8-9**]), a mechanism which ultimately became the CRA. The provisions of the CRA substantially replicated those set out in the briefing note and the short-form version of the explanatory statement prepared by the Administrators in connection with the Draft Scheme (SAF (34/35) at [36] [**1/18/7**]; Pearson at [27] [**2/7/9**]).

(c) Development of the CRA

29. There were numerous communications, meetings and updates between the Administrators and Trust Asset claimants throughout the course of the development of the Draft Scheme, and then the CRA (SAF (34/35) at [37] [**1/18/7**]; Pearson at [32], [36] to [44] and [130]). For the text of the CRA see [**3/315-492**]. The terms of the Draft Scheme (which, in substantial part, became the terms of the CRA) were developed over the course of 10 months in extensive collaboration with the Scheme Working Group, which had its first meeting on 10 February 2009 (Pearson at [36] [**2/7/16**]), and were shaped after extensive negotiation with the creditors' committee and certain members of the MFA and AIMA. When the Draft Scheme was replaced with the CRA, the Scheme Working Group was renamed the CRA Working Group (together, the "**Working Groups**") (Pearson at [36] [**2/7/16**]).

30. The Working Groups comprised representatives of the Administrators, their advisers and representatives of each of the members of the creditors' committee (the "**Creditor Representatives**") (Pearson at [37] [**2/7/16**]). Many of the people who were members

of the Working Groups on behalf of the Creditor Representatives were legally trained (Pearson at [38] [**2/7/16-17**]). From February to November 2009 the Working Groups formally met on at least 10 occasions, often for full-day discussions, and members also participated in a number of additional conference calls, during which the Creditor Representatives actively participated in discussions and debates (Pearson at [41] [**2/7/17**]). The contribution of the Creditor Representatives to the Draft Scheme and then the CRA through their participation in the Working Groups was not only in respect of the key terms of the mechanism but also at a granular level with respect to the operation and effect of particular provisions (Pearson at [42] [**2/7/17**]). The CRA, and the draft Scheme before it, had the unanimous support of the Working Groups and was recommended by the creditors' committee (Pearson at [42], [66] and [76] [**2/7/17 and 25-28**]).

31. The result of this process was that the CRA provided for a uniform set of rules for the return of Trust Assets and contained a standard methodology for the valuation of claimants' positions and other claims (Lomas 10 at [18] [**2/2/7**]). It was also designed to be capable of extension to creditors with purely unsecured claims (i.e. those with no Trust Asset claims), subject to certain conditions (Pearson at [28] [**2/7/9**]).

32. In the course of its development, the CRA was consistently described as:

(1) a mechanism for returning Trust Assets (in the same way as the Draft Scheme would have done), determining the value of a client's net financial position with LBIE and speeding up the return of Trust Assets (SAF (34/35) at [38.1] [**1/18/7**]; Pearson at [60] [**2/7/23**]); First Progress Report, p.34 [**7A/363**]);

(2) a compromise of claims relating to trust assets and Financial Trading Arrangements between LBIE and the client (the "**Financial Contracts**") (SAF (34/35) at [38.2] [**1/18/7**]; Pearson at [98] and [117] [**2/7/34 and 40-41**], update on the LBIE website dated 24 November 2009 in respect of the CRA, at page 702 of Exhibit SAP7 [**7B/702**]);

(3) an arrangement which sought so far as possible: (i) to determine, quantify and crystallise the value of unsecured claims; (ii) to establish standard methods for

the termination and valuation of Financial Contracts ([**3/217**] and page 12 of Exhibit SAP7 [**7A/12**]); and (iii) to achieve finality as regards the relationship between LBIE / the Administrators and the clients (SAF (34/35) at [38.3] [**1/18/7-8**]; Pearson at [24] and [117] [**2/7/8 and 40-41**]); and

(4) a mechanism which involved a release of all pre-existing claims in exchange for new claims against LBIE calculated by reference to the valuation methodology contained in the CRA (Pearson at [71] and [99] [**2/7/27 and 34-35**]).

(d) Implementation and operation of the CRA

33. The CRA was proposed to eligible clients on 24 November 2009 with the publication of the CRA circular (the "**CRA Circular**) [**3/209**] (SAF (34/35) at [40] [**1/18/8**]; Lomas 10 at [27] [**2/2/10**]; Pearson at [97] [**2/7/34**]). The CRA Circular contained the full text of the agreement and various supporting materials (SAF (34/35) at [40] [**1/18/8**]; Pearson at [34]; [97] [**2/7/15 and 34**]). A letter from the Administrators was sent to eligible clients (the "**CRA Letter**") [**3/216**] along with the CRA Circular and a summary of the principal provisions and effect of the CRA (Pearson at [97] [**2/7/34**]). The CRA Letter stated [**3/217**] that the "*objective of the* [CRA] *is to establish standard methods for the termination and valuation of Financial Contracts and to expedite the process of asset distribution in order to bring finality to Signatories in respect of these positions*" and noted [**3/219**] that one of the advantages of accepting the offer was that it was expected to "*provide finality and certainty regarding the financial position between Signatories and the Company*" (Pearson at [97] [**2/7/34**]).

34. CRA signatories were made aware that they would be giving up valuable rights arising out of their existing contracts in return for the benefits arising out of the CRA, including those associated with agreeing the value of unsecured claims under financial contracts and the return of Trust Assets (Pearson at [116] to [120]) [**2/7/40-2**].

35. As to the mechanism by which the CRA released pre-existing claims, CRA signatories waived and released the following (with effect from the date on which the CRA became effective) [**3/326**]:

(1) "*all Claims for or in respect of any payment for or on account of any Asset which is or was at any time the subject of an Asset Claim*" (Clause 4.2.1) [**4a/63**];

(2) "*all Claims for consequential or economic loss (including Claims for loss of bargain, loss of value or other losses computed by reference to the value which may have been available to a Signatory had any obligation of the Company to the Signatory been duly performed in a timely manner in accordance with its terms) in respect of any Asset which is or was at any time the subject of an Asset Claim*" (Clause 4.2.2) [**4a/63**]; and

(3) "*all Claims (apart from, for the avoidance of doubt, Modified Claims) in respect of any Financial Contract*" (Clause 4.2.3) [**4a/63**].

36. In exchange for the release of these claims the CRA signatories acquired various new rights under the CRA. In particular, pursuant to Clause 4.4.2, the CRA signatories acquired (inter alia) "*the right to claim as a new obligation of the Company their Net Financial Claim (if any)*" (Clause 4.4.2(ii)) and "*an Ascertained Claim (if any) for such amount as is determined under this Agreement…*" (Clause 4.4.2(iii)) [**3/327**].

37. Schedule 2 to the CRA Circular Letter ("*Reader's Guide to the Claim Resolution Agreement*") also made clear that "*one of the main purposes of the Agreement from the Company's perspective is to obtain a release from the Signatories to claims they might otherwise have against the Company and the Administrators, including any claims for consequential damages*" (paragraph 4.1(v)) [**3/234**].

38. In order to calculate a client's Net Contractual Position, it was necessary to convert all claims into a single currency. This enabled an account to be taken of all positions and claims arising between LBIE and a CRA signatory (e.g. for netting purposes) (SAF (34/35) at [45] [**1/18/9**]; Pearson at [29] [**2/7/9-10**]). The majority of claims subject to the CRA were already denominated in US dollars prior to the clients' accession to the CRA such that this conversion of claims into US dollars would only have been required in the minority of cases (Pearson at [29] [**2/7/9-10**] and Browning 1 at [10] [**2/6/3**]).

39. The CRA provided for the Net Contractual Position to be calculated by reference to the Contractual Valuation Provisions (as defined in the CRA) subject to a number of Overriding Valuation Provisions (as defined in the CRA) (Pearson at [119.3] [**2/7/41**]; Part 7 of the CRA [**3/350-364**]). The Overriding Valuation Provisions included provisions (*inter alia*): for the date at which the close-out amount of open contracts was to be determined; for the valuation of short security positions or any rehypothecated security; and for the disregarding of flawed asset and walk away provisions (see Clause 20.4 [**3/351**]). Clause 21 provided for the Contractual Valuation Methodology, which stipulated (*inter alia*) the circumstances in which (and the extent to which) the Overriding Valuation Provisions would trump the Contractual Valuation Provisions of each Financial Contract (Clause 21.6 [**3/354**]).

40. Whilst CRA signatories were free to compromise their claims on the basis of the CRA or to choose not to do so, in exchange for releasing valuable rights under the underlying Financial Contracts, the CRA signatories would obtain a number of benefits in addition to the early return of Trust Assets. For example, rehypothecated securities and short positions were valued as at 12 September 2008 (i.e. the last business date before the Lehman entities were placed in Administration or filed for Chapter 11 bankruptcy deepening the financial crisis) (Clause 20.4.3 [**3/351**]), and the ability to collateralise liabilities with unpaid claims enabled the reduction of any interest accrual on any liabilities (Pearson at [106], [119.3] and [120] [**2/7/36 and 41-42**]).

41. The CRA was proposed for collective approval and was therefore not subject to any further negotiation or amendment. However, Trust Asset claimants had significant notice of, and the opportunity for questions and answers on, the proposed terms of the CRA (Lomas 10 at [27] [**2/2/10**] and Pearson at [130] [**2/7/45-46**]). The material provisions of the Draft Scheme (which were substantially replicated in the CRA) were clearly set out and communicated to Trust Asset claimants in July 2009 (Pearson at [130] [**2/7/45-46**]).

42. The CRA included a specific non-reliance clause in the form of a warranty by each signatory that it was not relying on any communication or information from LBIE in entering into the CRA. See Clause 76 of Part 17 of the CRA at [**3/433**].

43. The CRA only became effective once a pre-determined approval threshold, which was set at a very high level, had been reached (Lomas 10 at [27] [**2/2/10**] and Pearson at [26] [**2/7/8**]). The CRA became effective on 29 December 2009 (SAF at [5]; Pearson at [108]). As at 14 March 2015, a total of 9,163 separate asset lines had been returned to 224 CRA signatories for a total value of £2.96bn (excluding derived income).

(e) The Consensual Approach, Project Canada and the CDDs

44. The CDDs were the culmination of the Administrators' attempts to: (i) streamline the process for compromising and quantifying unsecured claims; and (ii) make it easier for creditors to sell their claims against LBIE should they wish to realise those claims sooner than through distributions made in the administration. As with the CRA, the Administrators saw that there was benefit (both in terms of efficiency and fairness) in introducing a structured approach to dealing with potential counterparty claims.

(f) Objective of Project Canada and the CDDs

45. By late 2009, the Administrators had concluded that they should commence preparations in order to be in a position to make distributions to unsecured creditors from the LBIE estate. On 2 December 2009, they therefore obtained from Briggs J an order to convert the Administration into a distributing administration (SAF (34/35) at [3] [**1/18/2**]; Lomas 10 at [28] [**2/2/11**]).

46. Thereafter, the Administrators sent to all creditors whose addresses were known to them at that time a notice pursuant to Rule 2.95 informing them that the Administrators proposed to make a distribution to LBIE's unsecured creditors (the "**Distribution Notice**"), which was posted on the LBIE website on or about 4 December 2009 (SAF (34/35) at [4] [**1/18/2**]; Lomas 10 at [29] [**2/2/11**]; Pearson at [101] [**2/7/36**]).

47. By the time of the publication of the Administrators' Third Progress Report (i.e. 14 April 2010), the Administrators envisaged that approximately 4,500 counterparties were likely to be creditors of LBIE (SAF (34/35) at [50] [**1/18/10**]; Lomas 10 at [32] [**2/2/11-12**]).

48. From December 2009 onwards, the Administrators encouraged creditors to submit their claims as soon as possible (SAF (34/35) at [6] [**1/18/2**]; Lomas 10 at [31] [**2/2/11**]). As part of that process an online claims portal was launched in July 2010 in order to assist creditors in submitting their claims (the "**2010 Portal**") (Fourth Progress Report, p.28 [**5/1/30**]). However, the Administrators faced difficulties in persuading creditors to submit claims given the extended period until the last date for proving. By way of example, as at 14 September 2010, only 821 counterparties had submitted their claims. It might have been the case that, in light of the last date for proving being some time off, creditors preferred to "keep their powder dry". For the purposes of the first dividend, the last date for proving was originally set as 31 December 2010 but, as described below, it was later postponed to 31 December 2012 before ultimately being brought forwards to 31 July 2012.

49. The Administrators were acutely aware that the majority of LBIE's creditors had claims arising under complex Financial Trading Arrangements and that the process of determining such claims under the statutory proof of debt regime would be complicated and lengthy. As at 14 April 2010, the Administrators reported to creditors that the main challenges facing the Administrators' team dealing with unsecured creditors included: the complexity of the relationships (including cross-entity netting and set-off against positions with LBIE affiliates); the failure of counterparties to provide valuation statements; and reconciliations of underlying principal positions) (Third Progress Report, pp.23 and 31-35 [**7B/784 and 791-6**]).

50. As a result of the scale of the valuation and validation process required to determine the claims of such a large number of claimants, the Administrators considered it appropriate to explore alternative processes for determining unsecured creditors' claims (Lomas 10 at [33] [**2/2/12**]).

51. The difficulties faced by the Administrators in relation to valuing such claims included the fact that certain financial contracts allowed counterparties scope to formulate claims on their own interpretation of the terms of various master agreements which did not necessarily reflect the actual loss resulting from LBIE's insolvency, such that the difference between LBIE's valuation and that of many street counterparties was very considerable (Third Progress Report, p.35 [**7B/796**]).

52. The Administrators noted in an update posted on the LBIE website on 16 June 2010 (the "**June Website Update**") that **[4A/441-443]:**

> "*it is apparent from the work undertaken to date that the manner in which many unsecured creditors have calculated and submitted claims varies widely and that, in many instances, claims asserted by unsecured creditors are higher than LBIE's assessment. Drawing upon their experience in other major insolvencies and following a careful evaluation of the claims profile in this estate, the [Administrators] have concluded that a conventional procedure for determining claims, whether using their existing powers under a distributing administration alone or in conjunction with a scheme of arrangement or a company voluntary arrangement, it will involve a time consuming and expensive adjudication process that is likely to involve extensive disputes and potential litigation. This in turn means that it is likely to be many years before a material interim dividend can be paid to unsecured creditors.*"

53. The Administrators went on to note that they were exploring various options to progress the determination of unsecured creditors' claims and that they had been working together with the Unsecured Creditors' Resolution Working Group to explore the feasibility of an alternative, consensual procedure for determining claims (the "Consensual Approach"). It had initially been thought that the determination of unsecured creditors' claims might be best effected through a scheme of arrangement (Second Progress Report, 14 October 2009, p24 [**6/205**]), however, this gave way to the development of the Consensual Approach.

54. Subsequently it was reported in the Fourth Progress Report (dated 14 October 2010) that the complexities noted above persisted and that the Administrators anticipated that the resolution of LBIE's unsecured creditor claims, outside of an accelerated consensual approach to the resolution of such claims, would take many years to conclude (Fourth Progress Report, p.29), whereas the Consensual Approach would "*significantly shorten the life (and therefore cost to creditors) of the Administration*" (p.31) [**5/1/31-33**].

55. To assist the Administrators in effecting distributions as quickly and efficiently as possible (and in achieving finality and certainty in the resolution of unsecured claims), the Administrators considered that there were advantages in adopting the Consensual Approach as a prelude to (and to seek to avoid the potential uncertainties inherent in)

the formal proof of debt process which is set out in Chapter 10 of Part 2 of the Insolvency Rules 1986.

56. The Administrators noted in the June Website Update that the benefits to unsecured creditors under the Consensual Approach would include: (i) the rapid determination of an agreed and formally admitted claim against LBIE; (ii) a significant reduction in the administrative burden for unsecured creditors; (iii) a material reduction in the costs of determining unsecured creditors' claims; (iv) an acceleration to the timing of a cash dividend from LBIE; (v) the potential option of receiving a full and final payment in settlement of an admitted claim; and (vi) the potential for enhanced overall realisations in the LBIE estate as resources were focused on asset realisation.

57. The principal objective of the process described as Project Canada was therefore to simplify and accelerate claims determination and the distribution process by developing and implementing an alternative framework to the standard insolvency proving regime (Lomas 10 at [34] and [42] [**2/2//12 and 14**]). The Administrators intended to use CDDs, amongst other things, to streamline the process of agreeing with creditors the valuation of their claim amounts, to enable them to make distributions in respect of these claims (SAF (34/35) at [63] [**1/18/12**]; Lomas 9 at [61] and [65] [**2/1/20-21**]; Lomas 10 at [47-48] [**2/2/16-17**]; Fourth Progress Report p.29 [**5/1/31**]). The primary purpose of the CDDs was therefore to provide an efficient process for agreeing the amount of a creditor's claim such that distributions could be expedited (Lomas 10 at [48] [**2/2/16**]).

58. In designing the most appropriate way of dealing with creditor claims the Administrators also had to take into account the judgment given by the Court of Appeal in August 2010 in respect of the Administrators' application in relation to pre-administration client money (the "**Client Money Appeal Judgment**") (SAF (34/35) at [67] and [68] [**1/18/13**]; Lomas 10 at [38] [**2/2/16**]).

59. The practical impact of the Client Money Appeal Judgment was to create considerable uncertainty as to various material matters such as: which of LBIE's creditors had client money claims, unsecured claims or both; the value of the client money pool; and therefore what funds (if any) might be needed to "top up" the client money pool that

would otherwise be available for distribution to LBIE's unsecured creditors (SAF (34/35) at [67] and [68] [**1/18/13**]; Lomas 10 at [39] [**2/2/13**]). An important practical consequence of the Client Money Appeal Judgment, as explained in the Fourth Progress Report (p.12) [**5/1/14**] and the Fifth Progress Report (p.24) [**8/1/24**], was that the Administrators needed as a result of that judgment to embark on a complex exercise to identify counterparties who may have held contractual entitlements to client money (irrespective of whether such parties had previously claimed or were overtly given client money protection) and assets within LBIE's House Estate which might have been regarded as client money or the proceeds of client money through the mechanism of tracing and which would have to be added to the pre-Administration client money pool that was previously segregated by LBIE.

60. The Client Money Appeal Judgment also created considerable uncertainty as to the level of distributions LBIE would ultimately be able to make to unsecured creditors and, as a result, the Administrators were obliged to apply to the High Court for an extension by a two year period (to 31 December 2012) for the last date for proving (as specified in the Distribution Notice) (Lomas 10 at [40] and [41] [**2/2/13-14**]). The chief problem arising out of the judgment from the point of view of progressing the resolution of unsecured creditor claims was that the scope of client money entitlements was unclear and, therefore, there was considerable uncertainty as to whether certain claims should be treated as client money claims or unsecured claims. This impeded the Administrators' ability to reach a figure, for proving purposes, representing the value of many unsecured creditor claims.

61. The impact of the Client Money Appeal Judgment was set out by the Administrators in the Fourth Progress Report (dated 14 October 2010) as follows (p.31; emphasis original) [**5/1/33**]:

> "*When the concept of the Consensual Approach was first announced, it was anticipated that a LBIE Determination, once accepted by the creditor, would constitute an* ***admitted*** *unsecured claim in the Administration.*
>
> *The Appeal Court Judgment (see Section 7.2) means that there is now material uncertainty as to what constitutes an unsecured liability, and what constitutes a claim which is subject to Client Money protection. Furthermore, uncertainty now exists as to whether or not any House funds should in fact have Client Money status.*

The Administrators and creditors could simply choose to wait until the legal landscape is clearer before progressing further the resolution of unsecured claims. However, the Administrators are very concerned that it could take some time (perhaps years) before a complete picture is formed and over time it will become more difficult and costly to agree creditor balances.

In addition, whether or not a liability qualifies for Client Money protection or is simply an unsecured claim does not change a creditor's total overall claim against LBIE.

The Administrators have therefore decided to progress claim agreement (i.e. agreement of the net balance due to a creditor) and, if so agreed, the Administrators would later inform a creditor what portion of that net balance (if any) constitutes a Client Money claim. The residual balance (plus the shortfall, if any, on the Client Money portion) would then be admitted as an unsecured claim to rank for dividend.

Any creditors who would prefer not to adopt this approach and instead wish to wait to negotiate bilaterally may do so at a later date, albeit this is likely to take significantly longer to achieve."

62. In light of creditor support, the Administrators focused on developing standard form agreements for creditors in order to accelerate the claims agreement process, whilst also accommodating the uncertainty created by the Client Money Appeal Judgment (Lomas 10 at [42] [**2/2/14**]). This project was referred to externally as the Consensual Approach, but internally as Project Canada (Lomas 10 at [42] [**2/2/14**]).

63. Contrary to the SCG's suggestion in their skeleton argument, the Administrators do not consider that there was any sensible alternative at that time to pursuing the development of standard form agreements (such as the CDDs), particularly in light of the problems arising from the Client Money Appeal Judgment.

64. The CDDs were explained to creditors as a standardised legal agreement which was "*designed to preserve a creditor's potential entitlement to Client Money, notwithstanding its agreement of a single claim figure in respect of the LBIE estate, potentially incorporating both unsecured and Client Money elements*". The Administrators also noted that "*in recognition of creditors' desire for flexibility, the Deed allows creditors to freely trade agreed claims without the need for LBIE's consent*". See the Fifth Progress Report, p.29 [**8/1/29**].

65. The original CDD template (the "**Agreed Claims CDD**") was designed to achieve as much certainty as to the total value of unsecured claims as was possible, given the uncertainty to which the Client Money Appeal Judgment had given rise. This in turn was intended to facilitate the earliest practicable distribution of dividends to unsecured creditors, which was of benefit to all creditors. The Agreed Claims CDD accommodated the uncertainty to which the Client Money Appeal Judgment had given rise by agreeing the amount of a creditor's claim but leaving it for a later determination or agreement as to whether the claim constituted a Client Money Claim (as defined therein) or an unsecured creditor claim (or a combination of the two) (SAF (34/35) at [68] [**1/18/13**]; Lomas 10 at [49] [**2/2/16**]).

(g) Development of Project Canada and the CDDs

66. Just as the Draft Scheme and the CRA were developed in consultation with the Working Groups, Project Canada was developed from its inception in consultation with LBIE's unsecured creditors through the Unsecured Creditors' Resolution Working Group (which included members of the Creditors' Committee) (Lomas 10 at [42] [**2/2/14**]). The Administrators also engaged with over 230 creditors, including those with the largest unsecured claims and the most complex financial trading positions, to gauge their response to the approach (Fourth Progress Report, p 29 [**5/1/31**]).

67. It was noted, for example in the Fourth Progress Report (p.5) [**5/1/7**], that, during the six month period with which that report was concerned (15 March to 14 September 2010):

> "[a] *considerable amount of time and effort has again been contributed by members of the Committee, particularly with regard to the development of a claims agreement mechanism for unsecured creditors… Further, the Administrators have engaged in constructive dialogue with various individual creditors during the past six months. The Administrators are pleased to receive such engagement from LBIE's creditor community, which has significantly assisted the Administrators in the development of innovative frameworks for the pragmatic resolution of the Administration.*"

68. Thus, whilst the CRA and Project Canada (which resulted in LBIE entering into CDDs with creditors) were driven forward by the Administrators, the development of each of

these projects was informed by extensive consultation with the most significant creditor stakeholders (through working groups and the Creditors' Committee).

69. With the benefit of that consultation, the Administrators decided to progress the agreement of the amount of creditors' claims, whilst holding over the question of whether all or part of the agreed claim constituted client money for subsequent determination or agreement.

70. Furthermore, the structure designed with the assistance of the Unsecured Creditors' Resolution Working Group:

(1) proceeded on the basis that LBIE would offer a creditor a single number calculated by reference to LBIE's determination of the creditor's claim taking account of the positions under all Financial Trading Arrangements between LBIE and the creditor (the "**LBIE Determination**") (SAF (34/35) at [54] [**1/18/10-11**]; Lomas 10 at [44] [**2/2/15**]); and

(2) operated on the basis of LBIE's own valuation of a creditor's claim, which the Administrators considered to be a reliable and pragmatic alternative to a full assessment of the vast amount of documentation and data which would otherwise have been generated and relied upon by creditors in support of their claims.

71. In the Fourth Progress Report (dated 14 October 2010) the Administrators explained to creditors the mechanism underpinning the Consensual Approach in the following terms (p.7) [**5/1/9**]:

> "*A framework has been developed (the "Consensual Approach") for the expedited resolution of the claims of financial trading counterparties without Client Assets. Eligible creditors will receive an offer to agree their claim (the "LBIE Determination") by applying LBIE's House valuation methodology that will be consistently applied. Further details will be provided to eligible creditors over the coming months. It is intended that the Consensual Approach will be optional and will not be imposed on creditors.*"

72. This structure ultimately proved to be acceptable to a significant proportion of unsecured creditors who accepted LBIE's Determination and entered into a CDD (Lomas 10 at [44] [**2/2/15**]).

(h) Implementation and operation of the CDDs

73. The Administrators formally commenced the communication of LBIE Determinations to creditors in November 2010 (SAF (34/35) at [55] [**1/18/11**]; Lomas 10 at [46] [**2/2/15**]). Creditors were advised that the LBIE Determination was not intended to be a matter for negotiation and that they were entitled either to accept or reject it. If the creditor accepted the LBIE Determination, the agreement would be formalised in a CDD (provided the other terms thereof were accepted by the creditor). Creditors were also advised that if the LBIE Determination was rejected then their claims would have to be negotiated in due course (Lomas 10 at [45] [**2.2.15**]).

74. Creditors were not forced to enter into CDDs. The Administrators had no ability to compel creditors to enter into CDDs (SAF 36A at [11] [**1/19/3**]) and various creditors have not done so. Indeed it was made clear, for example in the Fourth Progress Report, that it was intended that "*the Consensual Approach will be optional and will not be imposed on creditors*" (p.7 [**5/1/9**]; see also p.30 [**5/1/32**]). Accordingly, the Administrators do not accept the SCG's contention, for example at paragraph 12 of their skeleton argument, that creditors were "*required*" by the Administrators to sign CDDs. Indeed, in the Fourth Progress Report it was emphasised that: "*The Consensual Approach is an optional claims determination process available to Street Creditors (estimated to be up to 3,490 counterparties, the claims of which LBIE estimated to total £4.8bn)*" (p.30) [**5/1/32**]. In the Fourth Progress Report it was also stated that: "*Any creditors who would prefer not to adopt this approach and instead wish to wait to negotiate bilaterally may do so at a later date, albeit this is likely to take significantly longer to achieve*" (p.31) [**5/1/33**].

75. However, the significant majority by value of LBIE's general unsecured creditors have now entered into a form of CDD (36A SAF at [2] [**1/19/2**]). Indeed, the concept of the Consensual Approach was noted to have been well received by creditors since its introduction in June 2010 (the June Website Update and Fourth Progress Report, p.27

[**5/1/29**]). This suggests that LBIE's creditors shared the Administrators' view that the settlement of claims by way of some form of CDD was, in the circumstances of the Administration, attractive (and mutually beneficial). In short, as well as being developed in close consultation with the Unsecured Creditors' Resolution Working Group, the CDDs have transpired to be popular with unsecured creditors in that a very large number of them have entered into CDDs.

76. Further, and as explained for example in Lomas 10 at [45] [**2/2/15**], whilst a creditor's entry into a CDD in fact facilitated earlier distributions or a sale of the claim, the failure to enter into a CDD did not prohibit participation in distributions. Rather, a creditor which refused to enter into a CDD was informed that it would be able to negotiate its claim in due course. Creditors would in any event have had to be dealt with in some sequence; they could not all have been assessed in parallel. The Administrators could not realistically have determined billions of pounds worth of factually and legally complex claims other than over a lengthy period, necessarily dealing with the claims of different creditors at different times. By dealing with the consensual claims first the Administrators reduced the uncertainty in the LBIE estate (for example as to the total amount of unsecured claims) more quickly than if it had first engaged in negotiations in respect of more contentious claims.

77. Entering into a CDD gave a creditor certainty as to the amount of its claim and, upon the claim becoming an Admitted Claim pursuant to the terms of the CDD, an entitlement to participate in such dividends as would be paid in the Administration (Lomas 10 at [48] [**2/2/16**]).

78. Another advantage for creditors was that the CDDs contained a transfer notice mechanism that ensured that, in the event that the creditor wanted to sell its claim both the creditor and the Administrators had a defined process by which the claim assignment would be acknowledged by LBIE. The transfer notice has become widely recognised in the market as the most expedient procedure for LBIE acknowledging the assignment of claims (Lomas 10 at [48] and [63] [**2/2/16 and 21-22**]). It follows that entering into a CDD assisted many creditors in realising immediate value by enabling them to sell their claims (Lomas 10 at [48] and [63] [**2/2/16 and 21-22**]). Indeed, it was in "*recognition of creditors' desire for flexibility*" that CDDs allow "*creditors to freely*

trade agreed claims without the need for LBIE's consent" (Fifth Progress Report, p.29 [**8/1/29**]).

79. The Administrators have sought, so far as reasonably possible, to ensure that CDDs remain relatively standardised, although CDDs have evolved to some extent over time (SAF (34/35) at [59] [**1/18/12**]; Lomas 10 at [57] [**1/18/11**]). In particular, the Administrators have made global revisions to the CDD templates from time to time in circumstances where a particular amendment was being commonly accepted by LBIE (SAF (34/35) at [60] [**1/18/12**]; Lomas 10 at [58] [**2/2/19**]). Further, although a large number of different creditors have entered into CDDs, many of them were represented by a relatively small group of law firms, such that CDD amendments agreed with one creditor would often be requested in the context of dealing with another creditor represented by the same solicitors (Lomas 10 [58] [**2/2/19**]). Whilst the CDDs were circulated under cover of an email that stated they were non-negotiable, LBIE did consider proposed amendments at the request of creditors on a case by case basis (SAF (34/35) at [84] [**1/18/16**]; Lomas 10 at [57] to [58] [**2/2/19**]). Of these changes, only a small number of substantive amendments relevant to the Release Clause were made. Generally these were followed by updates to the standard form CDDs (for example in relation to the Statutory Interest Language and the CCC Language) (Lomas 10 at [68-70] and [76-78] [**2/2/23ff.**]).

80. Each form of CDD included a specific non-reliance clause in the form of a warranty by each creditor that it was not relying on any communication or information from LBIE in entering into the CDD (see, for example, Clause 9.2 of the Agreed Claims Foreign Currency CDD (with no Statutory Interest or CCC carve-out) at [**11/1/13**]; also [**11/1A/12**]).

81. As at March 2015, over 1,600 CDDs had been entered into with approximately 1,290 different counterparties. For each of the CDDs entered into, there are typically, in addition to the final CDD itself, drafts of the deed exchanged between the parties as well as correspondence and other related documentation (SAF 34/35 at [61] [**1/18/12**]; Lomas 10 at [8] and [10] [**2/2/3**]).

82. The principal categories of CDDs that have been entered into have been explained in some detail in the evidence (in particular Lomas 10 at [38] to [64] [**2/2/12**]; also the 34/35 SAF at [67] to [80] [**1/18/12**]). In brief, LBIE entered into:

(1) Agreed Claims CDDs: These were intended to accommodate the uncertainty arising from the Client Money Appeal Judgment (see Lomas 10 at [38] to [52] [**2/2/12**]). LBIE also produced template supplemental deeds (each a "**Client Money Supplemental Deed**") which enabled a creditor to release or assign its client money entitlements in order to secure an "Admitted Claim" against LBIE, which claim would be admitted for dividends in the Administration (SAF (34/35) at [71] [**1/18/13**]; Lomas 10 at [52] [**2/2/17**]). The first Agreed Claims CDD was entered into on 30 November 2010 (SAF (34/35) at [8] [**1/18/2**]; Lomas 10 at [53] [**2/2/17**]).

(2) Admitted Claims CDDs: In April 2011, LBIE devised a CDD template which would operate such that the agreed amount of a claim would become an "Admitted Claim" immediately upon execution. These were all denominated in sterling and were used in circumstances where there was little or no possibility of the creditor having entitlements to client money (see Lomas 10 at [54] [**2/2/17**]; SAF (34/35) [74] to [76] [**1/18/14**). The first Admitted Claims CDD was entered into on 28 July 2011 (SAF (34/35) at [9] [**1/18/2**]; Lomas 10 at [54] [**2/2/18**]).

(3) Trust CDDs: These were developed specifically for creditors (both CRA signatories and non-CRA signatories) with claims to Trust Assets (see Lomas 10 at [64] to [65] [**2/2/22**]; SAF (34/35) at [77] to [80] [**1/18/15**]). As regards CRA signatories, although it was not strictly necessary for these creditors to enter into CDDs in order to agree and admit their unsecured claims (as the CRA was intended to be a complete mechanism for the resolution of their claims), LBIE's policy was to request that they did so where they reached agreement with LBIE as to the amount of their claim, given that a CDD was considered to be a more straightforward and less time-consuming way of documenting that claim than issuing the various notices required under the CRA (Lomas 10 at [63] [**2/2/22**]).

83. In addition, certain tiered release structures were entered into, whereby certain claims were agreed by way of a first CDD (the "**Original Tiered CDD**"), pending resolution of other claims which were carved out of the Original Tiered CDD release clauses and reserved for subsequent determination by way of subsequent CDD(s) (the "**Additional Tiered CDDs**") (Lomas 11 at [65] [**2/4/24**]).

(i) The CDD release provisions

84. A broad release provision (the "**Release Clause**") was included, in materially the same form, in each of the different forms of CDD save for the Trust CDDs (Lomas 10 at [61] [**2/2/20**]) (in which different language was sometimes used in the release clause to preserve certain types of outstanding claims for future determination such as asset shortfall or pending trade claims which were the subject of tiered CDDs) and Aggregator CDDs (in which there is still a broad release but this is in a slightly different form to the standard release as they provide for the release of the claims of the original creditor that have been assigned to the aggregator) (Lomas 10 at [61 and 62] [**2/2/20**]). The release provisions in the Aggregator CDDs are in a different form from the standard form release in that they provide for the release of the claims of the original creditor that were assigned to the aggregator. The reason for this different form of release is that an aggregator may have acquired a number of different claims against LBIE and it is not intended that rights in relation to other claims (i.e. other than those being agreed in the CDD in question) be released by the CDD (Lomas 10 at [52] [**2/2/17**]).

85. As noted at Lomas 10 at [59] [**2/2/19**], the Release Clause, generally at Clause 2.1 of the CDD, expressed so as not to apply to the Agreed or Admitted Claim, was in the following (or similar) form (see also SAF (34/35) at [81] [**1/18/16**]):

> "*…the Creditor and (i) the Company and (ii) the Administrators are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest costs and orders for costs), demands, actions, causes of action, Liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or*

statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the [Creditor] Agreement[s] or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and/or the Company and/or the Administrators on the date hereof…"

86. The Release Clause was designed to give LBIE and the Administrators certainty in respect of creditors' claims so as to facilitate making distributions (SAF (36A) at [1] [**1/19/2**]; Lomas 9 at [64.3] [**2/1/21**] and Fourth Progress Report, pages 29 and 31 [**5/1/31-33**]).

87. When the Administrators provided creditors with a draft CDD for their consideration, it was usual practice that the creditor received a standard form covering email. The precise wording of this email evolved over time but generally highlighted that (SAF (34/35) at [83] [**1/18/16**]; Lomas 10 at [56] [**2/2/18**]):

(1) The terms of the CDD, once executed, would establish the agreed claim amount which the counterparty would have against LBIE;

(2) The counterparty should take independent professional advice on the contents of the deed before executing it; and

(3) The terms of the CDD were intended to be non-negotiable.

88. Prior to 2012, the various CDD templates did not contain an express reference to Statutory Interest. However, in early 2012 the possibility of a Surplus started to be discussed in the market and this triggered queries from certain counterparties to the Administrators as to the impact of the Release Clause on any entitlement they may have to Statutory Interest. The Administrators' initial reaction to these queries was to explain their view that they considered the inclusion of language to preserve a creditor's right to Statutory Interest to be unnecessary on the basis that the Release Clause did not waive any entitlement a creditor may have to Statutory Interest (SAF (36A) at [3] [**1/19/2**]; Lomas 10 at [66] and [67] [**2/2/23**]).

89. However, between June 2012 and September 2012, given the increasing number of requests from creditors that the impact of the Release Clause on entitlements to Statutory Interest be clarified, the Administrators agreed (on a case-by-case basis) to include language in CDDs dealing with the preservation of the creditor's right to Statutory Interest (SAF (36A) at [4] [**1/19/2**]; Lomas 10 at [68] and [70] [**2/2/23**]). The amendment was made to clarify the position in relation to entitlements to Statutory Interest and was not intended to have a substantive effect (Lomas 10 at [69] [**2/2/23**]).

90. The first CDD incorporating an express reference to Statutory Interest was executed on 28 June 2012. The first Client Money Supplemental Deed incorporating an express reference to Statutory Interest was executed on 25 September 2012 (SAF (34/35) at [85] [**1/18/31**]; Lomas 10 at [66] and [68] [**2/2/23**]). In August 2012, the Administrators decided that the suite of CDD templates should be revised in order to include standard form language dealing with Statutory Interest (SAF (34/35) at [87] [**1/18/17**]; Lomas 10 at [70] [**2/2/23**]).

91. Such language was subsequently agreed by the Administrators in the form set out below (the "**Statutory Interest Language**") and was incorporated in the global suite of CDD templates in September 2012 with the effect that CDDs executed after this date generally contain the Statutory Interest Language:

> *"For the avoidance of doubt, this Deed shall not prejudice, affect or restrict (and entry into this Deed is not intended to be, and shall not be construed as, an election of remedy or a waiver or limitation of) any rights or claims that the Creditor may have for or in respect of interest under rules 2.88(7) to 2.88(9) (inclusive) of the Insolvency Rules or section 189 of the Insolvency Act."*
> (Lomas 10 at [70]).

92. The Client Money Supplemental Deeds were similarly updated in early September 2012 to include the following language in relation to Statutory Interest (the "**CM Statutory Interest Language**"):

> *"For the avoidance of doubt, this Deed and the CDD[s] shall not prejudice, affect or restrict (and entry into this Deed is not intended to be, and shall not be construed as, an election of remedy or a waiver or limitation of) any rights or claims that the Creditor may have for or in respect of interest on its Admitted*

Claims (if any) under rules 2.88(7) to 2.88(9) (inclusive) of the Insolvency Rules or section 189 of the Insolvency Act."
(Lomas 10 at [73])

93. On 26 November 2012, the Administrators gave notice of their intention to pay a first interim dividend of 25.2 pence in the pound. However it was only on 12 April 2013, with the publication of the Ninth Progress Report for the period 15 September 2012 to 14 March 2013 (p.9), that the Administrators first provided illustrative outcome estimates indicating a potential Surplus on a high case (SAF (34/35) at [17] [**1/18/4**]; Copley at [18] [**2/8/5**]; Pearson at [113] [**2/7/39**]).

94. The concept of a currency conversion claim ("**CCC**") was first raised with the Administrators by a creditor (Elliott Management Corporation) in the context of the Waterfall I Application in or around March 2013. At that point in time, the various CDD templates did not contain any reference to CCCs (SAF (34/35) at [90] [**1/18/17**]; Copley at [19] [**2/8/5**]).

95. In March 2013, Lydian Overseas Partners Master Fund Limited ("**Lydian**") was joined to the Waterfall I Application to argue for the existence of Currency Conversion Claims and their priority ranking behind Statutory Interest and ahead of the subordinated debt (and the Waterfall I Application was amended to include that issue for determination). Following the joinder of Lydian, certain creditors began to raise queries as to the possible existence of CCCs and, latterly, the impact, if any, of the Release Clause on the entitlements CCCs (Copley at [20] and [21] [**2/8/6-7**]).

96. The initial response of the Administrators was to refuse to make any amendments to the CDDs in light of the fact that the Administrators wished to deal with creditors on as consistent a basis as possible and a significant number of CDDs had already been executed (SAF (36A) at [10] [**1/19/3**]; Lomas 10 at [76] [**2/2/26**] and Copley at [21] [**2/8/7**]). The Administrators noted, when asked by creditors about this issue, that creditors should take their own legal advice as to the effect (if any) of the Release Clause on CCCs (Copley at [21] [**2/8/7**]). However, when asked his view, Mr Copley informed certain creditors that he did not know whether or not CCCs existed and, if they did exist (which he initially doubted), whether they were waived by virtue of the Release Clause contained in the CDDs (not at that stage having taken legal advice on

the matter) and that no change would be made to the CDDs in this regard so as to avoid creating different classes of CDDs (SAF (36A) at [12] [**1/19/3**]; Copley at [23] [**2/8/8**]).

97. The suggestion that the Release Clause waived CCCs was specifically made on 11 October 2013 at the pre-trial review of the Waterfall I Application (the "**Waterfall I PTR**") by leading counsel for LBHI2. This prompted the Administrators to revisit their position on CCCs and they engaged with various creditors and their legal advisors on the issue. This was largely because there was such concern about the potential effect of the Release Clause on CCCs that some creditors were already refusing to sign CDDs (SAF (36A) at [13] [**1/19/4**]; Copley at [24] [**2/8/8**] and Lomas 10 at [76] [**2/2/26**]). Mr Copley decided to cease signing Admitted Claims CDDs unless they included an express preservation of CCCs, which he instructed the Administrators' lawyers to draft, although Mr Copley is aware of a limited number of isolated examples where (for specific reasons) Admitted Claims CDDs were signed after the Waterfall I PTR without any such preservation language (SAF (36A) at [14] [**1/19/3**]; Copley at [24] [**2/8/8**]).

98. It became apparent to the Administrators that an amendment to the CDDs was likely to be necessary. The resulting negotiations of the carve-out dealing with CCCs which took place towards the end of 2013 and into 2014 proved to be difficult and lengthy, with proposals being put forward for consideration by the Administrators by various law firms acting for creditors (Copley at [29] and [30] [**2/8/10**]).

99. The first CDD incorporating an express reference to CCCs was executed on 31 October 2013 (SAF (34/35) at [90] [**1/18/4**]; Copley at [19] [**2/8/6**]), and between then and mid-February 2014 (when an agreed version of the CCC preservation language was added to the template documents) an interim version of the CCC preservation language was included in CDDs (Lomas 10 at [77] [**2/2/26**]; see Appendix C of Lomas 10 for the two most prevalent forms of this interim language [**2/2/44**]).

100. On certain occasions, Agreed Claims CDDs were entered into at the request of creditors (instead of using an Admitted Claims CDD which required the conversion of the creditor's claim into sterling) until the existing form of the CCC Language was approved and the CDD templates updated accordingly in February 2014 (SAF (36A) at [22] [**1/19**]; Copley at [30] [**2/8/10**]).

101. In mid-February 2014 the Administrators updated the CDD templates to contain wording (the "**CCC Language**") in the following form:

> *"Nothing in this Deed shall (i) prevent the Creditor from asserting a Currency Conversion Claim; (ii) operate as a discharge or release of a Currency Conversion Claim if any such claim exists; or (iii) constitute an acknowledgement by the Company of the existence (as a matter of law or fact) of any Currency Conversion Claim"* (Lomas 10 at [78]).

102. The CDDs therefore evolved in light of the perception by the market that a Surplus was possible, which led to queries raised and requests made by creditors, once the market considered there to be a likelihood of a Surplus, in respect of both claims to Statutory Interest and Currency Conversion Claims. In that context, the Administrators' projected outcome for unsecured creditors contained within their six monthly progress reports developed as follows during the relevant period:

(1) As at 14 September 2010, the Administrators were unable to estimate the quantum or timing of any future dividend distribution (Fourth Progress Report, p.11) [**5/1/13**];

(2) As at 14 September 2011, the Administrators anticipated that somewhere between £7.5bn (low case) and £12.5bn (high case) would be available for distribution to ordinary unsecured creditors with claims of between £51.1bn (low case) and £15.0bn (high case) (Sixth Progress Report, p.5) [**8/2/5**].

(3) As at 14 September 2012, the Administrators anticipated that somewhere between £8.1bn (low case) and £14.2bn (high case), would be available for distribution to ordinary unsecured creditors with claims of between £54.6bn (low case) and £15.0bn (high case) (Eighth Progress Report, p.6 [**7B/1056**]);

(4) As at 14 September 2013, the Administrators anticipated that somewhere between £15.87bn (low case) and £18.84bn (high case), would be available for distribution to ordinary unsecured creditors with claims of between £17bn (low case) and £13.59bn (high case) (Tenth Progress Report, p.6) [**8/3/6**].

(j) Miscellaneous points

103. The SCG assert that creditors who chose not to enter into CDDs would be disadvantaged as compared with the position they would have been in if the ordinary proving process had been followed because their claims would not be admitted (and no dividends would be received on them) until they could be agreed on a bilateral, negotiated basis (see paragraph 48 of the SCG's skeleton argument).

104. However, the Administrators would have had to deal with creditors' claims in some order and it was obviously sensible for them to enter into CDDs with those creditors who were prepared to accept the LBIE Determination. Indeed, while those creditors who entered into CDDs accrued various benefits from entering into them (e.g. an immediate sale to a purchaser), all creditors accrued benefits from the more expeditious resolution of the claims of some.

105. Further, in paragraphs 70 to 72 of their skeleton argument the SCG refer to the Surplus Entitlement Proposal (the "**SEP**"). The suggestion is made there that Mr Copley, in the course of a webcast on 6 May 2014, commented that the SEP was based on the Administrators' legal analysis of the creditors' entitlements and, where there was legal uncertainty, on what the Administrators considered fair. However, Mr Copley's comments in this regard referred to the way in which the SEP was put together as a package of compromises, rather than as to individual entitlements with which the SEP was designed to deal. In particular, it is to be noted that the slide to which Mr Copley was speaking when he made these comments referred to five "rules" for calculating creditors' entitlement to the Surplus, only one of which related to creditors' CCC entitlements.

(k) Conclusion

106. The Administrators have already paid 100 pence in the pound to LBIE's (unsubordinated) creditors and have returned substantially all Trust Assets and Client Money. It has been fundamental to the Administrators' strategy throughout this highly complex Administration to seek certainty and finality in their dealings with LBIE's

clients and creditors wherever possible and the Administrators have sought to develop standardised processes to resolve these complexities.

107. The implementation of the CRA and the CDDs has formed a key part of the Administrators' strategy. It has benefited the creditors as a whole by assisting the Administrators to return Trust Property and to declare and pay dividends earlier than would otherwise have been the case and to bring certainty and finality to the value of individual creditors' claims against the estate. It has also benefited those individual creditors who have wished to sell their LBIE debt and wished to do so in a form recognised in the market.

108. Accordingly, Post-Administration Contracts have conferred real and significant benefits both on the individual signatories to those agreements and on LBIE's creditors as a whole.

III. ISSUE 34

"*Whether a creditor's Currency Conversion Claim has been released in circumstances in which the creditor entered into either:*

(i) a Foreign Currency CDD incorporating a Release Clause;
(ii) a Sterling CDD incorporating a Release Clause; or
***(iii) the CRA.*"**

109. Wentworth's position is that where a creditor has entered into the CRA:

(1) it waived any right it may have had to a non-provable claim to interest (such as (to the extent that it exists) any non-provable claim based on *Bower v Marris*); and

(2) where a creditor had a pre-CRA contractual entitlement to be paid in US$, the CRA did not have any effect on such creditor's right (if any) to a CCC. Wentworth argues, however, that the combined effect of the CRA and a sterling CDD (entered into by the creditor after entry into the CRA) is to release any such CCC.

110. As to the construction of the CDDs, Wentworth contends as follows:

(1) that a sterling CDD (entered into prior to the inclusion of an express CCC carve-out into the release clause of such CDDs) and an Agreed Claims CDD denominated in a foreign currency (to the extent that, in whole or in part, it is denominated in a currency other than the original contractual currency), has the effect of releasing a creditor's CCC; but

(2) that a creditor's CCC is not released by a foreign currency CDD where the foreign currency specified in that CDD is the same as the underlying contractual currency of the creditor's claim (although Wentworth does contend that such a CDD has the effect of waiving a creditor's other non-provable claims).

111. The SCG's position on Issue 34 is that none of the Post-Administration Contracts referred to above, whether a Foreign Currency CDD or a Sterling CDD or the CRA, has the effect of releasing a CCC. The SCG also contends that, as a matter of construction, entry into the CRA gives rise to a CCC.

112. Subject to one point the Administrators consider that the arguments are fully made by the Respondents. That one point arises under Issue 34(iii) which, like Issue 38, concerns the impact of the CRA on a CCC and therefore is more conveniently dealt with in the context of Issue 38 (see above). This argument, if successful, would lead to the conclusion that a CRA signatory cannot assert a CCC. The reason that the Administrators are raising this argument is that they consider the point to be arguable, that a conclusion that the CRA releases any existing CCC may benefit some creditors and that no other party is running the argument.

IV. ISSUE 35

"*Whether a creditor's claim to Statutory Interest has been released in whole or in part in circumstances in which the creditor entered into either:*

(i) a CDD incorporating a Release Clause; or
***(ii) the CRA.*"**

113. As regards the CRA, Wentworth contends that this operates so as to release a creditor's contractual (or other) right to interest apart from the administration accruing after the date its financial contract was closed-out, such that Statutory Interest is payable to the creditor (for that period) only at the Judgments Act rate. As regards CDDs entered into prior to the introduction of specific language preserving a creditor's rights in respect of Statutory Interest (as described at paragraphs 66-73 of Lomas 10 [**2/2/23-25**]), Wentworth similarly contends that these CDDs operate so as to release the creditor's contractual or other entitlement to interest apart from the administration, such that Statutory Interest is payable to it at the Judgments Act Rate.

114. The SCG's position is that neither the CRA nor any of the CDDs has the effect of releasing in whole or in part a creditor's entitlement to Statutory Interest.

115. The Administrators consider that: (i) where the creditor is a signatory to the CRA it has released its entitlement to interest at the contractual rate and is therefore only entitled to claim Statutory Interest on its Net Financial Claim ("**NFC**") at the Judgments Act rate (because there is no rate applicable to the NFC apart from the administration); but (ii) none of the CDDs has the effect of releasing a creditor's entitlement to Statutory Interest, including at the rate applicable to the debt apart from the administration.

116. While the consequence of the parties' positions is that all of the available arguments are being run by one or other of the SCG and Wentworth, the Administrators consider that it is appropriate for them briefly to address the arguments because there are arguments on each of Issues 35(i) and 35(ii) that are not presented in conjunction by either one of the Respondents, but that ought to be argued together.

(a) The CRA

117. As for the CRA, where a claim has been compromised pursuant to the CRA, the provable debt of the creditor is the NFC which will, in accordance with Clause 25.1 of the CRA [**3/362**], only accrue interest "to the extent provided in Rule 2.88".

118. Rule 2.88(9) provides that the rate at which Statutory Interest is payable is "*whichever is the greater of the [Judgments Act rate] or the rate applicable to the debt apart from the administration*".

119. The CRA signatory's debt under a Financial Contract (as defined in the CRA), to which a contractual rate may have been applicable, is released and replaced with the NFC. That is the combined effect of various provisions of the CRA, in particular, Clauses 4.2.3 and 4.4.2 [**3/326-327**] (see above). Any contractual entitlement to a particular rate of interest on the debt under the Financial Contract, which applied prior to the release of the original debt, is released together with the debt itself. It does not apply to the signatory's new claim to the NFC which (together with the other rights to which the signatory is entitled under the CRA) wholly replaces the signatory's prior contractual rights.

120. The CRA in any event does not apply any particular rate of interest to the NFC. There is, therefore, no "rate applicable" to the NFC apart from the administration (the signatory's previous rights under any underlying contracts having been released by it in exchange for the NFC by virtue of its accession to the CRA).

121. Accordingly, the NFC accrues interest under Rule 2.88(9) only at the Judgments Act rate.

(b) The CDDs

122. For the purposes of Issue 35, the Administrators do not consider that the proper construction of the CDDs differs in any material respect among the different forms included at [**Bundle 11**]. (For convenience the Administrators refer to: (a) the Admitted

Claim CDD (with no Statutory Interest or CCC carve-out) at [**11/7**] (the most commonly executed form of CDD); and (b) the Agreed Claim Sterling CDD at [**11/4**].)

123. CDDs are concerned with the compromise and quantification of a creditor's claim as the first stage in a process which would ultimately lead to the distribution of LBIE's assets to its unsecured creditors.

124. This is clear from the recitals to the CDDs. See, for example, recital (B) to the Admitted Claim CDD (with no Statutory Interest or CCC carve-out) at [**11/7/1**]:

> "*In consideration of the Company and the Creditor agreeing that the Creditor's Claim(s) under the Creditor Agreement against the Company are fixed at the Agreed Claim Amount, the Company and the Creditor wish to release and discharge each other in respect of any and all other Claims, losses, costs, charges, expenses, demands, actions, causes of action, liabilities, rights and obligations to or against each other and howsoever arising*"

125. Accordingly, a CDD constitutes an agreement as to the quantum of the Agreed Claim (or the Admitted Claim, as the case may be), that quantum being the Agreed Claim Amount.

126. According to the definition included at Clause 1.1 of the majority of standard-form CDDs, the Admitted Claim is an unsecured claim which "*qualifies for dividends from the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act*". Again, see the Admitted Claims CDD (with no Statutory Interest or CCC carve-out) at [**11/7/2**]. Similarly, in the context of Agreed Claim CDDs, the Agreed Claim is typically defined at Clause 1.1 as an unsecured claim which "*which qualifies for dividends from the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act*". See the Agreed Claim CDD at [**11/4/3**]. Given that the agreement of an Agreed Claim is reached in anticipation of it becoming an Admitted Claim (in whole or in part), the Agreed Claim is capable of including provable interest but not Statutory Interest. Statutory Interest is *payable on* provable claims rather than constituting part of a provable claim.

127. The release provision, which typically appears at Clause 2.3, does not apply to the Admitted Claim (or to the Agreed Claim, in the context of an Agreed Claim CDD). The Admitted Claim is carved out from what is released by way of the words *"save solely for the Admitted Claim*". Again, see the Admitted Claim CDD (with no Statutory Interest or CCC carve-out) at [**11/7/6**].

128. The right to receive Statutory Interest is a right which is consequential and parasitic on the creditor having an Admitted Claim. This right forms part of the bundle of rights arising on the coming into existence of the Admitted Claim.

129. Therefore, the creditor's right to Statutory Interest under rule 2.88(7) of the 1986 Rules is preserved by the proviso at Clause 2.3 of the CDDs (*"save solely for the Admitted Claim*") [**11/7/6**].

130. If the Admitted Claim is not released, the right to receive Statutory Interest out of any surplus available after the payment in full of the debts proved is similarly not released. It is not a freestanding right.

131. Given that the creditor's right to Statutory Interest survives, it follows that the right to be paid Statutory Interest at "*the rate applicable to the debt apart from the administration*" (as provided by rule 2.88(9) of the 1986 Rules) also survives. The CDD, in contrast to the CRA, does not involve the release of the creditor's claims under the original contract, neither does it alter their character. It merely determines and fixes the value of the creditor's claim or claims. The original claims retain their identity (as was assumed for the purposes of Issue 37). Accordingly, the rate applicable to the debt apart from the administration is the rate which the creditor would have been entitled to had the administration not intervened. That rate is the contract (or other) rate which is wholly unaffected by the CDD release clause.

V. ISSUE 38

"*Whether (and if so in what circumstances) Part VII of the CRA, which specifies that claims of acceding creditors are to be calculated in US dollars, is capable of giving rise to a Currency Conversion Claim*."

132. Wentworth contends that Part VII of the CRA [**3/350ff.**] is not capable of giving rise to a CCC in circumstances where the creditor did not have such a claim prior to entry into the CRA. However, where a creditor has a right to a CCC which pre-exists the CRA (i.e. a right under the original contract to be paid in a currency other than sterling), Wentworth does not contend that the terms of the CRA give rise to a waiver of such a CCC, but rather it argues that the combined effect of the CRA and CDD or CDDs (entered into by the creditor after entry into the CRA) is to release any such CCC.

133. The SCG's position on Issue 38 is that Part VII of the CRA gives rise to a CCC in circumstances where the sterling sum received by the CRA signatory in sterling is, as at the date of receipt, less than the amount of its contractual entitlement under the CRA in US$ (being the currency in which the creditor's entitlement under the CRA is denominated).

134. As to Issue 38, the Administrators take the position that Part VII of the CRA is not capable of giving rise to a CCC in any circumstances. Moreover (as noted at above) the Administrators consider it appropriate to address Issue 34(iii) here, given the overlap between it and Issue 38.

135. As to Issue 34(iii), since Wentworth has not taken the point, the Administrators advance the argument that a signatory to the CRA does not have a contractual or other right to payment in a foreign currency in relation to which a CCC is capable of arising. The right under the original contract to be paid in a currency other than sterling does not survive the CRA but is caught by the release.

136. Accordingly, the Court should not treat it as common ground that the CRA, by itself, does not release a CCC (or, more accurately, does not operate in such a way that the requirements for a CCC exist).

137. As explained in detail above, the CRA was entered into in 2009 by LBIE and a substantial number of counterparties, primarily in order to resolve issues surrounding their entitlements to Trust Assets held by LBIE and under which "Signatories" gave up their existing claims in return for new unsecured claims against LBIE (see above).

138. What the creditor bargained for was an exchange of its original rights for a set of entirely new rights in respect of unsecured claims, rather than for a modification of those original rights.

139. In this regard, as referred to above, Clause 4.4.2 of the CRA provides as follows (emphasis added) [**3/327**]:

> *"All Signatories shall have their Released Claims exchanged for the following, as appropriate:*
>
> *(i) the right to have their Net Contractual Position, Allocations, Distributions and Appropriations determined on the basis set out in this Agreement;*
>
> *(ii) the right to claim as a new obligation of the Company their Net Financial Claim (if any)…."*

140. Further, Clause 25.1 of the CRA provides that [**3/362**]:

> "*A Net Contractual Position in respect of a Signatory expressed as a positive number will represent an amount due and owing by the Company to that Signatory, which shall constitute an ascertained, unsecured claim of that Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors (such Claim, a "Net Financial Claim"). 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.*"

141. Under the CRA the Net Contractual Position is arrived at with reference to the value of what the close-out amounts would have been under the underlying financial contracts.

142. In particular, the Close-Out Amount is defined in Part 18 of the CRA as follows [**3/441**]: "*in respect of a Financial Contract and each Signatory that is a party to it: (i) a single amount payable by either one of the Company or the relevant Signatory to the*

other as a result of termination of such Financial Contract as determined in accordance with Clause 20; or (ii) the aggregate of each Close-Out Component in accordance with Clause 21.3".

143. Broadly, therefore, whilst Close-Out Amounts under the CRA are calculated with reference to the close-out amounts which would have arisen under the financial contracts (absent the CRA), the Close-Out Amounts themselves are a creature of the CRA and are not identical to the close-out amounts that would have arisen in the context of the underlying financial contracts.

144. In brief, the relevance of the financial contracts is for the purpose of valuing the NFC. Any right to payment of a close-out amount pursuant to the underlying financial contracts is released, in exchange for the NFC. Further, where a Close-Out Amount is calculated with reference to a close-out amount which would not already have been denominated in US dollars under the underlying financial contract, this Close-Out Amount is expressed in US dollars using the Spot Rate at the close of business in London on 15 September 2008.

145. Accordingly, the NFC, a creature of the CRA, is an entirely new claim that exists only for the purposes of receiving a dividend from the insolvent estate, and for this reason it does not represent an entitlement of the creditor to be paid in a foreign currency (for the purposes of any alleged CCC). The NFC has to be converted into sterling in accordance with Rule 2.86. The NFC is defined at Clause 25.1 of the CRA [**3/362**] as an unsecured claim of the Signatory in the winding up or any distribution of LBIE's assets and such claim constitutes a provable claim only. The words "*A Net Contractual Position in respect of a Signatory expressed as a positive number will represent an amount due and owing by the Company to that Signatory, which shall constitute an ascertained, unsecured claim of that Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors*" are unambiguous in their meaning.

146. Accordingly, the Administrators submit that Part VII of the CRA is not capable of giving rise to a Currency Conversion Claim.

147. As to Issue 34(iii) the Administrators, on the basis that Wentworth might have been expected to take the point but has not done so, advance the argument that the CRA has the effect of releasing the contractual rights on the basis of which any CCC might have been capable of being asserted.

148. Upon entry into the CRA a CRA signatory, as noted above, exchanges the contractual right to be paid in a foreign currency that it had as at the date of Administration for an entirely new right to claim the NFC which is expressed as a US dollar amount. See in particular Clause 24.1 [**3/361**] and Clause 4.4.2 of the CRA [**3/327**].

149. The NFC to which the creditor is entitled under the CRA is a new right created solely for the purpose of enabling the creditor to participate in the estate available to unsecured creditors. It is a right limited in recourse and it no longer represents the creditor's original contractual entitlements, including the entitlement to be paid in a foreign currency which existed at the date of Administration and in respect of which a CCC may have been capable of arising.

150. The authorities indicate that a CCC may be asserted only where there is a surplus and the creditor has a continuing right to be paid in a foreign currency (i.e. a right which arose prior to the debtor's entry into insolvency proceedings and is continuing as at the date when a Surplus arises) which has not been fully vindicated in the payment of its proved debt in full. See Brightman LJ in *In re Lines Bros Ltd* [1983] 1 Ch 1, 21E-22B and David Richards J's reference to the creditor's "*full contractual rights*" in *Waterfall I* [2015] Ch 1, at [110].

151. It follows, therefore, that the right to be paid in a foreign currency under the original contract no longer exists and there is no basis for the signatory to assert a CCC as a non-provable claim against LBIE.

152. Put simply, the CCC is lost when the underlying contractual right to be paid in a foreign currency is released under the terms of the CRA.

VI. ISSUE 36A

"*If (as a matter of construction) a CDD or the CRA has the effect of releasing a Currency Conversion Claim, Statutory Interest claim or other non-provable claims, whether, by reason of, or by analogy with, the rule in Ex parte James (1874) LR 9 Ch App 609 and/or because to enforce such release(s) would unfairly harm creditors who have entered into a CDD or the CRA within the meaning of paragraph 74 of Schedule B1 to the Insolvency Act 1986, in all the circumstances, the Administrators should be directed not to enforce, or to cause LBIE to enforce, such release(s)*."

153. The SCG, Wentworth and the Administrators have each filed a supplemental position paper on Issue 36A, supplemented in each case by their written submissions on Issue 36A.

154. The SCG's position is that, if (contrary to their position on Issues 34 and 35) the CRA or a CDD has the effect of releasing a Statutory Interest claim, a CCC or any other non-provable claim, the Administrators should refrain from enforcing LBIE's strict legal rights and the Court should direct the Administrators not to enforce such rights, either on the basis of (or on a basis analogous to) the rule in *Ex Parte James* (1874) LR 9 Ch App 609 or on the basis that to enforce such releases would unfairly harm the creditors who have entered into a relevant CDD or the CRA within the meaning of paragraph 74 of Schedule B1 of the Insolvency Act 1986 (the "**1986 Act**").

155. Wentworth contends that the Court should not direct the Administrators to refrain from enforcing the releases, on either of the bases relied upon by the SCG.

156. In light of the Respondents' supplemental position papers, the Administrators did not take a position on Issue 36A, whilst reserving their right to do so in light of any material change of circumstance or the way in which one or other of the parties appears to be running its case.

157. In their skeleton argument, the SCG submitted that the Administrators' neutrality on Issue 36A suggests that the Administrators tacitly accept the SCG's position. This is not correct. The reason why the Administrators continue to take a neutral position on Issue 36A is simply that it appears to the Administrators that the SCG and Wentworth, between them, are fully ventilating the arguments on both sides of the Issue and that, in

all the circumstances, it is appropriate for them not to take a positive position before the Court.

158. The Administrators note that neither the SCG nor Wentworth, either in their supplemental position papers on Issue 36A or in their written submissions, seek to impugn the Administrators' conduct in any way and expressly state that they do not. The Administrators consider that there is no basis on which their conduct could be so impugned.

VII. ISSUE 9

"*Whether a creditor's accession to the CRA (and, in particular, the effect of clauses 20.4.3, 24.1, 25.1, 25.2 and 62.4 of the CRA) would impact upon the answers to questions 7 and 8 above, and if so, how.*"

159. Issues 7 and 8 relate to the date from which Statutory Interest accrues on contingent and future debts respectively.

160. At paragraph 56 of their position paper, the Administrators identified the following sub-issue to Issue 9:

> "*[W]hether, subject to the correct answers to issues 7 and 8, Statutory Interest in respect of a creditor's claim which has been agreed under the CRA is payable from the Date of Administration, from the date of the CRA, or from some other date*".

161. Both the SCG and Wentworth appear to consider that is now only the sub-issue which requires the Court's determination (the "**Reformulated Issue 9**"). Wentworth contends: (a) that a creditor's accession to the CRA results in the termination of open contracts, which triggers the contingency that makes the debt an actual one; and (b) that the answer to the Reformulated Issue 9 is dependent on the Court's answer to Issue 7 (which fell for determination at the Part A trial). The SCG consider, in light of their positions on Issues 7 and 8 (both of which fell to be determined at the Part A trial), that Statutory Interest will accrue on a creditor's CRA claim from the date of administration

in any event, whilst reserving its position as to when the NFC arises pursuant to the CRA and whether this is a present, future or contingent claim.

162. Whilst the Administrators do not take a position on Issue 9, they consider that it would be of assistance if the Court could determine what the status of a creditor's claim under the CRA is for the purposes of IR rule 2.88, specifically whether such a claim amounts to the crystallisation of a contingent claim (upon entry into the CRA), or to an entirely new claim (which comes into existence and becomes actual only upon entry into the CRA), or to a prospective claim. The Administrators consider that this question will turn not only on the construction of the CRA itself but also on the proper interpretation of statutory provisions beyond IR 2.88, such as those relating to the treatment (and definition) of contingent and prospective liabilities. Accordingly, it is not clear that the answer to Issue 9 will necessarily follow from the outcome of Issues 7 and 8.

163. The Administrators note that the SCG have reserved their position on this point (see fn. 24 of their skeleton). However, it would be helpful if the SCG and Wentworth were to engage with this question and provide full written submissions on it in their reply skeleton arguments so that the Court may determine it at trial. In doing so, the SCG is invited to explain the basis upon which the NFC can be said to have been "outstanding" as at the administration date in circumstances in which the CRA did not become effective until 15 months or so later.

164. The Court's determination of Issues 7 and 8 may not provide a complete answer to the reformulated Issue 9 and the Administrators consider that it would be a missed opportunity, and a potential source of delay to the distribution of statutory interest, for the point not to be argued and determined during the Part B trial.

William Trower QC
Daniel Bayfield
Alexander Riddiford

South Square

Gray's Inn

London WC1R 5HP

Tel: 020 7696 9900

8 May 2015