

<p>1 Monday, 18 May 2015</p> <p>2 (11.30 am)</p> <p>3 MR JUSTICE DAVID RICHARDS: Mr Trower, I'm sorry everyone is</p> <p>4 so crowded here. We have made enquiries and there</p> <p>5 isn't, at the moment, a larger court available.</p> <p>6 MR TROWER: My Lord, perhaps I can say this: perhaps the air</p> <p>7 conditioning could be kept very powerfully on.</p> <p>8 MR JUSTICE DAVID RICHARDS: I'm told that will react to the</p> <p>9 number of people and hence the amount of heat generated</p> <p>10 in here, but let's see how we go.</p> <p>11 MR TROWER: As your Lordship knows, this is the trial of the</p> <p>12 tranche B issues, last before the court for directions</p> <p>13 on 22 April. I appear together with Mr Bayfield and</p> <p>14 Mr Riddiford for the joint administrators. Mr Dicker,</p> <p>15 Mr Fisher and Mr Phillips appear for the Senior Creditor</p> <p>16 Group. Mr Zacaroli, Mr Allison and Mr al Atar appear</p> <p>17 for Wentworth.</p> <p>18 The issues listed for trial before your Lordship</p> <p>19 this week are issues 9, 34, 35, 36A and 38.</p> <p>20 The way I was going to structure my opening was to</p> <p>21 introduce your Lordship to some of the documents and to</p> <p>22 add a little colour to the circumstances in which they</p> <p>23 were entered into and also to explain, in fairly short</p> <p>24 form, the joint administrators' position on the issues,</p> <p>25 if that's convenient.</p> <p style="text-align: center;">Page 1</p>	<p>1 statement, which concentrates on the CRA; and</p> <p>2 Mr Copley's witness statement. Your Lordship has all of</p> <p>3 those in bundle 2.</p> <p>4 My Lord, one of the ways I thought we might find it</p> <p>5 or your Lordship might find it most helpful to get into</p> <p>6 the structure of what happened is by looking at the</p> <p>7 schedule, which appears to Mr Pearson's witness</p> <p>8 statement, at the back, because what it does is it gives</p> <p>9 a chronological summary of the key events. It's on</p> <p>10 page 48, concerning the return of trust assets with the</p> <p>11 lead-up to the entering into of the CRA. It's behind</p> <p>12 tab 7. That there are a number of events I'm going to</p> <p>13 take your Lordship through which are referred to in the</p> <p>14 chronological summary.</p> <p>15 MR JUSTICE DAVID RICHARDS: Right.</p> <p>16 MR TROWER: My Lord, can I ask this: of the three witness</p> <p>17 statements which I identified, did your Lordship manage</p> <p>18 in the reading to read initially --</p> <p>19 MR JUSTICE DAVID RICHARDS: I read those statements, yes</p> <p>20 MR TROWER: I'm grateful. I don't think for present</p> <p>21 purposes we need to go back to them now, apart from just</p> <p>22 keeping open on one side the chronological summary,</p> <p>23 although we will dip into them from time to time.</p> <p>24 MR JUSTICE DAVID RICHARDS: Right.</p> <p>25 MR TROWER: The CRA evolved from the trust asset scheme of</p> <p style="text-align: center;">Page 3</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes, I was just wondering,</p> <p>2 Mr Trower, I think I might find it convenient if we were</p> <p>3 to take the ex parte James issue separately from the</p> <p>4 other issues, so deal with what are principally the</p> <p>5 construction issues with everyone having their say on</p> <p>6 that, and then deal with ex parte James, as it were, at</p> <p>7 the end.</p> <p>8 MR TROWER: I'm very glad your Lordship said that because</p> <p>9 that was where we were.</p> <p>10 MR JUSTICE DAVID RICHARDS: Good.</p> <p>11 MR TROWER: So the consequence of that is that Mr Zacaroli</p> <p>12 will follow me once I've introduced the entirety of the</p> <p>13 case, but I'm not really going to say anything in</p> <p>14 opening about the ex parte James issues; I will</p> <p>15 concentrate simply on the construction points and then</p> <p>16 Mr Zacaroli will follow on.</p> <p>17 Submissions by MR TROWER</p> <p>18 MR TROWER: My Lord, much of the background to the entering</p> <p>19 into of the CRA and the CDDs is common ground and</p> <p>20 your Lordship has a statement of agreed facts in the</p> <p>21 bundles. The joint administrators gave colour as to the</p> <p>22 context of the CRA and the CDDs in some of the evidence</p> <p>23 and the principal witness statements that matter for</p> <p>24 these purposes are: Mr Lomas' tenth witness statement,</p> <p>25 at paragraphs 13 onwards; Mr Pearson's seventh witness</p> <p style="text-align: center;">Page 2</p>	<p>1 arrangement or proposed trust asset scheme of</p> <p>2 arrangement, which Mr Justice Blackburne and the Court</p> <p>3 of Appeal both determined that the court had no</p> <p>4 jurisdiction to sanction.</p> <p>5 That scheme -- and we need to start with the</p> <p>6 scheme -- was first planned in January 2009 when the</p> <p>7 concept of a scheme was approved by the creditors'</p> <p>8 committee and a scheme working group was established.</p> <p>9 There was a public announcement of this on</p> <p>10 26 February 2009 at the same time as a scheme working</p> <p>11 group meeting. Then the first document we're going to</p> <p>12 go to is further details that were given in the first</p> <p>13 progress report.</p> <p>14 If your Lordship would turn to bundle 6, which has</p> <p>15 the first progress report in it. In particular, if we</p> <p>16 could go to section 5.3 of the first progress report,</p> <p>17 which starts on page -- well, it starts on page 120 on</p> <p>18 the print, and 30 of the actual document.</p> <p>19 MR JUSTICE DAVID RICHARDS: 120, did you say?</p> <p>20 MR TROWER: It's 120 of what has been superimposed on it and</p> <p>21 page 30 of the actual document itself.</p> <p>22 MR JUSTICE DAVID RICHARDS: I have it, thank you.</p> <p>23 MR TROWER: What this section of the progress report does is</p> <p>24 in the first bit, the first three pages, it explains the</p> <p>25 significance of trust property issues in relation to the</p> <p style="text-align: center;">Page 4</p>

<p>1 administration of the affairs of this company generally 2 and how, from the very commencement of the 3 administration, there has been considerable focus on the 4 return of property to which third parties may assert 5 a trust claim.</p> <p>6 That is something which underpins a lot of what 7 my Lord will see in the early evidence in relation to 8 what the administrators were concentrating on in -- as 9 managing the affairs of this company.</p> <p>10 Then if we go on to page 34 and pause here for 11 a little longer, which is the proposed client asset 12 scheme of arrangement, your Lordship there sees, by way 13 of description of the background, again a reference to: 14 "... the return of trust property being a core 15 objective and priority to the administration ... anxious 16 to return trust property to clients as expeditiously as 17 possible."</p> <p>18 And the focus then becomes, as my Lord reads down 19 the left-hand column, on how it is that the 20 administrators consider that bilateral negotiations 21 between creditors is not a very satisfactory way forward 22 and they have to try and find some form of systematic 23 distribution approach.</p> <p>24 Would my Lord just read the left-hand column and 25 some of the right-hand column down to "development</p> <p style="text-align: center;">Page 5</p>	<p>1 going to be necessary to deal with questions of 2 jurisdiction at an early stage. So shortly after this 3 progress report was prepared, steps were taken in order 4 to get the matter before the court for determination on 5 the jurisdiction point.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: And at the time the jurisdiction application was 8 made, a draft explanatory statement had been produced 9 and your Lordship will find that at page 248 of the same 10 bundle.</p> <p>11 In paragraph 3 your Lordship sees a description on 12 page 249 of the context of the scheme: 13 "To provide the systematic procedures which will be 14 used by LBIE for the purpose of returning certain 15 property which LBIE holds and controls and which belongs 16 to its customers."</p> <p>17 And then there is --</p> <p>18 MR JUSTICE DAVID RICHARDS: Sorry, where is that?</p> <p>19 MR TROWER: Paragraph 3, 249.</p> <p>20 MR JUSTICE DAVID RICHARDS: I see, yes.</p> <p>21 MR TROWER: If my Lord would read to the end of that.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes, certainly. (Pause)</p> <p>23 MR TROWER: My Lord will see at the bottom of that page 24 a reference to released claims and new claims, which 25 becomes relevant in relation to the CRA.</p> <p style="text-align: center;">Page 7</p>
<p>1 process"?</p> <p>2 MR JUSTICE DAVID RICHARDS: Starting with "key issues"?</p> <p>3 MR TROWER: Yes. (Pause)</p> <p>4 Then my Lord sees under the development process that 5 the administrators go on and describe how -- there's 6 discussions going on with the representative group of 7 clients and a formal working group consisting of members 8 of the creditors' committee are assisting with exploring 9 the elements of the scheme and their application, how 10 they published information on the website and held open 11 meetings: 12 "[They're] taking the views of the working group and 13 industry bodies into consideration and actively working 14 with our legal advisers to find a feasible scheme." 15 And then how the nature and scope of the scheme 16 being explored is: 17 "... both novel and ambitious and [it] will require 18 compromises [et cetera]."</p> <p>19 So that was what was presented at the time of the 20 first progress report, which is dated 14 April 2009. At 21 that stage the administrators had already applied to the 22 court for permission to propose a scheme of arrangement, 23 and an initial direction was given by 24 Mr Justice Blackburne giving them permission to do so, 25 although fairly soon it became apparent that it was also</p> <p style="text-align: center;">Page 6</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: Then your Lordship sees a list of the purposes 3 of the scheme in 4.1, which are all focusing on: 1, 4 a bar date; 2, determining asset claims; 3, establishing 5 mechanisms to determine net contractual positions of 6 scheme creditors, which is a concept I will show 7 your Lordship in a moment in 9; and then 4 is 8 establishing mechanisms for retaining any retention 9 amounts.</p> <p>10 Retention amounts relates to: 11 "Security interests which third parties have in 12 respect of assets which are held by LBIE on behalf of 13 clients." 14 And then making provision for costs and effecting 15 distributions expeditiously -- and then at 8: 16 "To compromise and agree all of the claims other 17 than excluded claims of scheme creditors." 18 And more description of mechanisms.</p> <p>19 Then if your Lordship would just note in 5.1 the 20 category of scheme creditors, ie the persons who are 21 going to be summoned to the meetings, are: 22 "Those who have claims against LBIE in trust or in 23 equity at the relevant time for or in respect of 24 segregated assets and which was capable of being 25 satisfied for delivery in whole or in part of the</p> <p style="text-align: center;">Page 8</p>

<p>1 segregated assets."</p> <p>2 If my Lord would just note at this stage that the</p> <p>3 category of persons who are to be summoned to the scheme</p> <p>4 meetings was narrower than the category of persons who</p> <p>5 were entitled to be signatories under the CRA in that</p> <p>6 under the scheme it was only people with trust claims,</p> <p>7 whereas under the CRAs, as my Lord will see, there were</p> <p>8 some people called NTA signatories who didn't have trust</p> <p>9 claims which the CRA contemplated may be capable of</p> <p>10 becoming signatories. That was one of the developments</p> <p>11 that occurred, which I'll explain to my Lord when we get</p> <p>12 to it.</p> <p>13 Then if we can turn on to -- what the document then</p> <p>14 does is ... That was key concept 1 and there are then</p> <p>15 a series of key concepts. The key concept I want to</p> <p>16 draw your Lordship's attention to is key concept 5 at</p> <p>17 paragraph 9.</p> <p>18 The reason for drawing my Lord's attention to this</p> <p>19 is because it finds considerable echoes in some of the</p> <p>20 relevant parts of the CRA, which my Lord will see in due</p> <p>21 course. It sets out in 1 that the key concepts are</p> <p>22 "financial contract", "close-out amount" and "net</p> <p>23 contractual positions".</p> <p>24 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>25 MR TROWER: My Lord will then see in 9.2 the financial</p> <p style="text-align: center;">Page 9</p>	<p>1 the methodology for calculating termination payments</p> <p>2 provided for in the financial contracts: you start with</p> <p>3 the contract itself and then you can have, in certain</p> <p>4 circumstances, an agreed valuation methodology, and</p> <p>5 then, if the agreed contractual valuation methodology</p> <p>6 doesn't work and the agreed valuation methodology is not</p> <p>7 applicable, then there's a fallback methodology.</p> <p>8 My Lord will see all these concepts carried through into</p> <p>9 the CRA.</p> <p>10 MR JUSTICE DAVID RICHARDS: Right.</p> <p>11 MR TROWER: Then what my Lord sees under "overriding</p> <p>12 valuation provisions" -- and we'll look at them in the</p> <p>13 CRA, I think, rather than here in detail -- but what</p> <p>14 my Lord sees is a series of what in effect are</p> <p>15 provisions which are applicable to all close-out</p> <p>16 calculations irrespective of what the contract says. So</p> <p>17 you have overriding valuation provisions that are</p> <p>18 applicable across the board which constitute therefore</p> <p>19 variations of the contractual rights in all</p> <p>20 circumstances.</p> <p>21 Then there are a number of further key concepts</p> <p>22 which are described. Key concept 6 is dealing with</p> <p>23 allocations of trust assets and how shortfalls are dealt</p> <p>24 with. Key concept 7 deals with distributions and</p> <p>25 appropriations under the scheme. Then there are some</p> <p style="text-align: center;">Page 11</p>
<p>1 contract, what it is, and that it includes master</p> <p>2 agreements.</p> <p>3 In 9.3:</p> <p>4 "The close-out amount is the amount payable by</p> <p>5 either LBIE or the relevant scheme creditor to the other</p> <p>6 as a result of termination of a financial contract and</p> <p>7 it is determined using the valuation methodology</p> <p>8 described below. The close-out amount will be expressed</p> <p>9 in US dollars. When actual contracts provide for some</p> <p>10 other currency, the amount will be converted to US</p> <p>11 dollars at the open contract termination date."</p> <p>12 Then:</p> <p>13 "The net contractual position is the sum of all the</p> <p>14 close-out amounts as between LBIE and the scheme</p> <p>15 creditor."</p> <p>16 And:</p> <p>17 "Any financial contract which has not been</p> <p>18 terminated before the date of the scheme meetings will</p> <p>19 be automatically terminated on a fixed date. Following</p> <p>20 the scheme meetings, any voluntary early termination</p> <p>21 right will be ineffective."</p> <p>22 Then there are three methodologies which close-out</p> <p>23 amounts will be determined in accordance with. In each</p> <p>24 case incorporating certain overriding valuation</p> <p>25 provisions. The methodology is first in accordance with</p> <p style="text-align: center;">Page 10</p>	<p>1 more mechanical provisions dealing with how allocations</p> <p>2 work.</p> <p>3 Then, if my Lord would turn on to page 266. The</p> <p>4 only other bit of the explanatory statement</p> <p>5 I specifically wanted to show my Lord was paragraph 20,</p> <p>6 "Claims compromised by scheme creditors". There my Lord</p> <p>7 sees a description of the concept of release at 20.1 --</p> <p>8 and would my Lord read 20?</p> <p>9 MR JUSTICE DAVID RICHARDS: Yes. The whole of 20?</p> <p>10 MR TROWER: I think so because it's quite important.</p> <p>11 MR JUSTICE DAVID RICHARDS: Certainly. (Pause)</p> <p>12 MR TROWER: So what my Lord essentially sees here, the core</p> <p>13 part concept, is that there are releases and you get by</p> <p>14 way of exchange, under 20.7, certain rights.</p> <p>15 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>16 MR TROWER: I'll come back and we'll look at it in a CRA</p> <p>17 context in slightly more detail, but it's important</p> <p>18 your Lordship should see that it has as its origin this</p> <p>19 scheme.</p> <p>20 MR JUSTICE DAVID RICHARDS: I noted in passing on page 257</p> <p>21 the reference to interest and interest accruing under</p> <p>22 2.88. Sorry, page 257, 9.8.7.</p> <p>23 MR TROWER: Yes.</p> <p>24 My Lord, as soon as Mr Justice Blackburne had given</p> <p>25 his decision, which was given on 21 August, the</p> <p style="text-align: center;">Page 12</p>

<p>1 joint administrators announced that they were actively 2 considering alternative structures based on the scheme. 3 If I could just show my Lord the announcements because 4 there are one or two points that come out of them, which 5 are in 7A, page 574. This was the announcement which, 6 amongst other things, goes on the website. 7 There is a short description of what had happened, 8 the 14 July application and the judgment being handed 9 down on 21 August, as one sees in the second paragraph, 10 and then the recital of permission to appeal. Then: 11 "The joint administrators, having consulted with 12 their legal advisers and representatives, such as the 13 working group, in terms of the appeal decision in 14 parallel the administrators, their legal advisers and 15 representatives, the creditors' working group, will be 16 assessing whether the current scheme can be revised to 17 eliminate the jurisdictional problem and still 18 facilitate the return to clients or whether an 19 alternative approach incorporating many features 20 proposed in the current scheme should be adopted. They 21 are also continuing to return assets to clients through 22 bilateral negotiations." 23 And my Lord will, of course, bear in mind in this 24 context that there were always some relatively simple 25 trust asset claims where the sort of complexity which</p> <p style="text-align: center;">Page 13</p>	<p>1 a description of the currently proposed action plan and 2 illustrative timetable. A contractual solution had to 3 be linked with a bar date application for obvious 4 reasons, which one has described in part 1. 5 Then in part 2 there's a description of the 6 contractual solution document prepared and sent out to 7 the market and, in 2.2, how the joint administrators are 8 liaising with industry bodies: 9 "The MFA and AIMA are to arrange for promotion of 10 this solution by arranging open seminars in New York and 11 London during the week of 5 October." 12 And those obviously took place: 13 "Confirmation of the details of such arrangements 14 and invitations will be circulated. The purpose of the 15 sessions will be to introduce the contractual solution 16 more fully and allow for an interactive question and 17 answer. This will assist in the development of the 18 contractual document and also provide an opportunity for 19 active contributions to the process by the affected 20 clients." 21 Then my Lord sees reference to the fact that they 22 envisage that: 23 "The contract will be put in place for a circular to 24 be distributed to all of the prime brokerage 25 counterparties and is open for acceptance by any</p> <p style="text-align: center;">Page 15</p>
<p>1 was required, or with which the scheme was involved, 2 simply didn't arise. 3 MR JUSTICE DAVID RICHARDS: Yes. 4 MR TROWER: If we go over the page to paragraph 6 on 5 page 575, "What happens if the appeal is unsuccessful", 6 so one sees there that from August onwards an 7 alternative asset distribution process was being 8 considered. 9 Then if we go on to 579, there's a reference in the 10 third and fourth paragraphs down: why it is they're 11 appealing in the third paragraph and, in the fourth 12 paragraph, the desire to try and put together some 13 alternative in the event that the appeal fails. 14 By 5 October -- and we get this from the next 15 document at page 581 -- the administrators were able to 16 announce that the alternative contractual solution was 17 gaining real traction as an idea. At this stage, the 18 Court of Appeal had not yet handed down their decision. 19 The appeal was dismissed on 6 November. 20 The fourth paragraph down starts and then there's 21 a description of what the administrators had in mind by 22 way of contractual solution at B on the next page, 582. 23 (Pause) 24 MR JUSTICE DAVID RICHARDS: Yes. 25 MR TROWER: Then if one goes over the page into D, there's</p> <p style="text-align: center;">Page 14</p>	<p>1 creditor, whether or not they have assets held by LBIE." 2 So this is where one sees this concept coming in 3 of -- 4 MR JUSTICE DAVID RICHARDS: Sorry, where is that? 5 MR TROWER: That's at 2.4 under "Offer process". 6 MR JUSTICE DAVID RICHARDS: Yes, I see. 7 MR TROWER: Obviously what is critical for acceptance 8 is that there should be a high take-up of trust 9 claimants, but at this stage there were advantages, 10 which we'll come on to, of it being promoted more 11 generally. 12 MR JUSTICE DAVID RICHARDS: Yes, I see. 13 MR TROWER: And I don't think that the rest of the 14 announcement document my Lord needs to be worried by. 15 Progress was then further explained in the second 16 progress report, which I'm afraid we have to go back to 17 bundle 6 for, which came out about ten days after that 18 press release. It's bundle 6, page 182. 19 The report itself starts -- and the part that 20 matters is the part on page 212 of the bundle, 31 of the 21 document, section 5.3. The administrators there 22 describe in the left-hand column on section 5.3 the 23 promotion of the scheme of arrangement. Then in the 24 paragraph underneath the "Client asset scheme" heading, 25 five lines down:</p> <p style="text-align: center;">Page 16</p>

<p>1 "The client asset scheme included various provisions 2 which enabled the net indebtedness between LBIE and the 3 client to be determined. These amounts could be settled 4 as part of the asset return framework and contained 5 a mechanism for allocating any stock shortfalls." 6 Then there's a description as to what happened on 7 the jurisdiction application and the appeal having been 8 put in. At the top of the page: 9 "The administrators are anxious the appeal process 10 should not lead to any unnecessary delay in the return 11 of client assets. Therefore in parallel with the appeal 12 process they are developing alternative proposals that 13 would also assist with the return of client assets, 14 whether or not the appeal is ultimately successful. 15 In addition, they continue to make bilateral returns. 16 "As an alternative to the client asset scheme the 17 administrators developed a contractual mechanism to 18 return assets to clients. In essence, the arrangement 19 provides, subject to sufficient affected clients 20 agreeing to be bound, the administrators will offer to 21 such clients the ability to agree terms with LBIE, which 22 are substantially the same as those in the proposed 23 client asset scheme. This framework is in the process 24 of being refined and shared with affected clients. The 25 administrators intend to require that the overwhelming</p> <p style="text-align: center;">Page 17</p>	<p>1 principal things they're concentrating on: 2 "Any creditors who have submitted claims and have 3 completed the statement of claim forms and filed claims 4 through the client information and claims website ..." 5 Then you don't need to do anything further if you've 6 already done it at this stage. Then: 7 "[They] anticipate that the activities of the 8 counterparties' team will increase and include the 9 agreement in principle of creditors' claims." 10 Then at this stage, as my Lord will see: 11 "The administrators' current view is that a scheme 12 of arrangement is likely to be the most efficient and 13 suitable mechanism distribute funds to unsecured 14 creditors." 15 And then my Lord sees on the right-hand side some 16 very outline provisions as to what was intended at that 17 stage by way of unsecured creditor distributions. 18 MR JUSTICE DAVID RICHARDS: Yes. 19 MR TROWER: So that's that. 20 The second progress report does not give any 21 dividend estimates and my Lord doesn't see dividend 22 estimates for some time. Just to deal with a small 23 point that may or may not develop at some stage, it 24 includes a caution, as all of the progress reports do, 25 on page 184, on using any data in it for the purposes of</p> <p style="text-align: center;">Page 19</p>
<p>1 majority of affected clients must agree to the terms if 2 it is to be implemented." 3 Then it talks about the meetings. And then: 4 "Despite the attraction of the alternative 5 arrangement, the administrators remain of the view that 6 the client asset scheme is the optimal solution." 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: And so on. So that's where we get to on that 9 progress report. 10 Just so my Lord knows, this report also deals with 11 unsecured claims generally in section 4.5. It's 12 important context because we can see the two things 13 going ahead. 14 Page 205 of the bundle, page 24 of the document, 15 where there's a description under "Overview" of the 16 administrators considering how to distribute the 17 precedes of house realisations to unsecureds: 18 "It is our intention to materially progress the 19 framework for distributing realisations to creditors 20 over the coming months. As identified earlier, the 21 agreement of creditors' claims has not been a priority 22 during the first 12 months of the administration as 23 focus and resources have been deployed in realising 24 house assets and addressing third party title of claim." 25 So realisations and third party claims are the two</p> <p style="text-align: center;">Page 18</p>	<p>1 estimating a dividend. My Lord won't be surprised to 2 see that, but if we can just turn back so we can see the 3 focus of it. The wording of these cautions varies as 4 times goes on, but at this stage, page 184, it's in the 5 fifth paragraph down, on the left-hand side: 6 "Creditors will note this report does not include an 7 estimate of the likely level of recoveries ... very 8 material uncertainties continue to exist regarding the 9 timing of the realisable value assets and the eventual 10 level of creditor claims. Administrators wish to 11 caution creditors from using the data in this report to 12 estimate likely dividends as any such estimates are 13 likely to be materially misleading. We intend to 14 provide guidance on possible dividend levels in due 15 course." 16 What next happened was that on 6 November 2009 the 17 Court of Appeal dismissed the appeal and on the same day 18 the joint administrators announced their intention to 19 proceed with the CRA. There was clear evidence as well 20 at this stage that a significant majority of trust asset 21 claimants were supported with the principles underlying 22 the scheme. My Lord might remember seeing that -- 23 I don't think we need turn it up -- in Mr Pearson's 24 witness statement at paragraph 26. So that's bundle 2, 25 tab 7, page 8 of Pearson 7, paragraph 26.</p> <p style="text-align: center;">Page 20</p>

<p>1 Just so far as creditors are concerned, I'm going to 2 take my Lord to the CRA circular next, but before doing 3 so, your Lordship should note the extent of creditor 4 involvement in designing the scheme structure and 5 ultimately the CRA. Mr Pearson describes this in 6 paragraphs 36 to 44 of his witness statement.</p> <p>7 My Lord can get it in sort of summary terms from 8 looking at the chronological summary because there is 9 listed out the number of scheme working group and CRA 10 working group meetings that there were.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TROWER: You see on page 48 of the chronological summary 13 the first scheme working group meeting on 10 February, 14 second from the bottom. And then on page 49: 10 March, 15 16 April, 14 May, 17 June.</p> <p>16 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>17 MR TROWER: Then over the page, page 50: 10 September, 18 7 October, 5 November, 19 November.</p> <p>19 MR JUSTICE DAVID RICHARDS: Could you just remind me of the 20 membership of the scheme working party?</p> <p>21 MR TROWER: They were a combination of trust clients drawn 22 from the creditors' committee, but I can get a bit more 23 detail.</p> <p>24 MR JUSTICE DAVID RICHARDS: They were representatives of 25 trust clients?</p> <p style="text-align: center;">Page 21</p>	<p>1 market and available for consideration since July 2009 2 when the explanatory statement was first made available 3 for purposes of the scheme.</p> <p>4 So turning then to --</p> <p>5 MR JUSTICE DAVID RICHARDS: The 90 per cent support was 6 from?</p> <p>7 MR TROWER: Trust asset claims.</p> <p>8 MR JUSTICE DAVID RICHARDS: Exactly, yes.</p> <p>9 MR TROWER: Then, my Lord, if we go to the scheme circular 10 itself and the documents enclosed within it, they start 11 at page 209 of bundle 3. The list of what's contained 12 within this is at page 213, so I can just explain to 13 my Lord what I'll be looking at and what we'll pass 14 over.</p> <p>15 The letter from the administrators is a short 16 document between pages 216 and 221 of the bundle. There 17 is then a schedule described as background history 18 between 222 and 228. There is then a reader's guide, 19 229 to 245. There is then a summary of the principal 20 provisions, in effect, of the CRA, which is 247 to 312, 21 and that includes certain flow charts illustrating how 22 the CRA will work. Then the CRA itself with its four 23 schedules, which starts at page 313 of the bundle.</p> <p>24 My Lord, the letter and the reader's guide I think 25 we invited your Lordship to read if you had time.</p> <p style="text-align: center;">Page 23</p>
<p>1 MR TROWER: They were primarily trust clients, but there 2 was, I think, unsecured representation on it too, but 3 I'll confirm that in a moment if I may. It may be in 4 Mr Pearson's seventh witness statement, actually. It's 5 in paragraph 37, I'm told, of Mr Pearson's witness 6 statement.</p> <p>7 MR JUSTICE DAVID RICHARDS: I see, yes. (Pause)</p> <p>8 It doesn't quite tell me what their real interest 9 is.</p> <p>10 MR TROWER: No, it doesn't.</p> <p>11 Your Lordship sees there is a further sort of 12 description of the position over the page on page 17 --</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR TROWER: -- which is a discursive description of the role 15 that they played, which is apparent from the 16 chronological summary.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: So it is clear that this was a highly 19 collaborative process, which was conducted with the 20 support and consent of the working groups and, as 21 my Lord will know, it ultimately achieved 90 per cent 22 support of what was a highly sophisticated scheme with 23 a sophisticated base of creditors.</p> <p>24 It's also important for my Lord to bear in mind that 25 the key terms and concepts have been discussed in the</p> <p style="text-align: center;">Page 22</p>	<p>1 MR JUSTICE DAVID RICHARDS: I did read those, yes.</p> <p>2 MR TROWER: I'll just highlight, fairly shortly, one or two 3 points in it and then I'll move straight on to the CRA.</p> <p>4 I wasn't going to spend any time on the summary of the 5 principal provisions because they don't really add very 6 much if one is looking at the document itself.</p> <p>7 Just to go to the letter first. My Lord sees on 8 page 2 of the letter -- and we can take this quite 9 shortly -- 217, what one of the primary objectives of 10 the administrators has been. That's the second full 11 paragraph on page 217 --</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: -- and then how, in the next paragraph, the 14 administrators have worked with a subcommittee of the 15 creditors' committee of the company to develop an 16 approach. Then:</p> <p>17 "The administrators believe that for those clients 18 who have become party to the agreement, the agreement 19 establishes the most efficient available method of 20 determining the return of segregated client assets which 21 the company holds on trust. Are you eligible for the 22 offer? Offers being made to all eligible offerees."</p> <p>23 And there are two categories. The first category is 24 the TA offeree, who are clients with ownership claims to 25 assets which are recorded in the books and records of</p> <p style="text-align: center;">Page 24</p>

<p>1 the company. The second category is NTA offerees who 2 are clients to the company who do not have ownership 3 claims to segregated assets, but who at the date of the 4 circular are parties to financial contracts of the 5 company as of the time the company entered into 6 administration. So those are the new people who can 7 participate in the CRA, but who wouldn't have been 8 scheme creditors under the scheme.</p> <p>9 Then 4.1 deals with ... you become a signatory, so 10 you're an offeree if you're eligible and you'll become 11 a signatory if you accept the offer.</p> <p>12 4.2 deals with the description of the asset claims, 13 which is the first thing that's to be dealt with, and 14 it's the fourth paragraph as to what the scheme 15 primarily does in this respect.</p> <p>16 MR JUSTICE DAVID RICHARDS: The agreement sets out -- 17 MR TROWER: Sets out structured procedures for the return of 18 trust assets.</p> <p>19 Then we go on to "Other claims under financial 20 contracts":</p> <p>21 "The agreement establishes a mechanism for the 22 termination and close-out of all financial contracts 23 between a signatory and the company. Claims or 24 liabilities under each such contract are netted off 25 under the agreement to determine a single net claim</p> <p style="text-align: center;">Page 25</p>	<p>1 "For this and other reasons outlined in the letter, 2 the administrators are also of the opinion the agreement 3 is in the best interests of the creditors of the company 4 as a whole."</p> <p>5 Then why it is they believe the agreement will 6 benefit the unsecured clients of the company: 7 "Speed up the agreement of unsecured claims because 8 all unsecured claims and signatories are determined by 9 operation of the agreement. Expedite the distribution 10 process for unsecured clients on the basis that the 11 unsecured claims can be determined more quickly and 12 reduce the level of unsecured claims as certain claims 13 of signatories for consequential and indirect losses are 14 compromised by the agreement."</p> <p>15 Then there is what the position is if you don't 16 accept the offer.</p> <p>17 Then, in paragraph 7, my Lord there sees reference 18 to at least 90 per cent of TA offerees with ownership 19 claims have to accept.</p> <p>20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: And what the disadvantages are to the method of 22 distributing assets on a case by case basis, which are 23 again listed in four ways at the top of page 221. 24 MR JUSTICE DAVID RICHARDS: "There are certain disadvantages 25 to this method of return --"</p> <p style="text-align: center;">Page 27</p>
<p>1 against all liability to the company. In the event that 2 the net figure is a claim against the company, this will 3 be an ascertained unsecured claim against the company 4 for the purposes of any future distribution from the 5 general estate of the company."</p> <p>6 And then there's what happens with any net 7 liabilities to the company and so on.</p> <p>8 Then the advantages of accepting the offer -- 9 my Lord's seen this already, but there's a neat summary 10 of what the administrators' view is in relation to the 11 agreement, it being:</p> <p>12 "... the most efficient solution for a return of 13 trust assets in terms of both time and cost. Expedite, 14 provide finality, reduce cost, expedite the release of 15 assets which are not held on trust, and enable 16 subsequent distribution to clients of the company on the 17 basis that the agreement will not only deal with claims 18 for trust assets, but also establish signatories' 19 unsecured claims, if any, against the company."</p> <p>20 And then how it is that having a multilateral 21 solution, the implementation of the agreement will:</p> <p>22 "... progress the administration in enabling further 23 advances to be made in the management of the unsecured 24 estate." 25 And:</p> <p style="text-align: center;">Page 26</p>	<p>1 MR TROWER: "This method" is a reference back to the 2 distribution of trust assets on a case by case basis. 3 MR JUSTICE DAVID RICHARDS: Oh, I see. This is all trust 4 assets? 5 MR TROWER: Yes, we're here dealing with the trust asset 6 aspect. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: So the only time you dip into unsecured claims 9 is the unsecured claims in respect of trust asset 10 claimants. 11 MR JUSTICE DAVID RICHARDS: The focus of the conclusion is 12 on the return of trust assets? 13 MR TROWER: Yes. 14 MR JUSTICE DAVID RICHARDS: You pointed out that, unlike the 15 scheme, this creates a mechanism for agreeing just 16 unsecured claims on the close-out of contracts. The 17 focus of the letter -- 18 MR TROWER: Very much so, my Lord, and I don't want to leave 19 your Lordship with the impression that that is not the 20 case. The important thing is that there's a development 21 going on here, so the original concept under the scheme 22 has been developed into the CRA, but the focus is still 23 very much on trust assets. 24 MR JUSTICE DAVID RICHARDS: This is pure surmise on my part, 25 but it was necessary, in order to return trust assets,</p> <p style="text-align: center;">Page 28</p>

<p>1 to identify the net overall positions of trust claimants 2 so that the company could deduct net claims to the 3 company from those trust assets. 4 MR TROWER: Yes. 5 MR JUSTICE DAVID RICHARDS: It would seem a fair inference 6 that in view of the fact that that was going to be 7 undertaken on a significant scale, why not do it for all 8 financial contract claimants? 9 MR TROWER: Yes. One can see that there were concepts built 10 in here which were obviously going to be of advantage in 11 dealing with unsecured claims and to the extent that 12 people desired to do that, it was appropriate they 13 should be given the opportunity to do so. 14 MR JUSTICE DAVID RICHARDS: I have no sense, incidentally, 15 as to, if you look at the general body of unsecured 16 claims against LBIE, how they divide in percentage terms 17 between those under financial contracts and others. 18 Do you have a ... 19 MR TROWER: Those behind me will have heard that and I may 20 have an answer. I don't, I'm afraid, have an answer for 21 my Lord at the moment. 22 MR JUSTICE DAVID RICHARDS: In very rough terms. 23 MR TROWER: Yes, I understand. 24 So the covering letter plainly amounts to a strong 25 encouragement by the joint administrators to trust asset</p> <p style="text-align: center;">Page 29</p>	<p>1 background section. If we go to the reader's guide, 2 which starts at page 229, there is a statement of the 3 purpose of the agreement in the third main paragraph. 4 If my Lord would just read that paragraph. 5 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 6 MR TROWER: And then explaining what the purpose of this 7 guide is and then: 8 "Before making your decision, you should review the 9 actual agreement and remaining parts of the circular in 10 consultation with your legal advisers. It is the 11 agreement and not the summary that will govern the 12 disposition of your claims against the company." 13 So two points there: make sure you're doing it with 14 your legal advisers; and, secondly, look at the 15 agreement, not this, this is to help you. 16 There's an overview section in paragraph 2 and 17 paragraph 2.2, 2.3 and 2.4 -- 2.1 deals with trust 18 assets, 2.2 deals with unsecured claims, 2.3 deals with 19 liabilities, and 2.4 deals with the net contractual 20 position. All this picks up the structure that my Lord 21 saw in the explanatory statement in relation to the 22 scheme. 23 MR JUSTICE DAVID RICHARDS: Yes. 24 MR TROWER: Then I think we can probably go on to 25 paragraph 3 because this is where my Lord sees set out</p> <p style="text-align: center;">Page 31</p>
<p>1 clients to become signatories and that much my Lord can 2 take away from this letter and that's plainly what it's 3 doing. Plainly, the use of a collective agreement of 4 this sort was, in their view, the most efficient way of 5 dealing with trust assets. 6 MR JUSTICE DAVID RICHARDS: Yes. 7 MR TROWER: The next bit of the circular is the background 8 section, which starts at page 222. There is a further 9 description in paragraph 5 of the difficulties in 10 returning trust assets. I don't think we probably need 11 to dwell on it because my Lord's already got the flavour 12 of that, I think, from other documents. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: Then there is a description in 6 of what has 15 been returned so far and how there were processes put in 16 place from a very early stage, particularly for people 17 who as a matter -- show specific hardship to be 18 prioritised. By that stage some 13.3 billion had been 19 returned since the administration date. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: Then, in section 7, there is yet a further 22 description, which I don't think adds very much to what 23 my Lord's already seen of the development of the 24 agreement and the offer. 25 That's really all I think we need out of the</p> <p style="text-align: center;">Page 30</p>	<p>1 the offer and how you go about accepting it. So the 2 offer is open for acceptance until 5 o'clock on 3 29 December. There's a description of the mechanism by 4 which you accept: 5 "The company may but is not obliged to extend the 6 offer period." 7 Then the conditions of the offer. There my Lord 8 sees at least 90 per cent by value of trust asset 9 claimants have to be signed up -- 10 MR JUSTICE DAVID RICHARDS: Yes. 11 MR TROWER: -- and the company obtaining an acceptable court 12 order regarding the distribution of trust assets. 13 Just on that, that was the bar date application, 14 which was made just before Christmas 2009 and provided 15 for a bar date -- it's referred to actually in the 16 chronology to the Pearson witness statement 17 in March 2009. 18 MR JUSTICE DAVID RICHARDS: So the application was made on 19 26 November 2009? 20 MR TROWER: That's right. 21 MR JUSTICE DAVID RICHARDS: And the order of 2 December? 22 MR TROWER: No, that's a different order; it's 15 December. 23 I'll come back to that order in a moment. 24 MR JUSTICE DAVID RICHARDS: That's the general one, isn't 25 it?</p> <p style="text-align: center;">Page 32</p>

<p>1 MR TROWER: Yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: I see. I'm with you.</p> <p>3 MR TROWER: So it's 15 December, bar date as of 19 March.</p> <p>4 So that's the conditions.</p> <p>5 Then we have a section 4, which summarises the</p> <p>6 agreement. The point that I think my Lord ought to just</p> <p>7 note in 4.1, "General provisions", is 5 and 6. So</p> <p>8 you have the concept there, which I'll show my Lord in</p> <p>9 due course, of mutual releases.</p> <p>10 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>11 MR TROWER: Then at 4.6 my Lord has an overview of the</p> <p>12 distribution:</p> <p>13 "In order for the company to make distributions to</p> <p>14 the trust creditors it must first determine the</p> <p>15 following items with respect to each trust creditor: net</p> <p>16 contractual position, retention amount [which is to do</p> <p>17 with secured creditors] ..."</p> <p>18 Then:</p> <p>19 "... needs to be an ascertainment of non-financial</p> <p>20 contract liabilities."</p> <p>21 So where someone has another obligation to the</p> <p>22 company that is to be determined. And then there are</p> <p>23 provisions which deal with how you distribute trust</p> <p>24 assets where there's an asset shortfall.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes. So that's dealing with</p> <p style="text-align: center;">Page 33</p>	<p>1 MR TROWER: He will, yes.</p> <p>2 MR JUSTICE DAVID RICHARDS: -- and a figure in US dollars</p> <p>3 will be determined.</p> <p>4 MR TROWER: Yes.</p> <p>5 MR JUSTICE DAVID RICHARDS: You may be coming to this, but</p> <p>6 what does the agreement say about what is then done with</p> <p>7 that net position?</p> <p>8 MR TROWER: He gets a distribution. I'll come on to that.</p> <p>9 MR JUSTICE DAVID RICHARDS: Right.</p> <p>10 MR TROWER: I think it's easier to do this by reference to</p> <p>11 the CRA itself, which we'll go to next --</p> <p>12 MR JUSTICE DAVID RICHARDS: Certainly, by all means.</p> <p>13 MR TROWER: -- which starts at 315, because, as I indicated,</p> <p>14 I don't think there's much point in looking at the</p> <p>15 summary.</p> <p>16 MR JUSTICE DAVID RICHARDS: No.</p> <p>17 MR TROWER: 323 is where the document itself starts.</p> <p>18 Recital B on page 323 --</p> <p>19 MR JUSTICE DAVID RICHARDS: Could I just say, as we go</p> <p>20 through this, if there is any provision that Mr Zacaroli</p> <p>21 or Mr Dicker would like me to see, it might be helpful</p> <p>22 to see it so that I see in one go everything all the</p> <p>23 provisions that people think may be relevant. Thank you</p> <p>24 very much.</p> <p>25 MR TROWER: So recital B:</p> <p style="text-align: center;">Page 35</p>
<p>1 distribution to trust creditors?</p> <p>2 MR TROWER: Correct. Then the net contractual position.</p> <p>3 Again, the focus here is on the trust creditors' net</p> <p>4 contractual position --</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: -- and what has to be determined. And if</p> <p>7 my Lord would just -- it's quite a useful little</p> <p>8 summary, this, 4.7. I wonder if my Lord would just read</p> <p>9 that and over the page. (Pause)</p> <p>10 MR JUSTICE DAVID RICHARDS: The sentence at the top of</p> <p>11 page 238 I just noted. That must be talking about not</p> <p>12 being entitled to interest as a provable debt --</p> <p>13 MR TROWER: I think that's right, yes. That must be right.</p> <p>14 MR JUSTICE DAVID RICHARDS: -- because it's in accordance</p> <p>15 with standard insolvency rules.</p> <p>16 MR TROWER: I think that must be right.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes. Thank you.</p> <p>18 MR TROWER: I don't think my Lord needs any more than that.</p> <p>19 Then at 4.11, really just to note rather than dwell</p> <p>20 on, there is a description of appropriations and</p> <p>21 distributions.</p> <p>22 MR JUSTICE DAVID RICHARDS: What I'm not clear about at the</p> <p>23 moment is, okay, so this -- a signatory to this</p> <p>24 agreement who doesn't have a trust claim will</p> <p>25 nonetheless have his net position calculated --</p> <p style="text-align: center;">Page 34</p>	<p>1 "The company and the signatories have entered into</p> <p>2 this agreement to: release, modify and agree all claims</p> <p>3 of the signatories relating to the trust assets and</p> <p>4 financial contracts other than certain specified</p> <p>5 excluded claims in exchange for mechanisms to determine</p> <p>6 the asset claim to trust assets and to effect</p> <p>7 distributions and appropriations of distributable trust</p> <p>8 assets to TA signatories; allocate and make provision</p> <p>9 for the costs of managing trust assets and allocating</p> <p>10 distributable trust assets to TA signatories; retain any</p> <p>11 retention amount of TA signatories."</p> <p>12 That's amounts owed by signatories to creditors</p> <p>13 whose claims are secured on trust assets. That's that</p> <p>14 concept:</p> <p>15 "Determine, quantify and crystallise the value of</p> <p>16 unsecured claims, including any asset shortfall claim,</p> <p>17 pre-administration client money shortfall claim, and net</p> <p>18 financial claim of TA signatories. Determine the net</p> <p>19 financial liability pre-administration client money</p> <p>20 shortfall claim and net financial claim of all</p> <p>21 signatories."</p> <p>22 So there my Lord has a sort of comparison in 4 and 5</p> <p>23 between the TAs and the non-TAs.</p> <p>24 MR JUSTICE DAVID RICHARDS: Oh yes, I see.</p> <p>25 MR TROWER: Because it's all signatories --</p> <p style="text-align: center;">Page 36</p>

<p>1 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>2 MR TROWER: Then at 6:</p> <p>3 "Determine certain other liabilities owed to the</p> <p>4 company by signatories including assets owned and</p> <p>5 non-financial contractual liabilities."</p> <p>6 Then I was going to go on to clause 4, unless my</p> <p>7 learned friends had anything before that.</p> <p>8 Clause 4 deals with two categories of claim; there</p> <p>9 are claims modified and claims released. Clause 4.1</p> <p>10 deals with claims modified:</p> <p>11 "With effect from its accession date ..."</p> <p>12 And that's the date of notice that the form of</p> <p>13 acceptance has been validly submitted, so it's the time</p> <p>14 the creditor accedes to the agreement:</p> <p>15 "... each signatory's asset claims to trust assets</p> <p>16 [those are ownership claims in accordance with the</p> <p>17 definitions] against the released parties [and the</p> <p>18 released parties are the company, the</p> <p>19 joint administrators and other signatories] shall, to</p> <p>20 the extent that they are not excluded claims [and</p> <p>21 there's the definition at 4.52 of excluded claims] and</p> <p>22 subject to clause 4.3, be modified and amended, together</p> <p>23 the 'modified claims', so they constitute the new claims</p> <p>24 described in clause 4.4."</p> <p>25 So we'll come back to it, but we'll look at 4.4 in</p> <p style="text-align: center;">Page 37</p>	<p>1 obligation of the company to the signatory been duly</p> <p>2 performed in a timely manner and in accordance with its</p> <p>3 terms in respect of any asset which is or was at any</p> <p>4 time the subject of an asset claim."</p> <p>5 Sorry, there's rather a long parenthesis there and</p> <p>6 it's easier to see what it is really getting at when one</p> <p>7 takes out the parenthesis:</p> <p>8 "All claims for consequential or economic loss in</p> <p>9 respect of any asset which is or was at any time the</p> <p>10 subject of an asset claim."</p> <p>11 Then 3:</p> <p>12 "All claims apart from the avoidance of doubt</p> <p>13 modified claims in respect of any financial contract."</p> <p>14 So you have the claims there in respect of any</p> <p>15 financial contract. And the concept of claim</p> <p>16 your Lordship will find on page 446 of the bundle.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: If my Lord would just read that. (Pause)</p> <p>19 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>20 MR TROWER: Then there is a qualification in 4.3 to the</p> <p>21 modification and release. So there's a carve-out, which</p> <p>22 is referred to in the first few lines of both 4.1 and</p> <p>23 4.2:</p> <p>24 "Post-administration client money claims, excluded</p> <p>25 claims, claims against the company for breach of the</p> <p style="text-align: center;">Page 39</p>
<p>1 a moment, but we'll see them further described. So</p> <p>2 you have the concept here of modifying and amending this</p> <p>3 category of claim.</p> <p>4 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>5 MR TROWER: We then go over to 4.2:</p> <p>6 "With effect from its accession date [ie the date</p> <p>7 you accede] each signatory shall waive and release ..."</p> <p>8 So instead of modify and amend, we have "waive and</p> <p>9 release":</p> <p>10 "... the following claims against the released</p> <p>11 parties ..."</p> <p>12 And that's the same category, that's the company,</p> <p>13 the joint administrators and the other signatories:</p> <p>14 "... to the extent they are not excluded claims and</p> <p>15 subject to clause 4.3 [so there's again that proviso]</p> <p>16 all claims for or in respect of any payment for or on</p> <p>17 account of any asset which is or was at any time the</p> <p>18 subject of an asset claim."</p> <p>19 So that's an in personam claim that relates to an</p> <p>20 asset claim.</p> <p>21 4.2.2:</p> <p>22 "All claims for consequential or economic loss,</p> <p>23 including claims for loss of bargain, loss of value or</p> <p>24 other losses computed by reference to the value which</p> <p>25 may have been available to a signatory had any</p> <p style="text-align: center;">Page 38</p>	<p>1 terms of the agreement and any counterclaims against the</p> <p>2 company."</p> <p>3 And if you go to excluded claims -- so my Lord has</p> <p>4 that, that's at page 452. (Pause)</p> <p>5 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>6 MR TROWER: I don't think anything turns for present</p> <p>7 purposes on excluded claims.</p> <p>8 We then go on to the new claims under 4.4 and those</p> <p>9 are what is referred to in the fourth line of 4.1.</p> <p>10 MR JUSTICE DAVID RICHARDS: Sorry, four point?</p> <p>11 MR TROWER: If we go on to 4.4, "New claims and</p> <p>12 signatories", so that's what you get, and this is --</p> <p>13 they're referred to in the third and fourth lines of</p> <p>14 4.1. So this is what we are first looking at in 4.4.1,</p> <p>15 so they constitute the new claims described in</p> <p>16 clause 4.4:</p> <p>17 "The modified claims of each signatory shall remain</p> <p>18 unaffected save that ..."</p> <p>19 It then provides how it is that the modified claims</p> <p>20 are now to be treated. So the ownership claims are</p> <p>21 ownership claims that are reflected in the entitlement</p> <p>22 to distributions and appropriations under the agreement.</p> <p>23 MR JUSTICE DAVID RICHARDS: So the modified claims are</p> <p>24 defined --</p> <p>25 MR TROWER: The modified claims are the ownership claims.</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 MR JUSTICE DAVID RICHARDS: I see, yes, of course.</p> <p>2 MR TROWER: So what this is doing is saying that your</p> <p>3 ownership claim is modified so that it is unaffected</p> <p>4 subject to what is then set out in (i) and (ii) and</p> <p>5 (iii) of 4.4.1.</p> <p>6 MR JUSTICE DAVID RICHARDS: I see.</p> <p>7 MR TROWER: And what you get is the distributions and</p> <p>8 appropriations in respect of the assets in respect of</p> <p>9 which you assert an ownership right. So that's to deal</p> <p>10 with the fact that there may be competing claims in</p> <p>11 respect of those assets.</p> <p>12 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>13 MR TROWER: I don't think that the precise detail of how</p> <p>14 this bit of it works matters --</p> <p>15 MR JUSTICE DAVID RICHARDS: No.</p> <p>16 MR TROWER: -- but I will show your Lordship in due course</p> <p>17 the distribution and appropriation provisions.</p> <p>18 What is of more central relevance for today's</p> <p>19 purposes is in 4.4.2, which is dealing with the released</p> <p>20 claims:</p> <p>21 "All signatories shall have their released claims</p> <p>22 [ie the claims referred to in 4.2] exchanged for the</p> <p>23 following as appropriate: 1, the right to have their net</p> <p>24 contractual position, allocations, distributions and</p> <p>25 appropriations determined on the basis set out in this</p> <p style="text-align: center;">Page 41</p>	<p>1 two, that which you get under 4.4.2 in respect of the</p> <p>2 released claims. That's the structure.</p> <p>3 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>4 MR TROWER: Then if we can go to 5.1 next. This is the</p> <p>5 claims released by the company:</p> <p>6 "With effect from the accession date of each</p> <p>7 signatory the company shall, subject to 5.1.2, release</p> <p>8 the claims against the relevant signatory for or in</p> <p>9 respect of all rights in respect of any financial</p> <p>10 contracts. The company release claims shall not</p> <p>11 include: any claim the company may have against any</p> <p>12 person other than the signatories, whether arising in</p> <p>13 respect of any trust assets, any other asset or any</p> <p>14 other contract; claims against the signatories for</p> <p>15 breach of any terms of this agreement; and any</p> <p>16 antecedent transaction liabilities."</p> <p>17 Antecedent transaction liabilities are clawback</p> <p>18 claims, effectively.</p> <p>19 And:</p> <p>20 "The company shall have its company release claims</p> <p>21 exchanged for the following: the right to determine the</p> <p>22 net contractual position, allocation, appropriation,</p> <p>23 distribution and ascertained claims of each signatory on</p> <p>24 the basis set out in the [inaudible] to this agreement</p> <p>25 ..."</p> <p style="text-align: center;">Page 43</p>
<p>1 agreement."</p> <p>2 So it's a contractual right to have their net</p> <p>3 contractual position, allocation, distribution and</p> <p>4 appropriations determined on the basis set out in this</p> <p>5 agreement:</p> <p>6 "2, the right to claim as a new obligation of the</p> <p>7 company their net financial claim, if any."</p> <p>8 And the net financial claim is essentially where the</p> <p>9 net contractual position shows a balance in their</p> <p>10 favour.</p> <p>11 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>12 MR TROWER: Then 3:</p> <p>13 "An ascertained claim, if any, for such amount as is</p> <p>14 determined under this agreement."</p> <p>15 And the ascertained claim as a concept is defined on</p> <p>16 page 443. "Ascertained claim" is about two-thirds of</p> <p>17 the way down:</p> <p>18 "An ascertained unsecured claim in the winding up of</p> <p>19 the company or any distribution of the company's assets</p> <p>20 generally to its unsecured creditors."</p> <p>21 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p>22 MR TROWER: We'll look in a moment at the net contractual</p> <p>23 positions and net financial claims and so on. So you've</p> <p>24 got these two concepts of what are described as new</p> <p>25 claims, one, as the modified claims under 4.4.1 and,</p> <p style="text-align: center;">Page 42</p>	<p>1 So it has the right to do it, whereas the signatory</p> <p>2 had the right to have it done:</p> <p>3 "... the right to claim, as a new obligation of the</p> <p>4 signatory, the distribution liabilities as calculated</p> <p>5 under this agreement from the signatory."</p> <p>6 And that includes the net financial liability, which</p> <p>7 is the other side of the net financial claim. Then</p> <p>8 under 3:</p> <p>9 "The right to appropriate such part of the</p> <p>10 distributable trust assets as is allocated to</p> <p>11 a signatory in or towards the discharge of that</p> <p>12 signatory's distribution liabilities to the companies</p> <p>13 provided for under this agreement."</p> <p>14 So it's a right to appropriate the ownership</p> <p>15 interest in the trust assets of the signatories in</p> <p>16 discharge of what the signatory would otherwise owe.</p> <p>17 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>18 MR TROWER: So there's the exchange, the mutual release, if</p> <p>19 you like, the other side of the coin.</p> <p>20 Then there is another release provision</p> <p>21 your Lordship should just note -- I don't think very</p> <p>22 much turns upon it -- in clause 9, page 333.</p> <p>23 9.1.1 is:</p> <p>24 "Ownership claims in respect of assets already</p> <p>25 returned."</p> <p style="text-align: center;">Page 44</p>

<p>1 Then there's a release of the members of the 2 creditors group committee in connection with the 3 preparation and negotiation of the agreement and 4 a release in relation to negotiations and releases of 5 the administrators. So they're different concepts of 6 release or different categories of release. 7 Then there's clause 10, which sets out what is 8 contemplated as to the order of events, which is: 9 "The company may in its absolute discretion: 1, 10 determine the asset claims, net contractual positions, 11 allocations, retention claims, distributions [et cetera] 12 in respect of TA signatories first prior to determining 13 the net contractual positions of the NTA signatories 14 ..." 15 So what that's focusing on is the order as between 16 trust claimants and non-trust claimants: 17 "... and deal with disputes from TA signatories 18 first prior to those of the non-TAs, provided this does 19 not conflict." 20 And then I was going to go to, briefly, 11, but we 21 don't need to pause on it. 11 is where the bar date is 22 dealt with and, as I indicated, it was made on 23 15 December with the bar date for 19 March. 24 Then I was going to pass over 12, 13, 14, 15 and 16 25 and pause very briefly on 17. 17 is just really for</p> <p style="text-align: center;">Page 45</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. Sorry, 18.1 just tells 2 us -- I see, parts 7 to 12 -- 3 MR TROWER: I'm so sorry, parts 7 to 12 is what's coming up. 4 MR JUSTICE DAVID RICHARDS: -- set out the mechanism for 5 determining ... 6 MR TROWER: In respect of each signatory the net contractual 7 position and in respect of each TA signatory, and then 8 the list of identified things. 9 MR JUSTICE DAVID RICHARDS: Yes, I understand. Thank you 10 Yes. 11 MR TROWER: Then there's a summary, I think, of what's 12 coming, that I don't think we need to go to. We need to 13 take the next, part 7, more slowly because we're back 14 into a bit which is of direct relevance. 15 19 is dealing with the termination of financial 16 contracts and then 19.1: 17 "All open contracts between the company and 18 signatory shall be terminated in accordance with this 19 clause 19." 20 I think I can leave 19.2 for the moment and go on to 21 19.3: 22 "Each open contract not terminated pursuant to 23 clause 19.2 shall be deemed to be terminated as between 24 the company and the relevant signatory on the relevant 25 open contract termination date without any action being</p> <p style="text-align: center;">Page 47</p>
<p>1 noting rather than anything else specific and is dealing 2 with the asset valuation methodology. The asset 3 valuation methodology is an amount in US dollars, as 4 my Lord sees, in 17.1. So when quantifying the value of 5 the assets for the purposes of this agreement, it's a US 6 dollar figure. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: In 17.5, the conversion to US dollars is done as 9 at the administration date. That's what the relevant FX 10 conversion time is. I've written down the 11 administration date or the asset valuation date. I'm 12 not sure why I've done that. If my Lord would just give 13 me one moment. I think it's primarily the 14 administration date. I'm not sure very much turns on it 15 anyway. 16 Then if we go on to clause 18, this gives an 17 overview of the distribution mechanism. It starts by 18 saying: 19 "The next few parts [that's parts 7 to 12 of the 20 agreement] set out the mechanism for determining in 21 respect of each signatory the net contractual position." 22 And then, in respect of each TA signatory, the other 23 things that are done. So it's in respect of everybody 24 the net contractual position and then, in respect of 25 each TA signatory, the eight listed items.</p> <p style="text-align: center;">Page 46</p>	<p>1 required." 2 And the relevant open contract termination date is 3 the end of the month of accession to the contract, so 4 what this clause does is provide for an across the board 5 termination date in respect of each open contract, not 6 terminated pursuant to clause 19.2. And the "not 7 pursuant to clause 19.2" is simply a reference to deal 8 with whether a defective notice is a termination and 9 I don't think that really matters for our purposes. 10 So that's 19. We then get on to close-out amounts 11 in 20: 12 "The close-out amount in respect of each financial 13 contract shall be determined by the relevant party in 14 accordance with the applicable financial contract 15 valuation methodology. For the avoidance of doubt, the 16 overriding valuation provisions form part of each 17 financial contract valuation methodology." 18 So here one sees an echo of what my Lord saw 19 in relation to the scheme explanatory statement. 20 Then it sets out the order of play in relation to 21 the valuation methodologies: 22 "The close-out amount in respect of each financial 23 contract shall be determined first in accordance with 24 the contractual valuation methodology insofar as it is 25 possible to do so under clause 21. Secondly, in the</p> <p style="text-align: center;">Page 48</p>

<p>1 circumstances as further set out in 22 in accordance 2 with the agreed valuation methodology, and thirdly if 3 neither the contractual valuation methodology nor the 4 agreed valuation methodology is applicable, as further 5 described in clause 23, in accordance with the fallback 6 valuation methodology." 7 So the order of play is: contract first, then agreed 8 valuation methodology and then fallback. 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: And we'll come on to how the overriding 11 valuation provisions fit in a moment. Before we get 12 there, in 20.3: 13 "A close-out amount or a close-out component 14 representing an amount payable by the signatory to the 15 company shall be expressed as a negative number. 16 A close-out amount or a close-out component representing 17 an amount payable by the company to the signatory shall 18 be expressed as a positive number." 19 So that's just a help with the quantification. 20 Then we have the overriding valuation provisions, 21 and the overriding valuation provisions are provisions 22 which take effect in respect of the contractual 23 valuation methodology, so they're applicable to all 24 contracts. 25 MR JUSTICE DAVID RICHARDS: Yes, I see.</p> <p style="text-align: center;">Page 49</p>	<p>1 for valuation purposes. 2 MR JUSTICE DAVID RICHARDS: How important are these 3 provisions to the issues which arise on this 4 application? 5 MR TROWER: I don't know quite how it will develop, but 6 I wanted my Lord just to see that there are a series of 7 variations. That's what's important for present 8 purposes. 9 MR JUSTICE DAVID RICHARDS: I follow that. 10 MR TROWER: I think the real detail is not something that 11 my Lord needs to get into, but I might be wrong, looking 12 on either side of me. 13 MR JUSTICE DAVID RICHARDS: Conceptually, I suppose it's 14 this, isn't it, that where you have open positions on 15 contracts as at the date of administration, which are 16 not automatically terminated -- 17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: -- and I think the point I'm 19 about to make is made in some or all of the skeleton 20 arguments. Those contracts give rise to contingent 21 claims or they would once there's a possibility of 22 a distribution. 23 MR TROWER: Yes. 24 MR JUSTICE DAVID RICHARDS: The contingency could be valued 25 but will be ascertained if the contract was subsequently</p> <p style="text-align: center;">Page 51</p>
<p>1 MR TROWER: That is the way it works. And there is a list 2 of them. The first is that: 3 "Any proprietary right which is an asset claim which 4 is the subject of a financial contract shall be 5 disregarded in the valuation of the close-out amount." 6 So we're down to in personam claims for close-out 7 valuation purposes. The second is that: 8 "The close-out amount in respect of each open 9 contract except to the extent that it relates to short 10 positions and rehypothecated security shall be 11 determined as at the open contract termination date." 12 Which, as I indicated, was the last day of the month 13 of the accession date, so that applies as an overriding 14 valuation provision. 15 Then there is a variation of the date in respect of 16 the value of short positions and rehypothecated 17 securities under 20.4.3. Because for them, the way the 18 valuation is to be carried out is the market closing 19 price as quoted on a generally recognised price source 20 as at the relevant asset valuation date, which is the 21 date immediately before the administration. So when the 22 close-out amount is being quantified in accordance with 23 the contract, there is a date which is included for 24 short positions and rehypothecated securities as the 25 date before the administration, so they change the date</p> <p style="text-align: center;">Page 50</p>	<p>1 closed out. 2 MR TROWER: Yes. 3 MR JUSTICE DAVID RICHARDS: That would determine the amount 4 approved. And this really varies the contractual 5 provisions for valuing the claims both ways as between 6 LBIE and the counterpart. 7 MR TROWER: Yes. 8 MR JUSTICE DAVID RICHARDS: Is that what it does? 9 MR TROWER: That's in summary what it does. 10 MR JUSTICE DAVID RICHARDS: I follow. 11 Would that be a convenient moment? 12 MR TROWER: It would be a very convenient moment. 13 MR JUSTICE DAVID RICHARDS: Very good. 2 o'clock. 14 (1.00 pm) 15 (The Short Adjournment) 16 (2.00 pm) 17 MR TROWER: My Lord, two matters from this morning. 18 One, your Lordship asked about the creditors' 19 committee and the scheme working group and its 20 composition. The easiest way to do this is if 21 your Lordship goes to volume 6, page 189, which is the 22 second progress report. Page 189. 23 There's a list of the creditors' committee members 24 there on the left and, just of those, LBHI by the time 25 of this report had been replaced by LCPI, as it says on</p> <p style="text-align: center;">Page 52</p>

<p>1 the previous paragraph. They were unsecured only, LCPI. 2 Ramius is a trust and an unsecured. GLG, a trust and an 3 unsecured. Legal & General, unsecured only. Oceanwood, 4 trust and unsecured. 5 MR JUSTICE DAVID RICHARDS: Thank you. 6 MR TROWER: Then on the right-hand column, just for 7 your Lordship's note, there's a pithy little description 8 of the function and role of the committee and committee 9 meetings explaining the role of the working group in the 10 last paragraph of that column. 11 MR JUSTICE DAVID RICHARDS: Yes. Right, thank you. 12 MR TROWER: That was the first point. 13 The second point, my Lord, related to the 14 constitution of the unsecured creditor base. The best 15 way of doing this, I think, is to go to the most recent 16 progress report, which is in bundle 8, tab 4, which is 17 the 13th progress report, page 15. 18 Under the heading "Indicative outcome", there is 19 a list of three categories of non-affiliate creditors: 20 "street creditors", "client asset claimant creditors" 21 and "other third party creditors". If we go over to the 22 indicative outcome figures, high and low are the same: 23 "Street creditors, 7.9 billion. Client asset 24 claimant creditors, 4 billion. Other third party 25 creditors, 60 million."</p> <p style="text-align: center;">Page 53</p>	<p>1 proportion of the creditor base that does not have 2 a claim under a financial contract. 3 MR JUSTICE DAVID RICHARDS: Yes. Thank you very much. 4 MR TROWER: My Lord, I was on 20.4, I think, of the CRA when 5 we rose. We were looking at the overriding valuation 6 provisions. That's in bundle 3, page 351. 7 These, as my Lord knows, are the valuation 8 provisions that apply across the board, even though the 9 starting point is the contract. And I think we had done 10 20.4.3. 11 In 20.4.4 and 20.4.5, there are disregarded in the 12 calculation of the close-out amount fraud asset 13 provisions and walkaway provisions as defined. There's 14 then excluded from the calculation of the valuation of 15 the close-out amount pre-administration client money 16 claims and then there is a clause which my Lord, 17 I think, mentioned this morning, which we'd seen in the 18 explanatory statement, although it has a first line in 19 here which makes rather clearer what it's dealing with, 20 which wasn't so clear on the face of the financial 21 statement: 22 "In determining the close-out amount in respect of a 23 financial contract, no interest shall accrue on any 24 unpaid liability of the company from the administration 25 date save to the extent that such interest would accrue</p> <p style="text-align: center;">Page 55</p>
<p>1 I think. Yes. 2 Just so I can explain so far as the client asset 3 claimant creditors are concerned, there is a footnote 4 there, saying: 5 "Client asset claimant creditors includes pending 6 unsecured claims arising from client asset shortfalls." 7 But it only includes that amount, so the way the 8 administrators have always presented these is that if 9 you are a creditor with a client asset claim, you go 10 into that box in respect of the entirety of your 11 unsecured claim. 12 MR JUSTICE DAVID RICHARDS: Yes, I see. 13 MR TROWER: So what that's referring to. The 4 billion 14 there is the total unsecured claim of client asset 15 claimant creditors of which there is a relatively small 16 proportion, so I am instructed, that is actually the 17 client asset shortfall. So the major part of that 18 4 billion is not the client asset shortfall, but is the 19 unsecured element of their claim. 20 MR JUSTICE DAVID RICHARDS: Yes, I see. 21 MR TROWER: Then the street creditors are those who don't 22 have trust claims. 23 MR JUSTICE DAVID RICHARDS: So both of those categories are 24 financial contracts? 25 MR TROWER: Yes. So there is actually only a very small</p> <p style="text-align: center;">Page 54</p>	<p>1 under rule 2.88 of the insolvency rules." 2 What this is dealing with is part of the 3 quantification process of the close-out amount; it's not 4 dealing with interest in relation to the position once 5 the close-out amount has been decided. So that opening 6 line is what's important. 7 Then third party liabilities. It appears to be 8 focusing on, in effect, the early part of rule 2.88 9 rather than the -- 10 MR JUSTICE DAVID RICHARDS: That's what I was just checking. 11 MR TROWER: Although there is a slight oddity in relation to 12 it in that it's not entirely clear what the drafting 13 really is focusing on and it may be linked in some way 14 with the financial collateral arrangements because the 15 financial collateral arrangements ensure that close-out 16 netting provisions take effect in accordance with their 17 terms in situations such as this. That may be what it's 18 focused on because rule 2.88 in its pure terms without 19 the impact of the financial collateral arrangements 20 doesn't really seem to work terribly well. But I think 21 the important point is it's determining the close-out 22 amount is what this provision is dealing with. It does 23 not appear to be dealing with anything to do with 24 interest payable on the close-out amount. 25 Then there is an exclusion of third party</p> <p style="text-align: center;">Page 56</p>

<p>1 liabilities and an exclusion of antecedent transactions 2 in 2.4.8 and 2.4.9. So that's a raft of overriding 3 valuation provisions. 4 There is then a discretionary provision which 5 entitles the company to disapply the overriding 6 valuation provisions where it's not reasonably 7 practicable to apply them. There's then a provision in 8 20.6 which determines who the determining party shall be 9 for the purposes of quantifying the close-out amount. 10 Then we come on to the contractual valuation 11 methodology. At 21.2.1 is the operative provision: 12 "Subject to the other provisions of this clause 21, 13 in respect of each financial contract the close-out 14 amount shall be determined in accordance with the 15 relevant contractual valuation provisions as modified 16 and supplemented by the overriding valuation 17 provisions." 18 And then it makes clear that the overriding 19 valuation provisions prevail; which is then described as 20 the contractual valuation methodology. 21 Then 21.3: 22 "Where the contractual valuation methodology 23 contains provisions for calculating a single amount 24 payable by one party to the other as a result of the 25 termination of a financial contract, such amount shall</p> <p style="text-align: center;">Page 57</p>	<p>1 There is a provision in 21.8 for valuation 2 statements, again which my Lord, I don't think, needs to 3 look at apart from to note. 4 Then at 21.9 there's provision for the company to 5 apply the contractual valuation methodology where the 6 determining party is the signatory and it doesn't do it. 7 Then I think we can go on to 22, agreed valuation 8 methodology: 9 "Where the company is the determining party in 10 respect of a financial contract and the contractual 11 valuation methodology would otherwise apply but the 12 company determines that it is not reasonably practicable 13 for it to calculate such a close-out amount in 14 accordance with the contractual valuation methodology, 15 the company shall notify the signatory of this 16 determination." 17 So this is designed to deal with circumstances 18 where, for example, there isn't readily available data 19 to enable the contractual provision to be complied with. 20 So there's then a notice provision and the concept 21 here is that you try to go through an agreed valuation 22 methodology, which is dealt with later on in clause 22, 23 and in the absence of getting an agreed valuation 24 methodology you end up in the fallback valuation 25 methodology, which is in 23.</p> <p style="text-align: center;">Page 59</p>
<p>1 be the close-out amount in respect of such a financial 2 contract." 3 So that's the operative provision which imposes the 4 close-out amount. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR TROWER: Mr Dicker asked me to mention 21.1: 7 "In respect of each financial contract, contractual 8 valuation provisions shall be any terms in such a 9 financial contract which provide for the calculation of 10 an amount or amounts payable by one party to the other 11 as a result of the termination of such financial 12 contract." 13 Then 21.3.2 deals with aggregation of close-out 14 components to be the total close-out amount where 15 you have more than one financial contract. 16 Then I don't think I was going to draw 17 your Lordship's attention to anything until we got to 18 21.6, which just confirms that where there's a conflict 19 between the contractual valuation provisions and the 20 overriding valuation provisions, the overriding 21 valuation provisions prevail, unless it's ... Yes. 22 Then there is provision in relation to the 23 determining party under the contractual valuation 24 methodology again, which I don't think my Lord needs to 25 look at apart from just to note.</p> <p style="text-align: center;">Page 58</p>	<p>1 MR JUSTICE DAVID RICHARDS: Yes. 2 MR TROWER: The fallback methodology does have specific 3 provision as to what is included within it, as you'd 4 expect, which is in 23.3. The fallback valuation 5 methodology refers to: 6 "The calculation of a close-out amount in accordance 7 with the overriding valuation provisions being an amount 8 equal to the mid-market value." 9 And mid-market value is then dealt with in the next 10 clause, 23.4: 11 "Plus the unpaid amounts owing to the signatory less 12 the unpaid amounts owing to the company." 13 So it's a focus on mid-market value as where you end 14 up as a fallback as defined in 23.4. 15 Then there are provisions as to how mid-market value 16 is applied and how unpaid amounts are defined. Again, 17 for my part, I don't think your Lordship needs to 18 understand the detail of that. What's important is that 19 it's mid-market value and it applies as an ultimate 20 fallback. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR TROWER: Then going on to clause 24, which is the next of 23 the important provisions, 24.1: 24 "All close-out amounts shall be denominated in US 25 dollars."</p> <p style="text-align: center;">Page 60</p>

15 (Pages 57 to 60)

<p>1 So this is where the US dollars come in: 2 "To the extent that a close-out amount is 3 denominated in a currency other than US dollars, the 4 company shall convert such close-out amount into US 5 dollars using the spot rate as of the relevant FX 6 conversion time." 7 And for these purposes the relevant FX conversion 8 time is close of business on the administration date. 9 Then 24.2 deals with what you do where there's more 10 than one -- well, in 24.2.1, where there's one financial 11 contract, the close-out amount in respect of that 12 financial contract is the net contractual position. So 13 the two are exactly the same. 14 24.2.2 deals with what you do when there is more 15 than one contract. That's, I think, as far as one needs 16 to go on that. 17 Then there's a disregard of netting agreements in 18 24.3 and net contractual position statements are 19 provided for in 24.4. 20 Then we come on to next important provision, which 21 is 25.1: 22 "A net contractual position in respect of 23 a signatory expressed as a positive number will 24 represent an amount due and owing by the company to that 25 signatory which shall constitute an ascertained,</p> <p style="text-align: center;">Page 61</p>	<p>1 MR TROWER: Then there is a payment of interest first 2 provision in 25.4. Then in 25.5 there is a reference to 3 a collateralisation election in respect of a net 4 financial liability, which is essentially to allow 5 signatories who have net financial liabilities to 6 collateralise their obligation by the application of 7 other assets as against that liability. 8 MR JUSTICE DAVID RICHARDS: Right. 9 MR TROWER: Then, my Lord, we come to a series of provisions 10 which your Lordship just needs to see what they are, but 11 we don't need, I think, to look at them in any detail at 12 all. 13 26 through to 32, which is part 8, are dealing with 14 retention amounts which are claims by creditors of 15 signatories for security interests and trust assets. So 16 this is dealing with, in its essence, with where 17 a signatory's ownership right has been charged by way of 18 security interest to somebody else, what happens in 19 those circumstances, but I don't think we need look at 20 those. 21 We then can go on to part 9, which deals with 22 non-financial contract liabilities, and it's really just 23 for my Lord to note that there are provisions which deal 24 with non-financial contract liabilities in this 25 agreement.</p> <p style="text-align: center;">Page 63</p>
<p>1 unsecured claim of that signatory in the winding-up of 2 the company or any distribution of the company's assets 3 to its unsecured creditors, such claim a net financial 4 claim." 5 And then: 6 "For the avoidance of doubt, no interest shall 7 accrue on any net financial claim save to the extent 8 provided in rule 2.88 of the insolvency rules." 9 Then 25.2 is the other side of the coin, the net 10 financial liability: 11 "A net contractual position in respect of a 12 signatory expressed as a negative number will represent 13 an amount due and owing by that signatory to the 14 company." 15 Then there's specific provision for how interest is 16 computed on that claim going the other way, which 17 includes provision for something called a net financial 18 interest amount, which is then dealt with in some detail 19 in 25.3. 20 MR JUSTICE DAVID RICHARDS: Yes. 21 MR TROWER: I don't think whether my learned friends want 22 your Lordship to read the net financial interest amount 23 at this stage. Mr Dicker would like your Lordship to 24 note 25.3.2(iii), the applicable rate. 25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 62</p>	<p>1 MR JUSTICE DAVID RICHARDS: I see. So they're ascertained 2 as well, are they, or determined in some way? 3 MR TROWER: They are determined, yes. 4 MR JUSTICE DAVID RICHARDS: Yes, I see. 5 MR TROWER: "The company shall determine from time to time 6 whether there are any non-financial contract liabilities 7 in respect of each signatory." 8 Which is what you get in 33.2. Because for certain 9 purposes it's important. And in 33.3: 10 "For the purposes of part 11, ascertain 11 non-financial contract liabilities shall be denominated 12 in US dollars. To the extent that any ascertained 13 non-financial contract liabilities are denominated in 14 a currency other than US dollars, the company shall 15 convert them into US dollars using the spot rate at the 16 relevant FX conversion time." 17 That again is the administration date: 18 "For the avoidance of doubt, for the purposes of 19 part 11, this shall not prejudice any of the company's 20 rights to take any action against a signatory outside 21 this agreement in respect of anything." 22 MR JUSTICE DAVID RICHARDS: Sorry, this is the wrong way 23 round. These are liabilities of a signatory. 24 MR TROWER: Yes. 25 Then 34 to 51, which is part 10. Again, I wasn't</p> <p style="text-align: center;">Page 64</p>

<p>1 going to take my Lord to the detail of these, but it's 2 important you should note what they are and how complex 3 they are and how much of the agreement is actually 4 focused on these. They're complex provisions relating 5 to the allocation of trust assets and the computation of 6 shortfall claims where there's a shortfall in trust 7 assets. That's what they're designed to do. Obviously, 8 when my Lord is thinking about the burden of the way 9 this agreement fits, it is important you should know 10 that.</p> <p>11 That takes one right through to 51, which is on 12 page 389. Then we get, in part 11, to the appropriation 13 and distribution provisions on paragraph 52, starting at 14 page 390. 52.1:</p> <p>15 "The company determines distribution of distribution 16 assets to a signatory subject to any rights of the 17 company to appropriate distribution assets to reduce the 18 signatory's distribution liabilities to the company in 19 full or in part."</p> <p>20 And:</p> <p>21 "'Distribution' means any distribution of 22 a distribution asset to a signatory determined in 23 accordance with this part 11."</p> <p>24 And then, if you look at distribution assets, that's 25 to be found at 54.1 as to what is a distribution asset,</p> <p style="text-align: center;">Page 65</p>	<p>1 talking about allocation to TA signatories with a net 2 financial claim. So this is:</p> <p>3 "A TA signatory, ie a signatory with a trust asset 4 claim, with a net financial claim, where an asset 5 allocation is determined in respect of any stock line at 6 any time, the applicable distribution asset shall be 7 such asset allocation [so that's its trust right] and 8 net financial claim [so that's its net financial 9 claim]."</p> <p>10 And the applicable distribution liability will be 11 the amounts that have to be taken into account before it 12 gets what it is otherwise entitled to.</p> <p>13 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>14 MR TROWER: Then in 60.1.2, it deals with the appropriation 15 of the asset allocation, and 60.1.4 deals with the 16 appropriation of the net financial claim.</p> <p>17 60.1.2:</p> <p>18 "The company shall appropriate the asset allocation 19 [in a particular manner]."</p> <p>20 Ie the trust assets. 60.1.4 deals with the 21 appropriation of the net financial claim.</p> <p>22 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>23 MR TROWER: Then once that's happened, you go to 60.1.6:</p> <p>24 "If the net financial claim exceeds what it has been 25 appropriated against, then what it has been appropriated</p> <p style="text-align: center;">Page 67</p>
<p>1 and you find the list on the next page, 391:</p> <p>2 "Distribution assets are assets and/or claims for 3 which the company is accountable to or for the benefit 4 of a signatory under this agreement and which comprise 5 asset allocations, a retention allocation [that's the 6 surplus after secured creditors], the position 7 in relation to collateralisation elections and 8 shortfalls."</p> <p>9 And then:</p> <p>10 "The net financial claim of the TA signatory 11 determined in accordance with part 7 and any asset 12 shortfall claim of the TA signatory for each asset 13 pool."</p> <p>14 Then 54.2 provides for the application of 15 distribution assets in particular categories of 16 distribution asset in a particular order. Your Lordship 17 sees that at 54.2.1:</p> <p>18 "An asset allocation which shall be applied as 19 a distribution asset in the priorities of application 20 under clause 60 [effectively]."</p> <p>21 And then, if we go down to 54.2.8:</p> <p>22 "Net financial claims are applied as a distribution 23 asset in priority of application under 60.1."</p> <p>24 I was then going to go on to 60, unless my learned 25 friends have anything before we get there. This is</p> <p style="text-align: center;">Page 66</p>	<p>1 against, the limited ascertained non-financial contract 2 liabilities are reduced in full [so they go down to 3 nothing] and any remaining amount of net financial claim 4 after appropriation becomes an ascertained claim."</p> <p>5 Your Lordship may remember we looked at an 6 ascertained claim this morning and I'll just go to that 7 again in just a moment.</p> <p>8 MR JUSTICE DAVID RICHARDS: Just for the sake of the 9 transcript, it's 60.1.5.</p> <p>10 MR TROWER: I'm sorry.</p> <p>11 MR JUSTICE DAVID RICHARDS: It's not very clear.</p> <p>12 MR TROWER: Yes.</p> <p>13 So that's what happens to the net financial claim 14 and I think we can then probably go right on to 62 on 15 page 412 as to what happens with ascertained claims. 16 Right at the bottom of 412:</p> <p>17 "Ascertained claims. The company shall determine 18 the following ascertained claims, if any, of the 19 signatory."</p> <p>20 And the critical one, I think, is 62.4:</p> <p>21 "A TA signatory with a net financial claim after 22 appropriation in accordance with clause 60.1.4 shall 23 have an ascertained claim for an amount equal to such a 24 net financial claim remaining after appropriation. 25 An NTA signatory with a net financial claim shall have</p> <p style="text-align: center;">Page 68</p>

<p>1 an ascertained claim for an amount equal to such net 2 financial claim."</p> <p>3 Just to remind my Lord of what an ascertained claim 4 is, we have that at page 443 of the definitions: 5 "An ascertained unsecured claim in the winding-up of 6 a company or any distribution of the company's assets 7 generated to its unsecured creditors."</p> <p>8 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR TROWER: So what in essence has been going on in this 10 whole section is there are some very complicated 11 provisions which deal with how it is that the net 12 financial claims should appropriated if required after 13 it's actually been quantified. You then end up at the 14 end, in 62.4, with it becoming an ascertained claim.</p> <p>15 MR JUSTICE DAVID RICHARDS: Right, thank you.</p> <p>16 MR TROWER: We then go on to -- there's part 12, 13, 14 and 17 15 dealing with: delivery of distributions, part 12, 18 which is 63; closing, which is 64, closing statements; 19 representations, which is 65; and tax, which is 66. 20 I didn't think your Lordship needed to see those.</p> <p>21 Part 16 contains the dispute resolution mechanism 22 and we don't need to look at it in any detail, but just 23 so your Lordship knows it's in there, paragraph 67 and 24 following. In essence what it provides for is for there 25 to be an elevation of the dispute through three stages,</p> <p style="text-align: center;">Page 69</p>	<p>1 to whether this agreement is appropriate or proper for 2 it based upon its own judgment and upon advice from its 3 own advisers as it has deemed necessary. Signatories 4 not relying on any communication, written or oral, of or 5 from the company, including the circular, save for this 6 agreement contained within the circular, as 7 a recommendation or an inducement to enter into this 8 agreement, it being understood that information, 9 explanations relating to this agreement in the circular 10 will not be relied upon or treated as a recommendation 11 or an inducement to enter into this agreement. Nothing 12 in this agreement will exclude any liability the company 13 may have under the regulatory systems as defined in the 14 FSA rules, which may not be excluded or restricted 15 thereunder."</p> <p>16 And then there are authority and delegation 17 provisions, and then there is a provision in clause 79. 18 My Lord will just notice there is an obligation on the 19 signatories to cooperate with and render such assistance 20 to the company as it may reasonably require, providing 21 information and documents in connection with their asset 22 plans in the calculation of their net contractual 23 position."</p> <p>24 Then there is a modification provision. Just so 25 my Lord notes this: that modification provision has</p> <p style="text-align: center;">Page 71</p>
<p>1 starting with a valuation expert, going to an 2 adjudicator, and then ending up with the court 3 in relation to disputes. I didn't think there was 4 anything specific in there that your Lordship needed to 5 see to look at the drafting of, apart from to know that 6 that was there.</p> <p>7 Then, in part 17, there are a series of other 8 provisions which we need to look at one or two of. 9 Page 433. The first one, clause 75: 10 "No personal liability on the administrators. They 11 have entered into the agreement as agents for and on 12 behalf of the company and none of them shall incur any 13 personal liability." 14 So that's just to confirm the agency context in 15 which they're entering into this agreement and the 16 agreement of course is an agreement of the company, not 17 an agreement of the administrators.</p> <p>18 MR JUSTICE DAVID RICHARDS: Right.</p> <p>19 MR TROWER: It confirms that: 20 "The exclusion of liability continues 21 notwithstanding the termination of the agency." 22 Then there's a clause 76, a non-reliance on the 23 circular by the signatory: 24 "The signatory confirms that it's made its own 25 independent decision to enter into this agreement and as</p> <p style="text-align: center;">Page 70</p>	<p>1 actually been exercised in order to modify the CRA by 2 reason of the global claim that was made in the 3 insolvency of LBI in order to get some assets back. In 4 case my Lord wondered or stumbled across it, there is 5 elsewhere in the bundles a copy of the CRA as modified, 6 which my Lord ought not to look at; it's this one that 7 we need to look at in bundle 3.</p> <p>8 MR JUSTICE DAVID RICHARDS: Right.</p> <p>9 MR TROWER: And then in clause 81 there's a conflict 10 provision, which says that this applies, so: 11 "This agreement prevails over the IAA and the 12 insolvency rules to the extent that the act and the 13 rules permit it to do so." 14 As you would expect. 15 I then didn't have anything else that I thought 16 your Lordship needed to see on the agreement, on the CRA 17 itself.</p> <p>18 Clause 85: 19 "Any payment to the company under this agreement 20 shall be made and immediately available funds in 21 US dollars to a bank account as notified in advance by 22 the company to the relevant payer." 23 So that's payments to the company. 24 Then part 18, page 441, includes the definitions and 25 interpretation, just so my Lord has it, as to where</p> <p style="text-align: center;">Page 72</p>

<p>1 we can find it. I hope I've told you about the ones 2 that matter, but that's where they are. They start at 3 page 441. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR TROWER: Then if we go on to 473, this is a schedule to 6 the agreement that constitutes the terms of the offer 7 and, in particular, includes such things as who the 8 offer is open to in clause 3, the eligible offerees and 9 sets out the conditions of the offer and so on. But 10 I don't think that there is anything -- it's really to 11 deal with the structure of the way in which the 12 agreement comes into force because the offer is there 13 and you then accept it and the way you accept the offer 14 is by signing a form of acceptance, which is contained 15 in schedule 2. 16 Again, I don't think that there was anything on the 17 form of acceptance that added anything to what I've 18 already drawn your Lordship's attention to. 19 Page 480, clauses 9.1 and 9.2. What that provides 20 for is the circumstances in which a condition has to be 21 satisfied in order for the NTA condition to be 22 satisfied. So there are additional circumstances for 23 the NTA condition to be satisfied. The NTA hasn't been 24 satisfied in this case, so it doesn't actually apply. 25 Although the agreement contemplated NTA offerees</p> <p style="text-align: center;">Page 73</p>	<p>1 MR JUSTICE DAVID RICHARDS: All right, okay. 2 MR TROWER: I'm not sure it matters why. 3 MR JUSTICE DAVID RICHARDS: No, no. Thank you. 4 MR TROWER: Then there's a form of dispute notice in 5 schedule 3 and a form of written resolution in 6 schedule 4, which is 488 and 489. That brings us to the 7 end of this document. 8 MR JUSTICE DAVID RICHARDS: Right, thank you. 9 MR TROWER: The CRA then became effective as against TA 10 signatories on 31 December 2009, it having got the 11 relevant percentage, which was 90 per cent, of the trust 12 claimants. 13 By the time it had done so, the joint administrators 14 had obtained permission from Mr Justice Briggs to give 15 notice of intention to distribute under rule 2.95, but 16 with the last date for approving of 31 December 2010. 17 So that took place between the time the CRA circular 18 was sent out and the time the CRA agreement became 19 effective. That order was made on 30 November, sealed 20 on 2 December, and the notice to distribute was actually 21 dated 4 December 2009. 22 As explained by Mr Lomas, the effect of the notice 23 was to help in affording greater certainty as to claims 24 because of the operation of set-off and was a necessary 25 part of the unsecured determination process. That's</p> <p style="text-align: center;">Page 75</p>
<p>1 being bound by the agreement, they haven't in fact 2 satisfied the NTA condition or the NTA condition has not 3 in fact, in the events that have occurred, been 4 satisfied. 5 MR JUSTICE DAVID RICHARDS: Sorry, does that mean that this 6 CRA is not binding on any NTAs? 7 MR TROWER: It's not binding on any NTA offeree in the 8 events that have occurred. 9 MR JUSTICE DAVID RICHARDS: It was contemplated? 10 MR TROWER: It was contemplated it would be, but it's not. 11 It hasn't in fact happened. 12 MR JUSTICE DAVID RICHARDS: I see. 13 MR TROWER: Then if we go on to schedule -- 14 MR JUSTICE DAVID RICHARDS: So in fact the CRAs have taken 15 effect as regards unsecured claims only in respect of 16 those people who have trust claims -- 17 MR TROWER: Yes. 18 MR JUSTICE DAVID RICHARDS: -- for which purpose it was 19 necessary in any event to go through that exercise? 20 MR TROWER: Yes, and it is also the case, obviously, based 21 on that condition, that there was an extra condition to 22 be satisfied in respect of the NTA offerees. 23 MR JUSTICE DAVID RICHARDS: Yes. So an insufficient number 24 of NTAs acceded to the -- 25 MR TROWER: No, I think it was just withdrawn in the end.</p> <p style="text-align: center;">Page 74</p>	<p>1 what was going on there, so the two things were going on 2 in tandem. 3 What I was just proposing to do next, subject to 4 your Lordship, before going on to explain to my Lord 5 what happened next, was to just set out the textual 6 argument -- and it is no more than that -- in relation 7 to what the administrators consider your Lordship ought 8 to hear as an argument on issues 38 and 34.3 -- 9 MR JUSTICE DAVID RICHARDS: Yes. 10 MR TROWER: -- because it relates directly to the CRA and 11 I thought now was a sensible time to do it with the 12 provisions of the CRA fresh in mind. 13 These are the arguments that need to be taken 14 together with our skeleton at paragraphs 132 to 152. 15 My Lord might like to have the CRA open at clause 4 for 16 this purpose because the submission I'm going to make 17 is -- all the submissions on this area really flow from 18 a way of looking at what the CRA does and the way it 19 works. 20 MR JUSTICE DAVID RICHARDS: Which page? 21 MR TROWER: It is clause 4.2.3, page 326. 22 The way the argument goes is this, that the effect 23 of the CRA is to do the following: it releases all 24 claims in respect of any financial contract under 4.2.3, 25 which will include any original entitlement to be paid</p> <p style="text-align: center;">Page 76</p>

<p>1 in a foreign currency, and it grants in exchange the 2 right to claim, as a new obligation of the company, the 3 net financial claim under 4.4.2, the net financial claim 4 being any positive net financial position, that's 5 clause 25.1, being the sum of all close-out amounts 6 denominated in US dollars under clause 24.1. 7 So if we just flick on to 25.1, which is the net 8 financial claim, it's any positive net financial 9 position, and that is the sum of all close-out amounts 10 denominated in US dollars if one goes back to 24.1. 11 24.1: 12 "All close-out amounts shall be denominated in US 13 dollars." 14 And then 24.2: 15 "Where there is a single contract, that close-out 16 amount is the net contractual position. Where there is 17 more than one contract, the aggregate of the contracts' 18 close-out amounts is the net contractual position." 19 So if you move from 24.1, to 24.2, through 25.1, 20 your net financial claim is the positive net financial 21 position being the sum of all close-out amounts 22 denominated in US dollars. So what you get in exchange 23 is a US dollar amount in exchange for what was the 24 entitlement under the financial contract in whatever 25 currency it may have been denominated in. So whether it</p> <p style="text-align: center;">Page 77</p>	<p>1 dollars doesn't and never has carried with it the right 2 to be discharged in dollars. The right is and only ever 3 has been a right to have a claim treated as an unsecured 4 claim, which inevitably carries with it the right to 5 receive sterling. So the argument then follows that as 6 a currency conversion claim is simply the surviving part 7 of what the creditor bargained for, which is the way 8 your Lordship looked at it at first instance and the way 9 Lord Justice Briggs characterised it on appeal at 10 paragraph 137 of his judgment, what the creditor has now 11 bargained for is the net financial claim and any 12 obligation to pay in a foreign currency that might 13 previously have existed has been released. 14 MR JUSTICE DAVID RICHARDS: I'm just trying to understand 15 the concept of the new obligation. I can see that it's 16 a compromise of the rights as between each claimant and 17 the company, but I'm having difficulty with how you fit 18 a new obligation arising under these agreements with the 19 statutory regime for the distribution of assets. 20 MR TROWER: Well, what we suggest may be the answer to 21 this -- and it is around ... My Lord has, if I may say 22 so, homed straight in on what is the core of the point 23 I suspect on this particular point of construction. One 24 way of thinking about this is that on any view there is 25 a new contract here, so there are new contractual</p> <p style="text-align: center;">Page 79</p>
<p>1 was sterling, dollars or euros, that's what you get 2 back. 3 We then say that, under clause 25.1, the net 4 financial claim has all the attributes of an unsecured 5 claim as described in 25.1, but it's a new obligation of 6 the company denominated in dollars. But because the new 7 claim has all the characteristics and attributes of an 8 unsecured claim, it will have to be converted from 9 dollars to sterling for the purposes of proof. But 10 that's what the parties have agreed should happen by 11 giving it the description they have in clause 25.1. So 12 the contractual right under this agreement is therefore 13 a right to a claim in dollars, but provable in sterling 14 at the relevant exchange rate. There is no surviving 15 right to have the net financial claim discharged by 16 a payment in either the original foreign currency -- 17 MR JUSTICE DAVID RICHARDS: The contractual right is a claim 18 denominated in US dollars but payable in sterling? 19 MR TROWER: Payable and provable in sterling at the relevant 20 exchange rate under the insolvency rules. There is no 21 surviving right to have the net financial claim 22 discharged by a payment either in dollars or in the 23 original foreign currency. The only right is to have it 24 discharged through the proof process in sterling. 25 So the denomination of the net financial claim in</p> <p style="text-align: center;">Page 78</p>	<p>1 obligations that arise. 2 What we suggest is one way of looking at this 3 agreement is to say that that is a new bundle of rights 4 that arises as a result of something that the 5 administrators have done subsequent to the commencement 6 of the administration, but that new bundle of rights has 7 all the attributes of an unsecured claim as a matter of 8 contract. 9 MR JUSTICE DAVID RICHARDS: But how does this differ from 10 just a compromise of the claim? 11 MR TROWER: It depends on whether or not anything has 12 continued to subsist because if something has continued 13 to subsist, you may end up with a different answer on 14 the currency conversion claim. That's the point. 15 That's why this point matters because we -- 16 MR JUSTICE DAVID RICHARDS: But if you say that the 17 contractual claims, as they existed, and subject to 18 certainly unascertained -- had not been ascertained, may 19 have been disputed, but those claims as at the date of 20 administration are released and replaced by a wholly new 21 obligation, which is not based on the pre-administration 22 contract but is based on this contract, if you're going 23 that far -- 24 MR TROWER: It depends what one means by "based on". 25 MR JUSTICE DAVID RICHARDS: Yes, okay.</p> <p style="text-align: center;">Page 80</p>

<p>1 MR TROWER: We would accept that all the characteristics of 2 the -- there is something that is new as a chose in 3 action that arises, which draws into itself a number of 4 the characteristics from the original chose in action. 5 That's what discharge and replacement by way of 6 something, by way of exchange is about, we would 7 suggest, and that's why there is a difference in 8 language between amending and modifying, which you get 9 in 4.4.1, and the release and exchange, which you get in 10 4.4.2. So if one just goes back to that -- sorry, 11 I don't mean 4.4 --</p> <p>12 MR JUSTICE DAVID RICHARDS: Modified claims are ownership 13 claims --</p> <p>14 MR TROWER: That's right.</p> <p>15 MR JUSTICE DAVID RICHARDS: -- so there's no difficulty 16 conceptually in replacing a trust because there's no 17 statutory code which we have to fit this into.</p> <p>18 MR TROWER: Yes.</p> <p>19 MR JUSTICE DAVID RICHARDS: So if a trust's propriety claim 20 exists as at the date of administration there is no 21 conceptual difficulty in replacing that completely with 22 a new agreed claim --</p> <p>23 MR TROWER: Yes.</p> <p>24 MR JUSTICE DAVID RICHARDS: -- I don't think. 25 The difficulty comes with the -- now the released</p> <p style="text-align: center;">Page 81</p>	<p>1 elements of the original cause of action and then 2 reintroducing them under 4.4.2. So it's giving you back 3 ... But if you don't have it given back to you by 4.4.2, 4 you've lost it under 4.4.2 --</p> <p>5 MR JUSTICE DAVID RICHARDS: This may just be a way of posing 6 the underlying question in a different way, but I think 7 you're actually going further than that and you're 8 saying that because there is the complete release of the 9 pre-administration contractual rights and their 10 replacement by new contractual rights, that you can only 11 look to the new contract as the source of the creditors' 12 rights. Conceptually I can see that, but I think 13 there's a problem about it because how can you prove in 14 respect of a cause of action which arises for the first 15 time after the start of the administration?</p> <p>16 MR TROWER: It may be that what's happening here is that an 17 agreement that's been reached between the company and 18 the creditors is an agreement that has, as I say, all 19 the attributes which include the entitlement as against 20 the company to prove, but which are derived from the new 21 contract.</p> <p>22 MR JUSTICE DAVID RICHARDS: I'm not sure the administrators 23 have authority to do that.</p> <p>24 MR TROWER: Well, they may so. It depends whether or not 25 that -- that may go to the question of whether this</p> <p style="text-align: center;">Page 83</p>
<p>1 claims are the unsecured claims, aren't they? 2 MR TROWER: Yes.</p> <p>3 MR JUSTICE DAVID RICHARDS: That's where, at the moment, 4 I have more difficulty with this.</p> <p>5 MR TROWER: Well, what you have is a new obligation. On 6 this argument what one has is a new obligation of the 7 company that is incurred subsequent to the 8 administration date under this agreement.</p> <p>9 MR JUSTICE DAVID RICHARDS: But is that not true of all 10 compromises reached between an officeholder and 11 a creditor, in a sense?</p> <p>12 MR TROWER: Yes.</p> <p>13 MR JUSTICE DAVID RICHARDS: But actually, I think one would 14 think of it that the creditor has a claim arising under 15 a pre-administration contract --</p> <p>16 MR TROWER: Yes.</p> <p>17 MR JUSTICE DAVID RICHARDS: -- which is then compromised by 18 agreement as to the amount due.</p> <p>19 MR TROWER: Yes.</p> <p>20 MR JUSTICE DAVID RICHARDS: But it's not a new obligation in 21 the sense that it stems from some completely new cause 22 of action, which replaces the pre-administration 23 contract.</p> <p>24 MR TROWER: I think that's right, but what this agreement 25 does appear to be doing is stripping away all the</p> <p style="text-align: center;">Page 82</p>	<p>1 contract goes that far.</p> <p>2 MR JUSTICE DAVID RICHARDS: That's my point, really. 3 I think the submission you're making is that it's 4 not just that by a proper construction of the agreement 5 the creditors have released their currency conversion 6 claims; it is that from the moment of entering into this 7 they had a completely new basis of claim or cause of 8 action, if you like, which did not include, for the 9 reasons you have given, the possibility of a currency 10 conversion claim.</p> <p>11 MR TROWER: Your Lordship is right. That's the sort of 12 ultimate high point of the argument, but it works as 13 a point even if conceptually you don't go that far 14 because when you're trying to identify what the rights 15 are that you have by way of replacement, they are the 16 rights which you would have had under the original 17 relationship which had been released.</p> <p>18 MR JUSTICE DAVID RICHARDS: Save to the extent they've been 19 released.</p> <p>20 MR TROWER: Yes.</p> <p>21 MR JUSTICE DAVID RICHARDS: That I understand and that is 22 perhaps a slightly more conventional approach to the 23 construction of the agreement: it's an agreement 24 compromising the existing claim involving releases and 25 so on.</p> <p style="text-align: center;">Page 84</p>

<p>1 MR TROWER: The reason we put the argument, so your Lordship 2 can see it, as high as we did was because it still fits 3 within the concept of -- you still have to give meaning 4 to the concept of what is the new obligation which has 5 actually been imposed and what are the characteristics 6 of the new obligation. 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: They are only the characteristics that the 9 obligation is capable of having in circumstances in 10 which you ask yourself: what is being given back as 11 a replacement for that which has been released? 12 MR JUSTICE DAVID RICHARDS: Yes. 13 MR TROWER: And that, in essence, is the argument. That 14 it is only to the extent that the creditors concerned or 15 their right to the net financial claim carries with it 16 the elements that would be attributable to it in the 17 context of a proof that they get something back by way 18 of exchange; otherwise everything's been released. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR TROWER: If that makes sense. 21 MR JUSTICE DAVID RICHARDS: Yes. 22 MR TROWER: So my Lord, that was all I was going to say 23 about the way of thinking about the CRA. 24 Then just moving back to the history of what 25 happened next after the CRA was entered into. The next</p> <p style="text-align: center;">Page 85</p>	<p>1 three paragraphs. (Pause) 2 MR JUSTICE DAVID RICHARDS: Yes. 3 MR TROWER: Mr Lomas explains in his witness statement that 4 at this stage the administrators were still thinking in 5 terms of a CVA scheme or some form of multilateral 6 contract as being under consideration for the purposes 7 of dealing with unsecured claims. Then there's a little 8 bit on client assets at section 7.1, page 385. What 9 your Lordship will there see is a description in the 10 highlights section under "Client assets" of what the CRA 11 was in summary being represented as doing. So that's 12 page 385. 13 So that's where we got to by the time of the third 14 progress report. It continues, of course, to contain 15 all the caution on data usage and no dividend given at 16 this stage. 17 The next event that occurs is on 16 June -- still 18 the same bundle, 439 -- where the consensual approach 19 was then announced. 20 MR JUSTICE DAVID RICHARDS: Page? 21 MR TROWER: Page 439. 22 The bit that matters is just above halfway down 439, 23 where Mr Pearson says what the proposed solution is for 24 the determination of unsecured creditor claims. There 25 are two paragraphs to read there.</p> <p style="text-align: center;">Page 87</p>
<p>1 progress report was the third progress report, which was 2 dated 14 April, which your Lordship finds at 4A/339. 3 That has two relevant sections: one dealing with 4 unsecured claims and one dealing with client assets. 5 The unsecured claims section starts at page 375. 6 What my Lord will see, starting halfway down, 7 there's a receipt of formal claims from counterparties. 8 By this stage, of course, the unsecured claims 9 submission date was 31 December 2010 and they are there 10 pointing out that they don't have very many claims in 11 and the quality and completeness of the submitted claims 12 is varied. 13 Then the last paragraph: 14 "To optimise claim processing efficiency, a creditor 15 claims portal to manage claims will be used. The 16 revised version of the creditor claims portal shall be 17 available for creditors over the coming months." 18 So there's a portal through which you submit your 19 claims. 20 Then on the right-hand side of the page is 21 a description of the valuation in relation to financial 22 contracts and the valuation exercise that's going to go 23 on. 24 Over the page, there is a bit which, if my Lord 25 would read, in relation to resolution process, those</p> <p style="text-align: center;">Page 86</p>	<p>1 Then if we go on to the update on page 441, which 2 was issued on the same day. Would my Lord read fairly 3 quickly the background and then the description of the 4 consensual approach? 5 MR JUSTICE DAVID RICHARDS: Sorry, that's on page? 6 MR TROWER: Page 441. (Pause) 7 My Lord sees at the top of 442 there's the 8 introduction of the LBIE determination, which features 9 quite heavily. (Pause) 10 There's then a bit on next steps, but in the 11 conclusion, there's a little summary there of what the 12 benefits are, what they include, on page 443. 13 MR JUSTICE DAVID RICHARDS: Yes. 14 MR TROWER: This concept was then further described in the 15 fourth progress report, by which time the Court of 16 Appeal client money judgment had been handed down, and 17 that your Lordship will find in bundle 5, tab 1. 18 Just for my Lord to note by this stage, page 3, 19 there's the usual caution and then there's a statement 20 in relation, at this stage, to the amounts now being 21 stated in sterling. 22 Then if we go on to the bit that probably matters 23 most for present purposes, which is page 29 of the 24 bundle. It's section 6, dealing with unsecured 25 creditors. It describes the consensual approach and its</p> <p style="text-align: center;">Page 88</p>

<p>1 benefits to creditors with financial trading claims 2 which aren't client asset claims on page 32. 3 So if my Lord would just read the highlights section 4 on page 29 and we can then go over to page 31. (Pause) 5 MR JUSTICE DAVID RICHARDS: Yes. And then? 6 MR TROWER: Over to 31, which describes the consensual 7 approach in rather more detail. There is a bit at the 8 beginning about the complexity of claims and then under 9 the "consensual approach" heading, if my Lord would just 10 read those three paragraphs. (Pause) 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR TROWER: Then at the top of the next page, "Overview", 13 32: 14 "The consensual approach is an optional claims for 15 determination process available to street creditors, 16 currently estimated to be up to 3,490. The claims, of 17 which LBIE currently estimates a total 4.8 billion, are 18 designed primarily to accelerate the agreement of 19 creditor claims: 20 "Under the consensual approach, LBIE will offer to 21 agree each eligible street creditor's claim using LBIE's 22 in-house valuation methodology. The LBIE determination 23 has been established using a set of processes, data 24 sources and valuation approaches in line with market 25 practice, universally applied to determine street</p> <p style="text-align: center;">Page 89</p>	<p>1 first column on page 33. (Pause) 2 And this bit in the progress report is as good 3 a place as any to find a contemporaneous description of 4 how it is that the whole consensual approach process is 5 intended to work. 6 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 7 MR TROWER: And so my Lord also sees there there's 8 a description of the impact of the client money Court of 9 Appeal judgment, and that sees itself reflected in the 10 two different forms of CDD in due course because the 11 agreed form was designed to deal with the problems 12 arising out of the client money appeal judgment. 13 MR JUSTICE DAVID RICHARDS: Tell me: was the uncertainty 14 created by the Court of Appeal's judgment solved by the 15 Supreme Court's judgment? 16 MR TROWER: I don't think in all respects, no. 17 MR JUSTICE DAVID RICHARDS: Because there was still this 18 point that you had a client money claim in respect of 19 money which should have been segregated for you but 20 wasn't? 21 MR TROWER: Yes, although actually in practice, as my Lord 22 will see, the uncertainties arising out of the Court of 23 Appeal's judgment started to dissipate a little bit in 24 practice over time, which is why the admitted claims CDD 25 came in and started to be used.</p> <p style="text-align: center;">Page 91</p>
<p>1 creditors' unsecured claims. 2 "Creditors should also note that in offering a LBIE 3 determination, the administrators are seeking to treat 4 the street creditors consistently and are not simply 5 imposing a discount or haircut to their claims. 6 "Creditors with trust claims affiliates, any 7 creditors with non-financial trade contract claims and 8 certain other creditors, such as those who have asserted 9 set-off or debtor balances, which LBIE disputes, will 10 not be offered a LBIE determination but instead will be 11 dealt with separately." 12 So the concept here is that there is a determination 13 made on the basis of LBIE's methodology and records and 14 that's then offered and in due course my Lord will see 15 that the figure that is offered is then the figure that 16 ends up in the CDD. That is the way it works. 17 There's then another description on page 32 of the 18 benefits of the consensual approach and the progress 19 that has been made since it was initially outlined to 20 creditors in June 2010 in developing and implementing 21 further processes and procedures to enhance LBIE's 22 valuation methodology. There is more talk about the 23 engagement with counterparties and how it is that the 24 consensual approach is actually to operate in practice. 25 If my Lord would just read on to halfway down the</p> <p style="text-align: center;">Page 90</p>	<p>1 MR JUSTICE DAVID RICHARDS: Why is that? 2 MR TROWER: I don't know exactly. I'll characterise why 3 that is after the short break, if I may. 4 MR JUSTICE DAVID RICHARDS: I only ask because I noticed 5 from the evidence and perhaps the skeletons that the 6 finger was being pointed at the Court of Appeal for 7 creating uncertainty, but nothing was said about the 8 Supreme Court -- 9 MR TROWER: I think that's a timing point, as much as 10 anything else, because the agreed claims CDDs first 11 started to be used quite shortly after the Court of 12 Appeal judgment came out, so that was why -- 13 MR JUSTICE DAVID RICHARDS: I follow that; the agreed claims 14 CDD was to deal with that uncertainty. 15 MR TROWER: But I don't think the transition to the admitted 16 claims CDD flowed from the Supreme Court. 17 On the second column on that page, there is a little 18 bit about: 19 "Creditors who prefer not to adopt this approach as 20 they would wish to wait to negotiate bilaterally may do 21 so at a later date, albeit this is likely to take 22 significantly longer to achieve." 23 Because that would be a formal proof of debt 24 process. That's then referred to again at the bottom of 25 the page:</p> <p style="text-align: center;">Page 92</p>

<p>1 "Street creditors who elect not to accept a LBIE 2 determination provided for them will have their claims 3 reviewed in detail on a bespoke bilateral basis. 4 Extensive further work likely involving the need for 5 substantial evidentiary documentation may also be 6 required." 7 MR JUSTICE DAVID RICHARDS: Yes. 8 MR TROWER: Then there's a summary. So I think that's 9 probably all we need look at in that report. So what 10 my Lord sees there is that you don't have to do this, 11 but you're going to get dealt with quicker if you do do 12 it, and there are lots of benefits of doing it, is the 13 summary. 14 MR JUSTICE DAVID RICHARDS: Shall I perhaps give the break 15 now? I'll rise for five minutes now. 16 (3.15 pm) 17 (A short break) 18 (3.20 pm) 19 MR TROWER: My Lord, we were on the LBIE determination. 20 I think we've finished on the fourth progress report and 21 its description of the LBIE determination. Can we next 22 go just briefly to a bit of Mr Lomas' tenth witness 23 statement where he summarises the process for applying 24 the LBIE determination? That's in bundle 2, tab 2, 25 starting at page 14, where he's describing what was</p> <p style="text-align: center;">Page 93</p>	<p>1 deals with the progress on claims processing and in 2 particular, after a bit on the key achievements in 3 respects of the claim and the reconciliation and 4 valuation under the consensual approach, which is 5 referred to in the left-hand column, we then move on to 6 valuation methodologies on the right-hand column on 7 page 28. It shows that: 8 "This is a developing process where LBIE has spent 9 considerable time and resource reconciling and pricing 10 creditors' trading positions, reviewing legal 11 documentations [et cetera]." 12 And in the bottom paragraph of that section: 13 "LBIE's valuation methodologies and processes have 14 undergone significant review and challenge to ensure 15 they are robust and reflect market practice. 16 Additionally, data inputs have been reviewed to ensure, 17 where appropriate, they are derived from market sources 18 and/or based on standard industry-recognised pricing 19 models. LBIE determination ..." 20 And then if my Lord would just read down to the end 21 of that section. (Pause) 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR TROWER: So what you get there is the creditor starts by 24 submitting a proof of debt in compliance with the 25 insolvency legislation. Then a LBIE determination is</p> <p style="text-align: center;">Page 95</p>
<p>1 internally called Project Canada: 2 "Having determined not to use the previously 3 considered systematic collective approaches [so that 4 this is where they were thinking of the CVA scheme, a 5 mutual agreement type of concept] they then focused on 6 developing a bilateral claims agreement for creditors in 7 order to accelerate the claims agreement process whilst 8 also accommodating the uncertainty created by the client 9 money appeal. The process of development was undertaken 10 in consultation with the working group. The project was 11 referred to as the consensual approach, but internally 12 as Project Canada." 13 My Lord then sees in 44, 45 and 46 a pithy summary 14 of how the LBIE determination provisions were intended 15 to work. 16 MR JUSTICE DAVID RICHARDS: Yes. 17 MR TROWER: Its development as a concept was then reflected 18 in a number of subsequent progress reports, and I'm not, 19 your Lordship will be relieved to hear, going to take 20 you to all of them at all, but I'm just going to show 21 your Lordship two of them in bundle 8, which are the 22 next two, actually, the fifth progress report, bundle 8, 23 tab 1, page 28. 24 This is in section 8 of the progress report on 25 unsecured creditors, which starts on page 27. But 28</p> <p style="text-align: center;">Page 94</p>	<p>1 communicated. Then in the next section, there's 2 a claims determination deed which reflects the LBIE 3 determination. That's the way it works. 4 MR JUSTICE DAVID RICHARDS: Yes. 5 MR TROWER: And then if we go on to the sixth progress 6 report, which is behind the next tab; it's this time 7 page 29. There is a progress description on page 29, 8 which explains what is going on. If my Lord would just 9 read that down to the ends of "claims determination 10 deeds". (Pause) 11 Then under "Offers to creditors": 12 "Any offer to agree a creditor's claim under the 13 consensual approach is non-negotiable with creditors 14 being free to accept or reject it." 15 So what one has is a situation where, as I say, the 16 proof goes in, the LBIE determination is then given in 17 accordance with the internal methodology, and that 18 figure is non-negotiable; you can either accept it or 19 not. 20 Once you've accepted it, you then get on to the CDD 21 process and the CDDs themselves were presented in 22 standard form agreements, although as my Lord will see, 23 there is evidence that creditors negotiated the terms of 24 the agreements from time to time. But that's the 25 concept: the LBIE determination itself is not</p> <p style="text-align: center;">Page 96</p>

<p>1 negotiable, is the way it comes through, it's the CDD 2 which becomes negotiable, although it was presented as 3 a standard form and there was strong discouragement to 4 renegotiate it.</p> <p>5 Can I now just move on, my Lord, and show 6 your Lordship the relevant CDDs very briefly?</p> <p>7 Your Lordship will be relieved to know that they are 8 very, very much shorter and simpler than the CRA. 9 They're in bundle 11. The three CDDs the parties have 10 been working from are the ones at 1A, 4 and 7. 1A and 4 11 are agreed claims CDDs. 1A is a foreign currency.</p> <p>12 MR JUSTICE DAVID RICHARDS: Right, yes.</p> <p>13 MR TROWER: 1A is the Senior Creditor Group's preferred CDD 14 which is a foreign currency agreed claims CDD. 4 is the 15 Wentworth agreed claims CDD, which is a sterling one, 16 and 7 is an admitted claims CDD.</p> <p>17 MR JUSTICE DAVID RICHARDS: Right.</p> <p>18 MR TROWER: What I was simply going to do was use 1A just to 19 show your Lordship the form of what this entails. There 20 is a recital B on page 1:</p> <p>21 "In consideration of the company and the creditor 22 agreeing the creditor's claim against the company under 23 the creditor agreement and limited to the agreed claim 24 amount, the company and the creditor wish to release and 25 discharge each other in respect of any and all other</p> <p style="text-align: center;">Page 97</p>	<p>1 identified] and shall constitute the creditor's entire 2 claim against the company and save in respect thereof 3 ..."</p> <p>4 So that's the qualifying words for the release and 5 you then have the release set out in 2.1.1.</p> <p>6 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>7 MR TROWER: So it's:</p> <p>8 "The creditor and the company and the administrators 9 are hereby each irrevocably and unconditionally released 10 and forever discharged from any and all losses, costs, 11 charges, expenses [et cetera]."</p> <p>12 Doubtless your Lordship will hear submissions on 13 that wording from the parties, but I just show 14 your Lordship where they are.</p> <p>15 Then 2.1.2, there's a moratorium provision, and then 16 2.2, which carves out the ability to assert that some 17 part of the agreed claim constitutes a client money 18 claim, so that's a carve-out in relation to the client 19 money aspect.</p> <p>20 Then 3.1:</p> <p>21 "Save as set out below, the agreed claim shall not 22 be accepted as an admitted claim."</p> <p>23 So it works that way round.</p> <p>24 Then 3.2:</p> <p>25 "Where the creditor has either assigned to a nominee</p> <p style="text-align: center;">Page 99</p>
<p>1 losses [et cetera]."</p> <p>2 And then, first of all, the admitted claim is on 3 page 2:</p> <p>4 "A claim of a creditor of the company which 5 qualifies for dividends pursuant to the insolvency rules 6 and the Insolvency Act."</p> <p>7 The agreed claim is:</p> <p>8 "A creditor's claim against the company under or in 9 connection with the creditor agreement, including, for 10 the avoidance of doubt, any client money claim arising 11 under or in connection with a creditor agreement, but 12 excluding any trust asset claim."</p> <p>13 Then the agreed claim amount, and that's the figure 14 that comes out of the LBIE determination. Then there's 15 a definition of claims for my Lord to note, which is in 16 fairly extensive form. Then the exchange rate is 17 specifically provided for on page 4.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR TROWER: Then if we can go straight on to clause 2: 20 "The company and the creditor irrevocably and 21 unconditionally agree that notwithstanding the terms of 22 any contract, including the creditor agreement and the 23 other agreements to which the creditor and the company 24 are party, the agreed claim shall be limited to the 25 agreed claim amount [so that's the figure that's</p> <p style="text-align: center;">Page 98</p>	<p>1 or waived its client money claims, then the agreed claim 2 amount is converted to pounds sterling at the exchange 3 rate and shall be accepted as admitted claim."</p> <p>4 So creditors -- and this happened -- may wish to 5 simply waive their client money claims and rely on their 6 agreed rights to an agreed claim.</p> <p>7 Or, 2:</p> <p>8 "Any part of the client money claim it may have 9 under or in connection with the creditor agreement, then 10 the creditor shall have an admitted claim at an amount 11 equal to the amount of the assigned waived client money 12 claim converted to pounds sterling at the exchange 13 rate."</p> <p>14 So that's designed to deal with the situation where 15 questions in relation to client money entitlements have 16 been sorted out and at that stage the agreed claim 17 becomes an admitted claim.</p> <p>18 MR JUSTICE DAVID RICHARDS: Yes.</p> <p>19 MR TROWER: 3.3:</p> <p>20 "Where no client money confirmation has not been 21 provided to the company in accordance with 2.3.1 ..."</p> <p>22 And then there are a series of steps. So there's 23 a sort of double negative: it's not accepted in whole or 24 part as an admitted claim, save where 3.3 has actually 25 been complied with.</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 So that's admitted claims. Then there's a transfer 2 provision in clause 4, which permits the transfer of the 3 whole but not part of its agreed claim. 4 Then I think the remainder of -- then there are some 5 representations and warranties in 5, which I don't think 6 your Lordship needs to be concerned with anyway at this 7 stage. 8 The next bit of the agreement which I just wanted 9 your Lordship to see was contained in clause 9, which is 10 the non-reliance provision, and in particular 9.2. 11 The remainder of the provisions of the agreed claims 12 CDD I don't think my Lord needs to look at separately 13 for present purposes. There's then a form of transfer 14 notice, which is an appendix at the end of it, and 15 your Lordship will have seen evidence to the effect that 16 the existence of this transfer notice was commercially 17 of some relevance because it assists in the 18 marketability of the claims or the transferability of 19 the claims in the market. So that's 1A. 20 I was then just going to show your Lordship very 21 briefly the difference in the admitted claims CDD, which 22 is behind tab 7. The principal difference is that in 23 clause 2, which is on page 6, the agreed claim amount 24 gives rise to an admitted claim under clause 2.1. So 25 the moment the agreement is entered into, the agreed</p> <p style="text-align: center;">Page 101</p>	<p>1 now. 2 And the evidence is that the scale of the valuation 3 and validation process required a systematic approach 4 which was applicable to all, rather than the more 5 conventional bilateral claims agreement process that one 6 would normally have in any insolvency. 7 There are hints in the Senior Creditor Group's 8 skeleton argument from time to time that these have to 9 be treated effectively as compulsory documents and 10 something that people require to sign. I'm not quite 11 sure how it'll be put, but with respect, that wasn't the 12 case. 13 Of course it is the case that the administrators 14 were very keen to ensure people did sign them and that 15 is undoubtedly the tone of the materials. But it 16 remained a decision for individual creditors as to 17 whether they wished to accept the LBIE determination and 18 in so doing go down the CDD route. 19 Your Lordship has seen from the progress report 20 statements from time to time, particularly in the fourth 21 progress report, about how the process was voluntary. 22 MR JUSTICE DAVID RICHARDS: Yes. 23 MR TROWER: That is all I was going to say in relation to 24 the CDDs. 25 Can I just, before I sit down, subject to my Lord,</p> <p style="text-align: center;">Page 103</p>
<p>1 claim amount, which is the same as under the agreed 2 claims CDD, ie the specified amounts identified pursuant 3 to the LBIE determination, becomes an admitted claim, 4 and, under 2.2, constitutes a creditor's entire claim 5 against the company. 6 Then in 2.3 there is a release provision, which 7 opens slightly differently from the release provision 8 under the agreed claims CDD, but is otherwise in 9 essentially the same terms. Clause 2.4 then contains 10 a moratorium provision. 11 MR JUSTICE DAVID RICHARDS: Yes. 12 MR TROWER: I think I'm right in saying that the remaining 13 parts of this deed are in essentially the same terms as 14 the agreed claims CDD. 15 So what the evidence demonstrates is that the CDDs 16 and the consensual approach and the LBIE determination 17 were introduced to facilitate the agreement of claims 18 without undue delay to achieve a degree of finality, to 19 do so in a manner that dealt with uncertainty 20 in relation to the client money judgment, and to entitle 21 the creditors concerned to participate in such dividends 22 as would be paid in the administration. And they had 23 certain commercial benefits which went beyond the mere 24 facilitation of the agreement of claims without delay, 25 including the transferability which I referred to just</p> <p style="text-align: center;">Page 102</p>	<p>1 deal with one point which relates to issue 9? I told 2 you at the beginning that there were a number of issues 3 listed for hearing. Issue 9 raises the question of 4 whether a creditor's accession to the CRA would impact 5 on the answer to questions 7 and 8, which my Lord has 6 already heard argument on, whether interest payable on 7 contingent and future claims is payable from the date of 8 the administration or the date the claim form is due. 9 That's what 7 and 8 were about. 10 As we explain in our skeleton argument, the 11 particular issue is whether, where a creditor's claim 12 has been issued under the CRA, statutory interest is 13 payable from the date of the administration, the date of 14 the CRA or some other date. 15 Wentworth consider that the answer is best left 16 until after the determination of issue 7 as the answer 17 to 9 may well turn on the answer to 7. The SCG say that 18 the CRA makes no difference because in light of its 19 argument on issue 7, interest accrues from the 20 administration date in any event. If it's wrong on 21 issue 7, it reserves its right as to when a net 22 financial claim arises pursuant to the CRA and whether 23 the net financial claim is present, future or 24 contingent. 25 We are not convinced, it has to be said, that the</p> <p style="text-align: center;">Page 104</p>

<p>1 answer to issue 9 will flow only from the answer to 2 issue 7, but we do accept that the parties will be 3 assisted in formulating their positions in arguing 4 issue 9 once the answers to 7 and 8 are known and once 5 the court has determined issues 34, 35 and 38 and has 6 thereby characterised the nature of the rights under the 7 CRA. 8 So although we consider that issue 9 should be 9 determined as soon as practicable, we, like Wentworth 10 and the SCG, are now persuaded that it can more sensibly 11 be argued at a very short hearing once those other 12 issues have actually been decided, so subject to 13 your Lordship, what we would suggest is that issue 9 is 14 parked on the basis that a date is fixed for it to be 15 heard at a very short hearing -- and I don't think it'll 16 take very long -- once the parties have seen the 17 judgments on both these other two matters. 18 MR JUSTICE DAVID RICHARDS: Very well. 19 MR TROWER: Subject to your Lordship, that was all I was 20 going to say in opening. 21 MR JUSTICE DAVID RICHARDS: Thank you very much, Mr Trower. 22 Mr Zacaroli? 23 Submissions by MR ZACAROLI 24 MR ZACAROLI: My Lord, may I take a moment to create some 25 microphone-free space?</p> <p style="text-align: center;">Page 105</p>	<p>1 to both currency conversion and non-provable interest 2 in relation to the admitted claims CDD. 3 MR JUSTICE DAVID RICHARDS: Right. 4 MR ZACAROLI: And just so my Lord has it, as it were, at the 5 top here, what our case is that we say that the admitted 6 claims CDD has the effect of releasing both currency 7 conversion claims because the admitted claims CDD is 8 always in sterling, so it will have consistently 9 released currency conversion claims where some other 10 currency was the underlying currency of the contract. 11 Secondly, it has the effect of releasing any 12 non-provable claim to interest if my Lord finds there is 13 such a claim in answer to the questions on waterfall 14 1/2A. 15 Having dealt with the admitted claims CDD, I'm going 16 to go back to the CRA where our case is the following. 17 First of all, we say that the CRA has had the effect of 18 releasing or preventing any claim for non-provable 19 interest arising. And so far as currency conversion 20 claims are concerned, our case on the CRA is limited to 21 the following proposition, which is that when the 22 underlying contractual claim was a non-sterling and 23 non-dollar currency, for example yen or euro, we say the 24 CRA has had the effect of releasing the creditors' 25 contractual right to yen or euro and thus has the effect</p> <p style="text-align: center;">Page 107</p>
<p>1 MR JUSTICE DAVID RICHARDS: Yes, of course. (Pause) 2 MR ZACAROLI: My Lord, can I first of all outline the course 3 I propose taking in my submissions. The order in which 4 I'm going to take the issues is: 34, which is whether 5 the CRA and CDDs have released currency conversion 6 claims and non-provable claims to interest; then 38, 7 which is the question whether either the CRA or the 8 agreed claims CDD might have created a currency 9 conversion claim; and then 35, which is a small point on 10 statutory interest and the quantification of statutory 11 interest. 12 MR JUSTICE DAVID RICHARDS: Right. 13 MR ZACAROLI: After a short overview, I'm going to take 14 my Lord very briefly to the law, but briefly because 15 I know my Lord knows the law on construction and it'll 16 be just a couple of case references. Both sides have 17 dealt with this at reasonable length in the skeletons 18 and I don't propose to take up much time on that. 19 Then I'm going to go to the CDDs and the CRA in the 20 following order -- and the reason I'm doing it in order 21 and the reason I have started with admitted claims CDDs 22 is because admitted claims CDDs are those where 23 Wentworth's arguments apply fully. In every other case 24 there's some variation or slight difference in the 25 argument, so the argument is expressed fully in relation</p> <p style="text-align: center;">Page 106</p>	<p>1 of releasing a currency conversion claim in those 2 circumstances. 3 Just to be clear, we don't adopt the argument of my 4 learned friend Mr Trower on underlying dollar claims. 5 MR JUSTICE DAVID RICHARDS: Yes. 6 MR ZACAROLI: Then I'm going to deal with the agreed claims 7 CDD. Our position here is that -- and just to preface 8 this -- agreed claims CDDs were ... The currency of the 9 agreed claim was generally denominated in the 10 predominant of the underlying currencies. So if you had 11 a dollar claim at the beginning, the agreed claims CDD 12 specified your agreed claim generally in dollars, but 13 that's not always the case, in particular where there 14 were multiple currencies in your underlying contracts. 15 Then, by definition, the agreed claims CDD couldn't be 16 in all of those and it would be the predominant one. 17 So our case on currency conversion in relation to 18 agreed claims CDDs is limited to the proposition that 19 where your agreed claim amount was in sterling but your 20 underlying contractual claims included a claim in 21 a foreign currency, then the CDD does have the effect of 22 releasing any currency conversion claim based on that 23 original underlying currency. And as a follow-on on 24 that -- 25 MR JUSTICE DAVID RICHARDS: So that would include US</p> <p style="text-align: center;">Page 108</p>

<p>1 dollars?</p> <p>2 MR ZACAROLI: It would indeed, yes.</p> <p>3 Where the agreed claim amount is in, for example,</p> <p>4 dollars but you had an underlying contractual</p> <p>5 entitlement in yen or euro, then in exactly the same way</p> <p>6 as the CRA has had the effect of releasing the currency</p> <p>7 conversion claim based on the non-receipt of euros or</p> <p>8 yen, we say the agreed claims CDD has the same effect.</p> <p>9 So it's in those limited circumstances.</p> <p>10 Our case on non-provable interest is exactly the</p> <p>11 same under the agreed claims CDD as it is under the</p> <p>12 admitted claims CDD.</p> <p>13 Those are the two core different types of CDD, but</p> <p>14 there are two variants that I will deal with relatively</p> <p>15 quickly. No one, as I understand it, is suggesting that</p> <p>16 there is any different answer as a matter of</p> <p>17 construction in relation to the variant CDDs, but</p> <p>18 my Lord needs to see the way in which the construction</p> <p>19 argument on the words works because it's slightly</p> <p>20 different.</p> <p>21 So I'm going to go next to the aggregated claims</p> <p>22 CDDs. Those are where claims had been purchased by the</p> <p>23 entity entering into the CDD. And we say that</p> <p>24 in relation to the aggregated claims CDDs, first of all,</p> <p>25 they have the effect of releasing currency conversion</p> <p style="text-align: center;">Page 109</p>	<p>1 the prerequisite of any non-provable claim, whether it's</p> <p>2 to currency conversion or interest, that the creditor is</p> <p>3 remitted to its rights under the original contract</p> <p>4 insofar as they were not satisfied by payments out of</p> <p>5 the insolvency scheme. So it's the remission to</p> <p>6 contractual rights which matters. I don't need to take</p> <p>7 my Lord to authority, but just for reference, my learned</p> <p>8 friend Mr Trower pointed out that the Court of Appeal</p> <p>9 upheld my Lord's judgment on waterfall 1, in particular</p> <p>10 as to the characterisation of currency conversion claim.</p> <p>11 It's just that bit of your underlying contractual claim</p> <p>12 which hasn't been satisfied. Of course, that was always</p> <p>13 the case in relation to interest, Humber Ironworks, and</p> <p>14 if that non-provable claim survives it is because it's</p> <p>15 a remission to contractual rights.</p> <p>16 The second point follows on from that that where</p> <p>17 a creditor has compromised its contractual rights, ie</p> <p>18 released its contractual rights, so that it no longer</p> <p>19 has any contractual entitlement to be paid in a foreign</p> <p>20 currency, then there is no relevant contractual right to</p> <p>21 which it can be remitted so as to found a currency</p> <p>22 conversion claim.</p> <p>23 The third point is exactly the same point, but</p> <p>24 in relation to non-provable claims of interest. If a</p> <p>25 creditor has released, compromised its contractual right</p> <p style="text-align: center;">Page 111</p>
<p>1 claims to the same extent as either an admitted claims</p> <p>2 CDD or an agreed claims CDD, depending on which of those</p> <p>3 underlying templates was used in the aggregator, because</p> <p>4 the aggregator can be either based on the agreed form or</p> <p>5 the admitted form. So it's the same argument ultimately</p> <p>6 in relation to those two underlying templates in the</p> <p>7 aggregator template. We also say that it has the same</p> <p>8 effect of releasing non-provable claims to interest as</p> <p>9 the two underlying templates: admitted claims or agreed</p> <p>10 claims CDDs.</p> <p>11 Then, finally, I will turn to what we are calling</p> <p>12 the CRA CDDs. Those are CDDs entered into by persons</p> <p>13 already entered into the CRA. Here we say that</p> <p>14 non-provable claims to interest have already been</p> <p>15 released by the CRA, so we needn't be concerned with</p> <p>16 that here. So far as currency conversion claims are</p> <p>17 concerned, we say they have exactly the same effect as</p> <p>18 the underlying admitted claims CDDs.</p> <p>19 There are two versions to look at however because</p> <p>20 the form of the release is either broad or narrow, and</p> <p>21 I need to show my Lord those two different forms of</p> <p>22 wording and see how they would work as a matter of</p> <p>23 construction.</p> <p>24 So my Lord, before turning to the law, if I can make</p> <p>25 six very short points by way of overview. First, it is</p> <p style="text-align: center;">Page 110</p>	<p>1 to receive interest, then there is no relevant right to</p> <p>2 which it can be remitted.</p> <p>3 Fourth, on the natural and ordinary reading of the</p> <p>4 words of the CRA and the CDDs, our essential point</p> <p>5 is that the creditor has agreed to compromise and</p> <p>6 release its rights in precisely that way.</p> <p>7 The fifth point is that, again, on the ordinary and</p> <p>8 natural reading of the words of each of the documents,</p> <p>9 such release is unlimited, irrevocable for all purposes,</p> <p>10 not limited for example for the purposes of proof, and</p> <p>11 not limited to specific categories of claim, for example</p> <p>12 provable claims.</p> <p>13 Sixthly and finally, the purpose of the CRA and</p> <p>14 CDDs, or at least a substantial purpose, being to save</p> <p>15 costs for the estate and the creditor, to save time for</p> <p>16 the estate, to provide finality and certainty as to the</p> <p>17 relationship between LBIE and the creditor so as to</p> <p>18 enable earlier distributions to be made to creditors,</p> <p>19 that core purpose is, we say, wholly consistent with the</p> <p>20 natural reading of the words.</p> <p>21 To put it another way: there's certainly nothing in</p> <p>22 the context in which the CRA or CDDs were entered into</p> <p>23 which requires a qualification to be made to the clear</p> <p>24 wording.</p> <p>25 MR JUSTICE DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 112</p>

<p>1 MR ZACAROLI: Turning then to the law and briefly. For 2 my Lord's reference, our skeleton deals with this at 3 paragraphs 24 and 25, and our reply skeleton deals with 4 the points at paragraphs 4 and 5.</p> <p>5 There is no essential dispute about the principles 6 of construction. As you might expect, there is 7 a difference of emphasis in the passages that either 8 side has quoted from the cases. The SCG are no doubt 9 keen to emphasise passages which steer away from the 10 words and look at the context. For our part we would 11 emphasise a couple of points and I will take my Lord to 12 just a couple of authorities to reinforce that point.</p> <p>13 The first is that one starts with the words that 14 have actually been used because the starting assumption 15 is that the parties express their intentions in the 16 words of the written contract.</p> <p>17 As my Lord has heard, we have here contracts which 18 are the product of extensive work and negotiation 19 between the administrators and various representatives 20 of creditor groups on the other hand.</p> <p>21 Secondly, construction is nevertheless an iterative 22 process, which requires the natural reading of the words 23 to be tested against the context and the purpose of the 24 agreement as a whole.</p> <p>25 Thirdly, the court needs to be cautious in accepting</p> <p style="text-align: center;">Page 113</p>	<p>1 covered 22 vessels. One of the insured vessels was 2 Princess of the Stars, a ro-ro ferry.</p> <p>3 "The following warranty was included in the 4 insurance contract:</p> <p>5 "Notwithstanding anything contained in the policy 6 or clauses attached hereto, it is expressly warranted 7 that the carrying vessel shall not sail or put out of 8 sheltered port when there is a typhoon or storm warning 9 at that port, nor when a destination or intended route 10 may be within the possible path of the typhoon or the 11 storm announced at the port of sailing, port of 12 destination or any intervening port."</p> <p>13 And then under the facts below:</p> <p>14 "At 5 o'clock on 18 June, the Philippine Atmospheric 15 Geophysical and Astronomical Services Administration 16 reported in a severe weather bulletin that the low 17 pressure area had developed into a tropical depression 18 named Frank. At 20/04, two days later, the ship set 19 sail from Manila."</p> <p>20 Three paragraphs down in the right-hand column: 21 "Oriental argued that the warranty had to be 22 construed in the context of a circular issued on 27 June 23 by the headquarters of the Philippine Coastguard 24 containing revised guidelines on movements of vessels 25 during heavy weather. That stated that movements of any</p> <p style="text-align: center;">Page 115</p>
<p>1 broad generalisations about the commercial purpose of 2 a contract, if only because one side's assessment of the 3 purpose may well differ from the other side's. One is 4 obviously looking for purpose objectively ascertained. 5 The prime place to identify the purpose is the contract 6 itself.</p> <p>7 There are various passages in very recent authority 8 which emphasise that the use, the proper use to which 9 commercial purpose needs to be put. The first case I'd 10 like to show my Lord is the case of Amlin Corporate 11 Member Ltd v Oriental Assurance Corporation. It's 12 a careful the Court of Appeal, bundle 3 of the 13 authorities bundles -- that's the supplemental 14 authorities -- at tab 11.</p> <p>15 The context of this decision was the construction of 16 a marine policy in circumstances where the vessel 17 suffered a catastrophic loss, with sadly the loss of 18 many lives. In the headnote you'll see the at first 19 paragraph:</p> <p>20 "Under a marine policy for the period 21 31 December 2007 to 31 December 2008, the defendant 22 insurance company, Oriental, agreed to indemnify, 23 Sulpicio Lines Inc, a Philippine shipping company, in 24 respect of its liability for loss or damage to cargo. 25 The cover was within Philippine territorial limits and</p> <p style="text-align: center;">Page 114</p>	<p>1 vessel were left to the decision and responsibility of 2 its master/shipowner if PSWS number 1 was hoisted within 3 the vessel at point of origin, the route and 4 destination. On that basis there was no breach because 5 there was no storm or typhoon warning prohibiting or 6 advising against the vessel's departure."</p> <p>7 So that's the context in which the argument was 8 raised.</p> <p>9 The Court of Appeal, Lord Dyson, Master of 10 the Rolls, Lord Justice Davis and Lady Justice Gloster 11 dismissed the appeal holding:</p> <p>12 "1B, the argument for Oriental that the typhoon 13 warranty had to be construed by reference to or in the 14 context of the circular or by reference to what an 15 experienced insured would have understood the relevant 16 storm warning to have meant would be rejected. The 17 warranty was to be construed in accordance with the 18 ordinary natural meaning of the words used. The court 19 was reluctant to produce words not used in the actual 20 contractual provisions as part of the construction 21 exercise unless the court was satisfied that the words 22 selected by the parties were commercially nonsensical 23 and it was clear the parties intended some other 24 purpose."</p> <p>25 And then C:</p> <p style="text-align: center;">Page 116</p>

<p>1 "On the plain reading of the words used by the 2 parties there was no ambiguity as to require the 3 existence of a typhoon or a storm warning." 4 And the question of construction and the principles 5 of construction, are set out briefly in the judgment of 6 Lady Justice Gloster at paragraphs 44 and 45. Perhaps 7 my Lord can read 44 and 45 of the judgment. (Pause) 8 MR JUSTICE DAVID RICHARDS: So, first of all, was the 9 contract of reinsurance in a standard form or in 10 a negotiated form? Do you know? I think there is 11 a reference in one of the paragraphs I have just read to 12 the relevant wording being put forward by Oriental. 13 MR ZACAROLI: Yes, there is. 14 MR JUSTICE DAVID RICHARDS: Do you know whether it's -- 15 MR ZACAROLI: I don't know. 16 MR JUSTICE DAVID RICHARDS: All right. That's one question. 17 The second question is this: the passage I have just 18 read in 44 and 45 is talking about introducing words, or 19 adding words, so we seem to be edging towards the 20 territory of an implied term or, at any rate, implied 21 additional language, so some form of qualification or 22 something. Can you just help me: I'm not sure I've 23 exactly got so far what it is that it was -- was it 24 Oriental? -- yes, what they wanted to introduce into 25 this provision.</p> <p style="text-align: center;">Page 117</p>	<p>1 which is summarised on the right-hand side of page 561. 2 MR JUSTICE DAVID RICHARDS: So this contract was dated ... 3 Well, it covered a period from December 2007 for a year, 4 I see. So this must have been before. Do we take it 5 that 27 June was before the -- 6 MR ZACAROLI: Yes. 7 MR JUSTICE DAVID RICHARDS: Okay. 8 MR ZACAROLI: The argument is actually set out in the 9 judgment. 10 MR JUSTICE DAVID RICHARDS: Sorry, I'll just re-read this 11 paragraph on 561. (Pause) 12 Right, okay. 13 MR ZACAROLI: The argument is set out very clearly in fact 14 at the bottom of page 566, paragraph 22. 15 Paragraph 21 is the straightforward argument of the 16 reinsurers on the wording of the insurance contract, 17 that there had been a breach of limb 1 and limb 2 and 18 then Oriental's argument at 22 is set out. 19 MR JUSTICE DAVID RICHARDS: Yes. (Pause) 20 Yes, I see. I think I see. Right, yes, I see. 21 MR ZACAROLI: B, for example, page 567, left-hand side, is 22 an argument on construction that you would read the 23 phrase in that way because of the circular. 24 MR JUSTICE DAVID RICHARDS: So you read in that there should 25 be a warning prohibiting or advising against departure</p> <p style="text-align: center;">Page 119</p>
<p>1 MR ZACAROLI: The passages are not just about introducing 2 words. Paragraph 44 is not about that at all; it's 3 about construing the words. It's only at 4 paragraph 45 -- 5 MR JUSTICE DAVID RICHARDS: Yes, that's right. 6 MR ZACAROLI: For example, paragraph 44 at the top of 7 page 573, left-hand side: 8 "Whilst in a case where the language used has more 9 than one potential meaning, the court is entitled to 10 prefer the construction that is consistent with business 11 common sense and to reject the other. Where the parties 12 have used unambiguous language, then they don't." 13 MR JUSTICE DAVID RICHARDS: Just so I understand the actual 14 issue in the case, a vessel was not put out of the 15 sheltered port when there is a typhoon or storm warning 16 at that port -- 17 MR ZACAROLI: Yes. 18 MR JUSTICE DAVID RICHARDS: -- nor when her destination or 19 intended route may be within the possible path of the 20 typhoon or storm, announced at the point of sailing, 21 port of destination or any intervening point. So what 22 was the particular -- sorry, I didn't quite gather the 23 exact facts. 24 MR ZACAROLI: What the party was seeking to introduce or to 25 construe the contract by reference to was the circular,</p> <p style="text-align: center;">Page 118</p>	<p>1 rather than simply a typhoon or storm warning at the 2 port; is that right? 3 MR ZACAROLI: Well, actually, because -- the argument is put 4 this way because there was no storm or typhoon warning 5 advising against. 6 MR JUSTICE DAVID RICHARDS: Quite, but those words 7 "prohibiting or advising" against don't appear in the 8 contract; is that the point? 9 MR ZACAROLI: It's not really words in the contract, it's 10 construing the words in the light of the circular as 11 requiring a sort of warning -- 12 MR JUSTICE DAVID RICHARDS: That sort of warning rather than 13 simply there being a warning that there is a typhoon or 14 storm? 15 MR ZACAROLI: Exactly, it qualifies the nature of the 16 warning there has to be. 17 MR JUSTICE DAVID RICHARDS: I follow, I follow. Right, 18 okay. 19 MR ZACAROLI: My Lord, the other case, which is nearer to 20 home in the sense it's construing a financing contract 21 of some form, is BMA Special Opportunity Hub Fund v 22 African Minerals Finance Ltd tab 8 of the same bundle. 23 The issue in this case was the true construction of 24 clauses in an agreement relating to the voluntary 25 prepayment of a loan and whether or not a particular</p> <p style="text-align: center;">Page 120</p>

<p>1 prepayment fee was required in the circumstances. 2 MR JUSTICE DAVID RICHARDS: Right. 3 MR ZACAROLI: We can see this from a few paragraphs in the 4 judgment of Lord Justice Aikens. 5 First of all paragraph 6: 6 "The single issue was whether the prepayment of the 7 loan was, in the circumstances, a voluntary prepayment 8 of the loan pursuant to clause 8.5 [we'll come to that 9 clause in a moment] in which case because the prepayment 10 was made before the first anniversary of the closing 11 date, a 6 per cent prepayment fee would be due pursuant 12 to clause 8.8(d)(1) of the facility terms. 13 "The borrower contends the prepayment was one that 14 the borrower was obliged to make because the 15 circumstances fell within clause 8.3(a) of the facility 16 terms and the provision that clauses 8.3 and 8.5 are 17 mutually exclusive. It was common ground that if the 18 circumstances of prepayment did not fall within 19 clause 8.5 then no prepayment fee was payable." 20 And the two clauses in issue are set out at 21 paragraphs 13 to 14 of the judgment: 22 "Clause 8.3 is headed 'Disposal proceeds and finance 23 proceeds' and stipulates the borrower shall repay the 24 loan in the amount of finance proceeds promptly upon 25 receipt of any finance proceeds by any member of the</p> <p style="text-align: center;">Page 121</p>	<p>1 loan were voluntarily repaid in the first year of 2 facility ...(reading to the words)... before the judge 3 the borrower's counsel accepted that if the borrower's 4 construction were correct then the only circumstances in 5 which a prepayment fee could be incurred would be when 6 the borrower itself prepaid \$100 million or more of the 7 loan in the first year of the facility from its own 8 funds. 9 "Yet, on the borrower's construction of clause 8, 10 the prepayment fee could easily be avoided by the 11 borrower arranging a refinancing of the loan rather than 12 by using its own funds to make the prepayment. And if 13 it did this before the first anniversary it would not 14 only avoid having to pay the 6 per cent prepayment fee, 15 but also the 3 per cent bonus fee provided for in the 16 fees letter." 17 That was characterised as an uncommercial 18 construction because: 19 "... it was inconceivable or highly unlikely the 20 borrower would be able to repay at least \$100 million 21 within a year of drawing down the facility." 22 MR JUSTICE DAVID RICHARDS: Sorry to interrupt. In 23 clause 8.3, "finance proceeds" meant the proceeds of 24 some finances, loan or other financing arrangement? 25 MR ZACAROLI: Paragraph 9, yes. It means:</p> <p style="text-align: center;">Page 123</p>
<p>1 group.' 2 "Thus it was accepted in argument before us by 3 counsel for the lenders that once the borrower and the 4 parent have received the proceeds of the refinance 5 facility with Standard Bank and others the borrower was 6 obliged by clause 8.3(a) to use those proceeds to repay 7 the loan." 8 In this case it was the whole proceeds. Then 8.5 is 9 at 14: 10 "Voluntary prepayment. The borrower, if it gives 11 the facility to the agent with not less than five 12 business days prior notice, may prepay the whole or any 13 part of the loan, but if in part in an amount that 14 reduces the loan by a minimum amount of \$100 million." 15 It's a payment under 8.5 which gives rise to the 16 prepayment fee, not 8.3. 17 MR JUSTICE DAVID RICHARDS: Yes. 18 MR ZACAROLI: The argument of Mr Boswood QC for the lenders 19 is succinctly stated at paragraph 19. The third line: 20 "Mr Boswood submitted the judge should have paid 21 much more attention to the issue of which construction 22 was more consistent with business common sense. 23 Mr Boswood submitted the purpose of the prepayment fee 24 was to compensate the lenders for the higher rate of 25 return on interest payments that would be lost if the</p> <p style="text-align: center;">Page 122</p>	<p>1 "The cash proceeds of any equity issuance 2 received -- 3 MR JUSTICE DAVID RICHARDS: Where is that, sorry? 4 MR ZACAROLI: Paragraph 9, four lines from the bottom of the 5 page: 6 "The cash proceeds of any equity issuance received 7 or financial indebtedness incurred by any member of the 8 group which thus includes ..." 9 MR JUSTICE DAVID RICHARDS: I see. 10 So in other words, if it simply re-financed this 11 borrowing, then it would fall within 8.3? 12 MR ZACAROLI: Yes, that's right. 13 MR JUSTICE DAVID RICHARDS: And Mr Boswood was saying, well, 14 that's -- yes, I see the argument. 15 MR ZACAROLI: That's the context. The particular paragraphs 16 that set out the principles of construction relevant to 17 this are under the heading "Analysis" and it's just 18 paragraph 24, if my Lord could perhaps read that. 19 (Pause) 20 MR JUSTICE DAVID RICHARDS: Just paragraph 24? 21 MR ZACAROLI: Yes, that's the general principles upon which 22 we draw from this case. The decision, as you might have 23 expected, was that Mr Boswood's argument was rejected. 24 MR JUSTICE DAVID RICHARDS: Yes. There's nothing in the 25 context or background in this case, it would appear, to</p> <p style="text-align: center;">Page 124</p>

<p>1 suggest that the clause should carry one meaning rather 2 than another; it was simply the lenders' submission, 3 well, it really produces an absurd result. 4 MR ZACAROLI: Yes. 5 MR JUSTICE DAVID RICHARDS: It's that sort of case. 6 MR ZACAROLI: Except that that is, in a sense, based upon -- 7 MR JUSTICE DAVID RICHARDS: What I meant when I said "the 8 context" is there was nothing special in the context. 9 MR ZACAROLI: No. 10 MR JUSTICE DAVID RICHARDS: This is an argument which could 11 arise in any number of finance agreements in any number 12 of commercial contexts and none of the contexts would 13 make any difference to the argument. 14 MR ZACAROLI: Indeed, I accept that. 15 In a sense it's distinguishable -- well, it's 16 different to the other case where there was something 17 specific in the background which was said to be relevant 18 to the construction. 19 MR JUSTICE DAVID RICHARDS: Yes. 20 MR ZACAROLI: That's all I wanted to show my Lord on the 21 cases. As I said, the principles will be well-known to 22 my Lord of construction. 23 Is that a convenient moment to break? 24 MR JUSTICE DAVID RICHARDS: It may be, unless you have some 25 short point you'd like to deal with now.</p> <p style="text-align: center;">Page 125</p>	<p>1 2 I N D E X 3 4 Submissions by MR TROWER2 5 6 Submissions by MR ZACAROLI105 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 127</p>
<p>1 MR ZACAROLI: The only other point I was going to deal with 2 on the authorities is the approach to release clauses, 3 which requires my Lord to look at BCCI v Ali. 4 MR JUSTICE DAVID RICHARDS: Let's look at that at 10.30 5 tomorrow. 6 (4.18 pm) 7 (The hearing adjourned until 10.30 am the following day) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 126</p>	

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