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

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N

(1) ANTONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

- and -

(1) BURLINGTON LOAN MANAGEMENT LIMITED
(2) CVI GVF (LUX) MASTER S.A.R.L.
(3) HUTCHINSON INVESTORS, LLC
(4) WENTWORTH SONS SUB-DEBT S.A.R.L.
(5) YORK GLOBAL FINANCE BDH, LLC

Respondents

SENIOR CREDITOR GROUP'S SKELETON ARGUMENT FOR TRIAL (PART B)

A. INTRODUCTION

1. This Skeleton Argument is filed on behalf of Burlington Loan Management Limited, CVI GVF (Lux) Master S.a.r.l, and Hutchinson Investors LLC (the "Senior Creditor Group"). The members of the Senior Creditor Group through their various affiliates together hold unsecured claims against LBIE in excess of £2.75 billion. Although not formally representative creditors, the Senior Creditor Group is advancing arguments for the benefit of unsecured creditors generally. Those arguments align with their own interests.

2. This hearing is concerned with Questions 9, 34, 35, 36A and 38 of the Application, which relate to the effect of certain post-administration contracts entered into by a large majority (by value) of LBIE's creditors with LBIE and the Administrators at the instigation of the Administrators.

Questions 34, 35 and 38

3. Questions 34, 35 and 38 are concerned with the construction and effect of the Claims Resolution Agreement ("CRA") and Claims Determination Deeds ("CDDs") and, in particular, with whether a creditor's rights in respect of the claims that have been agreed and admitted to proof, including rights to Statutory Interest, Currency Conversion Claims or other non-provable claims, have been released by those agreements.

4. The CRA and the CDDs are not simply arm's length bargains between two commercial parties each of which is motivated by self-interest, and nor should they be construed as if they were.

5. The CRA and CDDs arise out of processes initiated by the Administrators to facilitate the return of trust assets and the quantification of claims against the estate. Both processes operate within the context and framework of the statutory regime contained in the Insolvency Act and Rules. That regime requires the Administrators to return trust assets to those entitled to them, and imposes duties on the Administrators to, among other things, ascertain and admit claims in a quasi-judicial capacity and distribute assets *pari passu* among those entitled to them in accordance with the statutory waterfall, with any surplus going to members only after creditors' claims have been paid in full.

6. The Administrators are highly experienced insolvency practitioners, who have at all times had the benefit of extensive specialist insolvency legal advice. In contrast, general unsecured creditors, most of whom have little, if any, experience in relation to insolvency proceedings and in any event are likely to have been disinclined to incur large irrecoverable legal costs, will have relied, and were entitled to rely, on the Administrators acting in a manner that was consistent with the statutory regime and their duties, fairly and in the interests of creditors as a whole.

7. The regime contained in the Insolvency Act and Rules along with the duties and functions it imposes on the Administrators, together with the purposes for which the CRA and CDD processes were created, provide the basic context against which the provisions of the CRA and CDDs are to be construed. Those documents were intended to operate in a way that was consistent with that statutory regime and with the duties and functions of the Administrators, and with their purposes as communicated by the Administrators, and should be construed accordingly.

8. The CRA and CDDs, taking into account their context and purpose, do not on their true construction have the effect of releasing creditors' claims to Statutory Interest, Currency Conversion Claims or other non-provable rights in respect of the claims which have been agreed and admitted to proof. That is to say, the processes initiated by the Administrators could not have had the effect of intentionally and unnecessarily depriving unsecured creditors of substantial sums in excess of £400 million with respect to Currency Conversion Claims alone[1], to which they are otherwise entitled. At no stage was that ever suggested or, indeed, were such claims ever referred to or discussed.

9. As regards Currency Conversion Claims, it is important context that, when it entered administration, LBIE was a company which typically did business, accounted and reported in US dollars. The last report filed by LBIE before it entered administration stated that *"the Company's functional currency is US dollars as the directors consider this to be the most appropriate currency for the Company's business*". The bulk of claims against LBIE (i.e. its liabilities) and of LBIE's assets were denominated in US dollars.

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1 LBIE Surplus Proposal of 10 March 2014 at page 28: MNB1 pages 1 to 29 [**6/1/28**].

10. In summary, as regards the CRA **[3/1/315]**:

(1) At the time that LBIE entered administration, it held a large number of assets on trust for clients ("Trust Property"). The genesis and main purpose of the CRA was to enable Trust Property to be returned to those who were entitled to it.

(2) As an ancillary aspect to the return of Trust Property, it was necessary to determine the net creditor position between beneficiaries and LBIE. A mechanism was therefore included in the CRA to facilitate this, which reflected the underlying economics of the relationship between the client and LBIE subject to certain limited overriding valuation principles.

(3) When the client is a creditor of LBIE, the claim is quantified and agreed in the form of a "Net Financial Claim" that is then also made admissible for the purpose of proof.

(4) Given that the ascertained and agreed unsecured "Net Financial Claim" arising under the CRA and owed by LBIE is denominated in US dollars, the CRA creditor is entitled to be paid in US dollars. The claim in US dollars exists because, in order to return Trust Property, it was necessary to use a common currency in which to assess all claims in order to establish a net position and ensure that the relevant beneficiary was a creditor of LBIE and, in the event of a shortfall in trust assets, to ensure that the beneficiary received a proportionate share of those assets. The use of US dollars reflected among other things the currency in which the substantial majority of claims against LBIE (and assets) were held, and the fact that, prior to its administration, LBIE's functional and reporting currency had been US dollars. As a result, a Currency Conversion Claim may arise in the event of a surplus, which is unaffected by the releases in that document or the CDDs. That Currency Conversion Claim reflects the currency of underlying entitlement for the substantial majority of CRA signatories.

(5) The CRA does not alter the creditor's entitlement to Statutory Interest in the event that there is a surplus. There is no reason why it should do, as the CRA is not concerned with doing anything other than quantifying the claims of the

creditor so that Trust Property can be returned. The CRA expressly provides for the preservation of a creditor's right to Statutory Interest by reference to Rule 2.88 of the Rules in the event of a surplus (see Clauses 20.4.7 and 25.1). Where a Financial Contract provided for interest to be payable, that Financial Contract continues to provide the relevant contractual rate for the purpose of the rate applicable to the debt apart from the administration under Rule 2.88(9) and thus for the purpose of the creditor's right to interest under the express terms of the CRA. This is entirely logical. It was not necessary to achieve the CRA's purpose of enabling the return of Trust Property to alter the economic substance of the relationship between LBIE and its creditors in respect of Statutory Interest.

(6) The release clause relied upon by Wentworth is irrelevant as regards the Net Financial Claim, and therefore also to the creditor's right to payment of the full US dollar amount owed and to Statutory Interest payable in respect of that claim. The release clause, although broadly worded, only operates to release claims other than the Net Financial Claim and the rights in respect of it given by the CRA.

(7) Given the purpose of the CRA as communicated to creditors, and the purpose of the Administration, it would be wrong to construe that agreement as having been intended to deprive a creditor of LBIE of its right to payment in full of the agreed US dollar amount or to Statutory Interest in the event of a surplus.

11. In summary, as regards the CDDs:

(1) The CDDs were part of the 'Consensual Approach' to the admission of general unsecured claims developed by the Joint Administrators in 2010. The 'Consensual Approach' aimed to facilitate the payment of dividends by, amongst other things, giving LBIE and the Administrators a degree of finality as to the claims LBIE would face from creditors. A CDD was an agreement a creditor entered into at the end of the 'Consensual Approach' process.

(2) Whereas the ordinary proof process allows creditors to vary the amount of their proof or to submit a new proof or to challenge in Court the amount at which a creditor's proof is admitted, the CDD process achieved a greater degree of

finality by agreeing the amount of creditors' claims, supported by releases of any other claims which might otherwise be relied on by creditors to supplement or vary the amount of their proofs, or to try and recover, otherwise than by proving, more than the entitlements conferred by their agreed and admitted claims.

(3) Creditors whose claims are agreed and admitted to proof through the CDD process have all their usual rights in respect of such claims. In the event of a surplus, they have a right to Statutory Interest pursuant to Rules 2.88(7) and (9) on such claims. They also have Currency Conversion Claims or other non-provable claims to the extent that the claim which forms the basis of the proof is not fully satisfied by payment through the proof process. This is entirely consistent with the language used in the various forms of CDDs.

(4) The releases contained in the CDDs do not purport to extend to the claims agreed and admitted by the CDDs or to creditors' rights in respect of such claims. The release clause, although broadly worded, only operates to release claims other than the claim which has been agreed and admitted to proof.

(5) Given the purpose of the CDDs as communicated to creditors, and the purpose of the Administration, it would be wrong to construe those agreements as having been intended to deprive a creditor of its right to payment of Statutory Interest or payment in full of the foreign currency amount that it was owed in the event of a surplus.

(6) Wentworth's case would result in creditors being treated differently depending, for example, on whether they entered into a CDD, which type of CDD they entered into, and when they did so. Such differences in treatment would have nothing to do with the purpose of the CDDs or the reasons for the different versions, as communicated to creditors by the Administrators. They would be entirely arbitrary and cannot sensibly have been intended.

Question 36A

12. If, contrary to the Senior Creditor Group's position, the CRA or a CDD has the effect of releasing Statutory Interest claims, Currency Conversion Claims or other non-provable

rights in respect of claims that have been agreed and admitted to proof, then such an effect was an inadvertent and unintended consequence of a process initiated and (until 2014) required by the Administrators.

13. The consequences of enforcing any such release would, in all the circumstances, be regarded by a reasonable member of the public, knowing all of the facts, as unfair, inappropriate and unbefitting of an officer of the court, would harm the interests of creditors and would confer a unfair benefit or enrichment on the estate and a windfall to the subordinated creditors and shareholders.

14. The Administrators were required to return trust assets and to identify claims and deal with proofs of debt in a quasi-judicial manner. They could not properly have set out intentionally to procure a release of Statutory Interest claims, Currency Conversion Claims or other non-provable claims where doing so was not required by the purpose of the Administration or the purpose of the CRA or CDD processes, was not explained to creditors, would not treat creditors equally, and would cause prejudice to one or more classes of unsecured creditors and consequentially result in a windfall to subordinated creditors and shareholders. The position is no different merely because any release of such rights was inadvertent. It is notable, in this regard, that the Administrators are not seeking to advance or adopt the arguments made by Wentworth in relation to Question 36A, or to justify such an outcome.

15. The Administrators should refrain from taking advantage of LBIE's strict or technical legal rights and should not enforce, and the Court should direct the Administrators not to enforce, such releases, on the basis of the rule in *ex parte James, Re Condon* (1874) LR 9 Ch App 60 **[Auth/1A/2]**, alternatively paragraph 74 of Schedule B1 to the Insolvency Act 1986.

Question 9

16. Question 9 asks whether a creditor's accession into the CRA (and, in particular, the effect of Clauses 20.4.3, 24.1, 25.1, 25.2 and 62.4 of the CRA) would impact upon the answers to Questions 7 and 8. Questions 7 and 8 were determined in Part A of the proceedings and are concerned with the date from which Statutory Interest is payable on contingent and future debts.

17. For the reasons set out in the Senior Creditor Group's Skeleton Argument (and Reply Skeleton Argument) filed in connection with Part A, interest under Rules 2.88(7) and (9) is payable on all debts proved in the administration from the date of the administration, regardless of whether such debts were present or future, certain or contingent as at the date of the administration, and is payable on any claim made pursuant to the CRA as from the date of the administration[2].

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2 If the Court finds against the Senior Creditor Group on Questions 7 and 8, the Senior Creditor Group reserves its position as to when the Net Financial Claim arises pursuant to the CRA and whether this is a present, future or contingent claim; see the Senior Creditor Group's Reply Skeleton Argument filed in connection with Part A.

B. GENERAL BACKGROUND

18. This section provides a general chronological overview of the genesis, purpose and development of the CRA and CDD processes and the broader context in which they occurred, as set out in the evidence. References below to the Statement of Agreed Facts for Questions 34-35 and 36A are in the form "SAF (34/35)" and "SAF (36A)", respectively. References to the Senior Creditor Group's Statement of Disputed Facts for Questions 34-35 and 36A are in the form "SDF (34/35)" and "SDF (36A)", respectively.

(1) LBIE'S INSOLVENCY AND THE EXISTENCE OF THE SURPLUS

19. The financial position of LBIE has evolved materially since September 2008. Whilst the LBIE estate is now in surplus (Lomas 9 at [3] and [9]-[10] **[2/1]**), when the CRA and the CDD processes were initiated and developed, and for a substantial period afterwards (including when the CRA was entered into, the first Agreed Claims CDD was entered into and the first Admitted Claims CDD was entered into), the Administrators' progress reports had not communicated any expectation that LBIE would or might be able to pay provable claims in full, let alone Statutory Interest or non-provable claims: SAF (34/35) at [15] **[1/18]**.

20. In was not until their Fifth Progress Report, dated April 2011 **[8/1]**, that the Administrators first provided creditors with projections of possible outcomes. At that time, the best case *"high end"* scenario projected by the Administrators indicated a shortfall of £2.1 billion against ordinary unsecured claims (April 2011 at page 9 **[8/1]**). Subsequent *"high end"* projections in the Sixth Progress Report (October 2011 at page 11 **[8/2]**), Seventh Progress Report (April 2012 at page 10 **[7B/1/992-1048]**) and Eighth Progress Report (October 2012 at page 9 **[7B/1/1049-1100]**) similarly continued to show substantial shortfalls against ordinary unsecured claims. It was not until the Administrators' Ninth Progress Report dated 12 April 2013 **[5/3]** that the best case *"high end"* scenario projected the possibility of a surplus against ordinary unsecured claims (April 2013 at page 6 **[5/3]**): SAF (34/35) at [17] **[1/18]**. It was not until October 2013 that the Administrators' projections indicated that there might, on a low case scenario, be a recovery for creditors close to 100%: see SDF (34/35) at [2] [**1/20**]; Tenth Progress Report at page 6 **[8/3]**.

21. The emergence of the surplus over proved debts was due, at least in material part, to the success of the Administrators and their advisors in negotiating settlements with other Lehman affiliates and, in particular, through the settlement between LBIE and the Lehman US broker dealer Lehman Brothers Inc. (or "LBI") in 2012 (see e.g. SDF (34/35) at [1] [**1/20**]; Ninth Progress Report at pages 5, 6 and 8 [**5/3**]). The improvement in LBIE's financial position was neither inevitable nor predictable by creditors.

22. The CRA and CDD processes were therefore introduced, and the CRA and many CDDs were entered into, at a time when the statutory regime was concerned with (and the duties and functions of the Administrators directed towards) the return of trust assets and the ascertainment, admission and payment of dividends on unsecured provable claims, and without any focus being placed on the likelihood of a surplus sufficient to pay Statutory Interest, let alone other non-provable debts or on creditors' rights in the event of a surplus.

(2) THE CRA GENERALLY

23. The return of Trust Property to beneficiaries was a priority in the LBIE administration from its commencement: SAF (34/35) at [31] **[1/18]**; Lomas 10 at [14] **[2/2]**.

24. However, the Administrators encountered difficulties in returning Trust Property to its owners (see Lomas 10 at [16] **[2/2]**):

    (1) In a number of cases, LBIE held security rights over Trust Property, securing certain liabilities owed to LBIE by beneficiaries. Accordingly, in order to return Trust Property to beneficiaries the Administrators needed to ascertain whether LBIE had any net claim against the beneficiary secured by Trust Property and, if so, the quantum of such claim.

    (2) LBIE faced competing claims from other parties (including affiliates) to some Trust Property.

    (3) In some cases, the trust claims in respect of a particular stock line exceeded the amount of securities and so the Administrators needed a mechanism to allocate

shortfalls given that a return policy based on tracing would have been costly and time consuming: SAF (34/35) at [33]-[34] **[1/18]**.

25. The above factors, together with uncertainty as to the accuracy of LBIE's books and records, gave rise to a risk of LBIE returning Trust Property to someone who was in fact a debtor of LBIE or to the wrong person.

26. In order to meet these difficulties, LBIE initially sought to advance a scheme of arrangement pursuant to Section 895 of the Companies Act 2006 (the "Trust Property Scheme"). The proposed scheme would have operated in US Dollars, and would have converted all non-USD positions and claims into US Dollars (Browning 1 at [18] **[2/6]**; Pearson 7 at [29] **[2/7]**). The Trust Property Scheme ultimately failed due to a lack of jurisdiction (see: SAF (34/35) at [35] **[1/18]**; Lomas 10 at [17] **[2/2]**).

27. Following the failure of the Trust Property Scheme, the Administrators developed an alternative, contractual mechanism for returning Trust Property (Lomas 10 at [18] **[2/2]**). This ultimately led to the creation of the CRA, which was based on the terms of the Trust Property Scheme and incorporated substantially all of its provisions (see: SAF (34/35) at [36] and [38.1] **[1/18]**; the extract from the update to clients posted by the Administrators at **[6/1/334-341]**, referred to in Browning 1 at [20] and [23] **[2/6]**).

28. The Administrators therefore proposed the CRA to creditors on the basis that they believed that it "*establishes the most efficient available method of determining the return of segregated client assets which the Company holds on trust*" (CRA Circular Letter at page 2 **[3/1/216]**).

29. The CRA Circular [**3/1/201-314]** and CRA itself **[3/1/315-493**] were made available to creditors on 24 November 2009 (SAF (34/35) at [40] **[1/18]**), and had to be returned by creditors who were willing to enter into the CRA by 29 December 2009. On 29 December 2009, LBIE and the Administrators entered into the CRA with a large number of LBIE's creditors (exceeding 90% of the Acceptance Value of the Acceptance Threshold Claims as defined in the CRA: SAF (34/35) at [42] **[1/18]**; Lomas 10 at [27] **[2/2]**). As at that date, the possibility of LBIE having sufficient assets to pay all of its provable debts in full was not contemplated by the Administrators, and could not have been in the contemplation of LBIE's creditors who were dependent on the Administrators for information.

30. The primary purpose of the CRA was to create a consensual contractual mechanism to enable the Administrators to return Trust Property to its owners: SAF (34/35) at [43] **[1/18]**; Browning 1 at [22]-[23] **[2/6]**; Pearson 7 at [24] **[2/7]**; Browning 2 at [6(a)] **[2/11]**. To achieve this, it was necessary to include terms providing for the quantification and agreement of all claims as between LBIE and the beneficiary as at a particular date: SAF (34/35) at [44] **[1/18]**.

31. As part of this, the Administrators had to ascertain and agree the net position as between LBIE and the beneficiaries and, to this end, adopt a common currency. Thus (see, for example, Lomas 10 at [16]-[18] **[2/2]**):

    (1) The Administrators needed to ascertain whether LBIE had any claims against the beneficiary for which it held Trust property as security and, if so, the quantum of such claims.

    (2) In order to ascertain whether LBIE had any claims against the beneficiary, the Administrators needed to take into account any claims that the beneficiary had against LBIE and to establish the net position between LBIE and the beneficiary: SAF (34/35) at [44] **[1/18]**.

    (3) In order to establish the net position as between LBIE and the beneficiary and to ensure that the Trust Property could be distributed, it was necessary to convert all claims into a common currency as at a common reference date: SAF (34/35) at [45] **[1/18]**. As explained in paragraph [38] below, the use of US dollars as the common currency was the obvious choice since it was among other things the currency in which most claims against LBIE (and assets) were held, and had been LBIE's functional and reporting currency. The last report filed by LBIE before it entered administration stated that "*the Company's functional currency is US dollars as the directors consider this to be the most appropriate currency for the Company's business*".

32. As a result, the CRA contains a uniform set of rules for the ascertainment of net balances due to or from creditors, which includes:

(1) Terms providing for the assessment of all claims as between LBIE and the beneficiary as at particular dates, depending on the nature of the claim in question.

(2) Terms providing a standard methodology for the valuation and agreement of unsecured financial claims by reference to the parties' underlying contractual entitlements, subject to a number of overriding valuation principles (see Clause 21): SDF (34/35) at [6] [**1/20**]; Lomas 10 at [18] **[2/2]**.

(3) The conversion of all claims into a common currency (US dollars) as at a common reference date (the Date of Administration) (see Clause 24.1).

33. The underlying purpose of the process remained, however, to enable Trust Property to be returned to beneficiaries: SAF (34/35) at [43] **[1/18]**. It was for that reason that the Administrators had to ascertain and agree the net position as between LBIE and the relevant beneficiary.

34. Where the CRA process gives rise to a net balance in favour of a creditor (a "Net Financial Claim") this reflected the amount due to the creditor, which could be "*fed into*" the distribution process at a later date: Pearson 7 at [23], [24] and [75] **[2/7]**; Browning 1 at [25] **[2/6]**. The CRA therefore, as a by-product of the need to return Trust Property to beneficiaries, provides an alternative mechanism for agreeing claims for the purposes of proof, giving LBIE a degree of certainty as to the unsecured claims arising from Financial Contracts: Pearson 7 at [30], [99.1] and [128] **[2/7]**; Lomas 10, at [19(b)] **[2/2]**.

35. The Net Financial Claim under the CRA reflects, and is calculated primarily by reference to, a signatory's existing contractual entitlements, subject to a number of overriding valuation principles[3]. Save in respect of the particular variations in the economic relationship between the parties necessary to effect a return of Trust Property set out in the CRA, there was no commercial need or proper justification for altering the economic

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3 Such as the exclusion of asset claims and any pre-administration client money claims in the valuation of close-out amounts, the valuation of short and rehypothecated assets as at 12 September 2008, the automatic termination of open contracts as at the end of the month on which the signatory acceded to the CRA and the disapplication of "walk-away" clauses or equivalent provisions such as section 2(a)(iii) of the ISDA Master Agreement **[3/1/149-172]**: see Clause 22.9 of the CRA.

substance of the relationship between LBIE and its creditors, and the CRA did not do so.

36. The Administrators held two "town hall" meetings to discuss the terms of the CRA with LBIE counterparties in London and New York in December 2009, at which it was made clear that there were provisions in the CRA that were intended to determine and agree the amount of the claims of CRA signatories as described in Browning 1 at [29] **[2/6]**.

37. In addition to the town hall meetings, the Administrators prepared various documents regarding how the CRA would operate (see the Letter, Reader's Guide and Summary as referred to in Browning 1 at [35] **[2/6]**). The CRA was described in a manner that suggested that the broad intention was to quantify claims but preserve the underlying economics of the Financial Contracts in question to the extent possible: SDF (34/35) at [7] [**1/20**]; Browning 2 at [6(b)] **[2/11]**; Browning 1 at [32]-[47] **[2/6]** and the examples given. The Administrators did not state at the meetings or in the materials describing the provisions of the CRA that entering into the CRA would result in creditors giving up any significant and potentially valuable attributes of debts agreed and admitted to proof in the event of a surplus: Browning 1 at [32], [36] and [47] **[2/6]**.

38. As noted above, in order to enable Trust Property to be returned to clients, and the net position to be calculated, all claims by creditors against LBIE, and by LBIE against the creditors, needed to be dealt with in a single currency (see: SAF (34/35) at [49] **[1/18]**; Browning 1 at [25] **[2/6]**). As in the proposed Trust Property Scheme, US dollars were used as the common currency, consistent with the currency in which most claims against LBIE were held[4], the fact that, prior to its administration, LBIE's functional and reporting currency had been US dollars, and the other matters set out in Browning 1 at [12] – [14], [17] and [30] and Browning 2 at [6(d)] **[2/11]**. US dollars was therefore the "*obvious choice*": Browning 1 at [25].

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4 The majority of claims against LBIE were in US Dollars: Browning 1 at [5] and [9] **[2/6]**, Browning 2 at [6(d)] **[2/11]**. A presentation by the Administrators on 10 March 2014 stated that, as at that time, 78% of the claims against LBIE were denominated in US dollars (ibid, and page 25 of the presentation on 10 March **[6/1/1-29]**); SAF (34/35) at [27] **[1/18]**). Over 90% of the claims now held by Baupost where the relevant counterparty acceded to the CRA were denominated in US dollars prior to the CRA coming into effect: Browning 1 at [9].

39. The fact that the majority of claims against LBIE were already denominated in US dollars meant that the provisions of Clause 24.1 of the CRA (providing, broadly, for conversion of claims into US dollars) did not have any economic impact on the majority of claims: see SDF (34/35) at [10] [**1/20**]; Browning 1 at [5], [9]-[11], [21] and [25]-[27] **[2/6]**; Browning 1 at [21].

(3) PROJECT CANADA: THE CONSENSUAL APPROACH

40. The first CDD was initially developed during 2010 as part of what the Administrators called "Project Canada". This was a project which, according to Lomas 9 at [61] **[2/1]**, sought to develop and implement a framework that:

(1) Allowed the Administrators and LBIE to agree with creditors the value of their claims without undue delay and without the need to reconcile and agree every component part of a claim.

(2) Allowed LBIE and the Administrators to achieve a degree of finality as to the claims LBIE would face from those creditors.

(3) Accounted for difficulties arising from uncertainty as to creditors' entitlements in respect of client money under Chapter 7 of the CASS Rules.

41. The CDDs are the culmination of the "Consensual Approach" (as described further below) once agreement was reached by the Administrators and the creditor as to the valuation of claims: in that sense, they are "*the documents used by the Joint Administrators for the purposes of agreeing the quantum of certain claims*" (Lomas 9 at [61] **[2/1]**).

42. A key purpose of this process (irrespective of the form of CDD ultimately used by the Administrators to record the agreement reached) was to enable LBIE and the Administrators to achieve a degree of finality as to the claims LBIE would face from creditors, compared with the effect of the ordinary proof process under the Insolvency Act and Rules, which, for example, allows creditors and the Administrators to vary the amount of a creditor's proof and permits creditors to challenge in Court the amount at which their proof is admitted: SAF (34/35) at [64] **[1/18]**.

43. The Administrators believed that the Consensual Approach, and use of CDDs, would facilitate the making of distributions to unsecured creditors within a more expeditious timeframe and communicated this to creditors, thereby encouraging them to participate in that process (see SAF (34/35) at [53] and [63] **[1/18]**; Section 5 of the Third Progress Report dated April 2010 **[4A/1/339-439]**; Press release of 16 June 2010 **[4A/1/439-441]**; the Creditor Update of 16 June 2010 **[4A/1/441-444]**; Section 6.1 of the Fourth Progress Report dated October 2010 [**4A/1/527-610**]; Lomas 9 at [61] and [65] **[2/1]**; Lomas 10 at [33]–[34] and [47]-[48] **[2/2]**).

44. The so-called "Consensual Approach" was formally introduced and described to creditors in the Administrators' Fourth Progress Report dated 14 October 2010: SAF (34/35) at [52] **[1/18]**. Section 6.1 of the Fourth Progress Report explains **[4A/1/527-610]**:

(1) The Consensual Approach was designed to accelerate the agreement of unsecured claims with a view ultimately to expediting distribution payments (page 29 "Highlights" **[4A/1/557]**).

(2) The immediate focus of the Administrators was on *"agreeing balances provable"* (page 29 "Highlights" **[4A/1/557]**).

(3) Creditors would benefit from a set of robust creditor valuation and reconciliation processes, in line with market practice and universally applied to determine creditors' unsecured claims (page 30 "Overview" **[4A/1/558]**).

(4) In offering a determination of their unsecured claims, the Administrators were seeking to treat creditors "*consistently*, *and are not simply imposing a discount or "haircut" to their claims"* (page 30 "Overview" **[4A/1/558]**).

(5) The Consensual Approach was designed to provide certainty by allowing creditors to agree their total net claims against LBIE without the need for further substantial evidentiary documentation and interaction in support of their claims and without the need to enter into a protracted agreement process (page 30 "Benefits" **[4A/1/558]**).

(6) Creditors would be presented with a determination by LBIE as to the value of their unsecured claims (a "LBIE Determination") as a *"non-negotiable option (which creditors are free to accept or reject)"* (page 31 **[4A/1/559]**).

(7) Creditors who elect *"not to accept a LBIE Determination provided to them will have their claims reviewed in detail on a bespoke bilateral basis"* (page 31 **[4A/1/559]**).

45. The Consensual Approach, including the use of the CDD process, was therefore presented as providing a streamlined and more efficient process for agreeing claims and admitting them to proof within the framework of the statutory regime.

(4) THE CDD PROCESS

46. The process used to agree creditors' unsecured claim amounts under the CDDs utilises a number of facets of the ordinary proof process:

(1) Creditors are required to submit a proof of debt *"complying with the Insolvency Act and Rules"* (Fifth Progress Report, April 2011 at page 29 **[8/1]**), in the currency of the creditor's underlying entitlement on an online claims portal (the "Claims Portal") set up by the Administrators (see SAF (34/35) at [22] **[1/18]**; SDF (34/35) at [5] [**1/20**]; Garvey 3 at [18] **[2/3]**).

(2) LBIE then makes an offer in respect of the creditor's claim(s) (i.e. the "LBIE Determination") (SAF (34/35) at [54] **[1/18]**; Lomas 10 at [44] and [45] **[2/2]**), by reference to the claims contained in the proof and ordinarily in the currency in which the corresponding proof of debt is denominated: SAF (34/35) at [54] and [58] **[1/18]**; Garvey 3 at [19] and [20] **[2/3]**. A draft CDD is typically sent by the Administrators at the same time as the LBIE Determination, in which the amount of the agreed or admitted claim is left blank: SAF (34/35) at [58] **[1/18]**; Garvey 3 at [20] **[2/3]**.

(3) If that offer is accepted, LBIE and the creditor enter into a CDD (Lomas 9 at [62] **[2/1]**). The draft CDD is typically updated by LBIE and sent to the creditor by e-mail as a final version for signing with the agreed amount of the claim included. Where the CDD is an Agreed Claim CDD, this is typically in the

currency of the underlying obligation, pending later conversion to Sterling pursuant to Rule 2.86(1). Where the CDD is an Admitted Claim CDD, this is the agreed offered figure after converting that sum into Sterling as at the date of the administration pursuant to Rule 2.86(1): SAF (34/35) at [75] **[1/18]**; Garvey 3 at [20] and [21] **[2/3]**.

(4) The Administrators explained the purpose of converting foreign currency claims to Sterling was as being "for the purposes of having a proven [sic] claim against LBIE" and "in accordance with the provisions of UK insolvency law for the purposes of proving": SDF (34/35) at [13] [**1/20**]; Fourth Progress Report at page 33 (see also pages 10 and 75) **[4A/1/527-610]**. To this end, the Claims Portal is programmed automatically to convert non-Sterling denominations into Sterling pursuant to Rules 2.86(1) and (2): SAF (34/35) at [22] **[1/18]**.

47. Creditors were advised by LBIE when provided with a CDD that: (i) the amount at which LBIE proposed to agree each creditor's claim (which was typically communicated in the currency of contractual entitlement) by the CDD; and (ii) the form of the CDD; were both non-negotiable: SAF (34/35) at [56] and [83.3] **[1/18]**; Lomas 10 at [45] and [56] **[2/2]**; example covering e-mail at AVL10 page 614 **[2/10/614]**; Garvey 3 at [16] **[2/3]**; Fourth Progress Report at page 31 **[4A/1/527-610]**.

48. From 2010 until early 2014, creditors were informed that, if they did not accept the LBIE Determination and enter into CDDs as part of the Administrators' proposed "Consensual Approach", they would have to enter into bilateral negotiations with the Administrators at an unspecified future date: SAF (34/35) at [56] **[1/18]**; Lomas 10 at [45] **[2/2]**; Garvey 3 at [15] **[2/3]**. As a consequence, payment of distributions to them would be delayed (potentially for a significant period) without any reason to expect (given the Administrators' indications of the likely shortfall with respect to provable claims) compensation for the delay in determining the quantum of their claims outside the "Consensual Approach" and CDD process. Furthermore, creditors not accepting the determination of their claim in a CDD in accordance with the "Consensual Approach" faced ongoing uncertainty about when and at what value their claims would be admitted: Garvey 3 at [17] **[2/3]**; Fourth Progress Report at pages 29-32 **[4A/1/527-610]**. Until March 2014, updates provided to creditors by the Administrators in connection with interim dividend distributions stated that to be eligible to participate in interim dividends,

creditors must execute a CDD or similar agreement (see, for example, the Creditor Update dated 24 March 2014 **[9/23]**): SDF (34/35) at [12] [**1/20**]; Garvey 3 at [15] **[2/3]**; the FAQ issued by LBIE with respect to each dividend (e.g. **[9/26]**); Lomas 10 at [81] **[2/2]**.

49. Although in some circumstances certain provisions in the CDD were ultimately amended for certain creditors (Lomas 10 at [57]-[58] **[2/2]**), the release clause has not been the subject of material amendment and was and is regarded by the Administrators as being in materially the same form in all types of CDD save for those dealing with CRA Trust Property (SAF (34/35) at [82] **[1/18]**; Lomas 10 at [61] **[2/2]**)[5].

50. The release provisions are included in the various CDDs "*with the intention that the amount of the Agreed Claim or Admitted Claim (as the case may be) would not need to be revisited once it had been agreed in a CDD*" (Lomas 10 at [59] **[2/2]**, which also sets out the terms of the standard CDD release; SAF (36A) at [1] **[1/19]**). The waivers and releases are "*designed to give LBIE and the Joint Administrators certainty in respect of the creditor's claims so as to facilitate making interim distributions*": Lomas 9 at [64.3] (emphasis added) **[2/1]**. The terms of the release in respect of the various different forms of CDD are addressed in detail below.

(5) EVOLUTION OF THE CDDS

51. Approximately 1600 CDDs and 460 Client Money Supplemental Deeds have been entered into: SAF (34/35) at [61] **[1/18]**; Lomas 11 at [64] **[2/4]**.

52. The CDDs have evolved over the period 2010 to 2014. However their basic purpose and function has remained the same and the intention of the Administrators has been, in so far as reasonably possible, to ensure that CDDs remain relatively standardised (SAF (34/35) at [59] **[1/18]**; Lomas 10 at [57] **[2/2]**). The different forms are described in Appendix A to Lomas 10.

53. Once it was appreciated that there might be a surplus, an issue arose as to whether the effect of the existing form of CDDs might be to release claims to Statutory Interest or

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5 The release provisions in Aggregator CDDs are in a different form from the standard form release in that they provide for the release of the claims of the original creditor that were assigned to the aggregator i.e. those who acquired claims in the secondary market: Lomas 10 at [62] **[2/2]**.

other non-provable claims. Concerned creditors contacted the Administrators, who agreed to amend the standard templates to include language which expressly preserved first Statutory Interest (on a "for the avoidance of doubt" basis) and, later, Currency Conversion Claims (see sections (6) and (7) below), reflecting the fact that it was no part of the CDD process to require the release or compromise of rights to interest or other non-provable rights in respect of claims which had been agreed and admitted to proof in the event of a surplus.

54. The three principal forms of CDDs relied upon by the Senior Creditor Group in these proceedings (which, as explained below, varied over time to include language expressly addressing Statutory Interest and Currency Conversion Claims) are:

(1) The Agreed Claims CDDs generally recorded the agreement of creditors' claims in the currency of underlying entitlement pending conversion to Sterling pursuant to Rules 2.86(1) and (2): SAF (34/35) at [72] **[1/18]**; Garvey 3 at [18] **[2/3]**.

(2) Admitted Claims CDDs (which recorded the agreement of creditors' claims in Sterling following conversion of the agreed claims to Sterling pursuant to Rules 2.86(1) and (2): SAF (34/35) at [74]-[75] **[1/18]**.

(3) CRA CDDs (which, although not required in order to do so, were used to admit to proof of claims made pursuant to the terms of the CRA).

55. Each of these forms of CDD is addressed in further detail below. Although the Administrators updated the CDD templates over time, there was no clear date on which one form of CDD was replaced by another. It is therefore possible, for example, that on one day different creditors might simultaneously have been signing: (i) an Agreed Claim CDD and an Admitted Claim CDD; or (ii) a form of CDD with language expressly preserving rights to interest and a form of CDD without such language.

56. Since December 2013, the Administrators have determined the claims of certain creditors using admittance letters instead of CDDs, in the event that the creditor is unwilling to sign a CDD ("Admittance Letters"): SDF (34/35) at [12] **[1/20]**; Lomas 10 at [81] **[2/2]**. Those letters expressly state that the unsecured claim is admitted without prejudice to any further rights that the creditor may have to (i) Statutory Interest under

rule 2.88(7)-(9) or (ii) a Currency Conversion Claim (Lomas 10 at [82]). There is no release clause (or other form of release) in the Admittance Letters. The Administrators have also admitted the claims of certain creditors by bespoke contracts (Lomas 10 at [83] **[2/2]**).

(6) STATUTORY INTEREST

57. Prior to 2012, none of the CDD templates contained an express reference to Statutory Interest: SAF (34/35) at [85] **[1/18]**. In early 2012, the possibility of a Surplus was being discussed in the market and this triggered queries from certain creditors as to the potential impact of the release clause on any entitlement to Statutory Interest (SAF (34/35) at [15]-[16] and [86] **[1/18]**; Lomas 10 at [66] **[2/2]**). The Administrators' initial reaction to these enquiries as described in Lomas 10 at [67] was to explain that:

> *"the inclusion of language to preserve a creditor's right to Statutory Interest was unnecessary on the basis that the release did not waive <u>any</u> entitlement a creditor may have to Statutory Interest.*" (emphasis added) (SAF (36A) at [3] **[1/19]**)

58. In due course, and as from 28 June 2012 on a case by case basis, the Administrators agreed to include an express reference to Statutory Interest in CDDs in order to clarify that any such rights were preserved: SAF (36A) at [4] **[1/19]**; Lomas 10 at [68]-[69] **[2/2]**. In August 2012, they decided to make an equivalent revision across the suite of CDD templates and standard language was agreed by the Administrators in September 2012: SAF (34/35) at [87]-[88] **[1/18]**; Lomas 10 at [70]-[71][6]. A similar update was made to the template Client Money Supplemental Deeds in early September 2012: SAF (34/35) at [89] **[1/18]**; Lomas 10 at [73].

59. As explained in Lomas 10 at [69] **[2/2]** (SAF (36A) at [6] **[1/19]**):

> *"The Joint Administrators did not ultimately have a difficulty in amending the CDD to include language expressly preserving claims for Statutory Interest as, while, to the best of the Joint Administrators' recollection, the impact of the Release Clause on Statutory Interest was*

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6 It is to be noted that (1) certain CDDs may have been executed even after September 2012 which do not include the agreed preservation language because the draft was sent to the counterparty prior to the global template amendments being made; and (2) the language in CDDs executed between 28 June 2012 and September 2012 may vary slightly: SAF (36A) at [5] **[1/19]**; Lomas 10 at [71] and Appendix B to Lomas 10 **[2/2]**.

not considered during the development of the CDDs, it was never our intention that creditors would waive their right to Statutory Interest by virtue of the Release Clause."

60. Approximately one third of all CDDs (by number and value) do not include any express "for the avoidance of doubt" language preserving rights to Statutory Interest: Lomas 11 at [64] **[2/4]**. In 2014 the Administrators estimated that the value of Currency Conversion Claims arising from Sterling denominated CDDs exceeded £400 million.[7]

(7) CURRENCY CONVERSION CLAIMS

61. The possible existence of Currency Conversion Claims was first raised with the Administrators by Elliot Management Corporation in early March 2013 in connection with the Waterfall I Application: SAF (34/35) at [90] **[1/18]**; SAF (36A) at [9] **[1/19]**; Lomas 10 at [74] **[2/2]**; Copley at [19] **[2/8]**; Ryan 1 at [10] **[2/9]**. At this time:

(1) None of the CDDs referred to Currency Conversion Claims (Lomas 10 at [74] **[2/2]**).

(2) As set above, the Administrators' Progress Reports did not indicate that LBIE, even in the projected best case "*high end*" scenario, would be able to pay provable claims in full, let alone Statutory Interest.

62. In mid-2013, certain creditors enquired whether the Administrators were willing expressly to preserve the creditors' rights in respect of Currency Conversion Claims in the CDDs: SAF (36A) at [9] **[1/19]**; Lomas 10 at [75] **[2/2]**.

63. Mr Copley, the Administrator who signed CDDs on behalf of LBIE, and who was responsible for the development and implementation of Project Canada and the agreement of creditors' claims in the period 2 November 2011 until 31 December 2013 (SAF (36A) at [7] **[1/19]**; Copley at [14] [**2/8]**), has stated that his overriding preference, at that time, was to resist any change to the then standard form CDDs in order to ensure consistency of treatment of creditors in that regard (SAF (36A) at [10] **[1/19]**; Copley at [21] **[2/8]**).

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7 LBIE Surplus Proposal, 10 March 2014 at page 28 MNB1 pages 1 to 29 [**6/1/28**].

64. However, due to the uncertainty as to the effect of the release clause on Currency Conversion Claims, certain creditors refused to execute CDDs and the progress of the claims determination process became materially impaired during the latter part of 2013: Lomas 10 at [75]-[76] **[2/2]**. Although the Administrators initial response had been to state that no amendments would be made to the CDD templates, they revisited their position and engaged with certain creditors and their legal advisors on this issue: SAF (36A) at [10] and [13] **[1/19]**; Lomas 10 at [76] **[2/2]**.

65. The impact of the release clause on Currency Conversion Claims was then specifically raised by Leading Counsel for LBHI2 at a PTR for the Waterfall I Application on 11 October 2013 (SAF (36A) at [13] **[1/19]**; Lomas 10 at [75] **[2/2]**; Copley at [24] [**2/8]**). On or shortly after that PTR:

(1) Mr Copley decided to cease signing Admitted Claim CDDs in their existing form unless there was an express preservation of Currency Conversion Claims: SAF (36A) at [14] **[1/19]**; Copley at [24] [**2/8]**.

(2) Mr Copley mentioned to various creditors that, as the Administrator who signed CDDs on behalf of LBIE, he did not intend to compromise Currency Conversion Claims and was willing to give evidence to ensure that the CDD provisions were correctly interpreted (Copley at [32] [**2/8]**). He also stated that, subject to obtaining legal advice, his preference was to make a publicly-available statement on the section of the PWC website making it clear to all creditors that "*it was the Joint Administrators' view that CDDs did not have the effect of releasing Currency Conversion Claims and that it had not been the intention of the Joint Administrators that creditors waive their right to Currency Conversion Claims*" (Copley at [25] [**2/8]**; SAF (36A) at [15] **[1/19]**).

(3) In making such statements, Mr Copley was "*acknowledging that there could not have been a positive intention, at the time the Release Clause in the template CDDs was originally drafted, specifically to release creditors' rights in relation to Currency Conversion Claims, in circumstances where, so far as I was aware, prior to 2013, the possibility of Currency Conversion Claims being made (or, indeed, existing) had not been considered by the Joint Administrators* (Copley at [25] [**2/8]**; SAF (36A) at [16] **[1/19]**).

(4) Following consultation with their legal advisors the Administrators decided that it "*was not appropriate (because the CDDs might have the effect of releasing Currency Conversion Claims) to provide the update on the PWC website"* (Copley at [26] [**2/8]**; SAF (36A) at [17] **[1/19]**).

66. Interim language was used to preserve Currency Conversions Claims in a number of CDDs between the end of 2013 and early 2014 (see SAF (34/35) at [17] **[1/18]**; Lomas 10 at [77] and Appendix C to Lomas 10 **[2/2]**; Copley at [30] [**2/8]**). By mid-February 2014, the Administrators approved a final form of language which CDDs executed since that time have generally[8] contained: SAF (34/35) at [91] **[1/18]**; Lomas 10 at [77]-[80] **[2/2]**.

67. In discussions with creditors from mid-2013 onwards, Mr Copley stated (Copley at [28] [**2/8]**; SAF (36A) at [18] **[1/19]**):

> "*had I known (which I did not) about the existence of such claims at the time the Release Clause was drafted to be included in the CDDs in 2010, I would have sought to have them carved out from the effect of the Release Clause if it were necessary to do so in order to preserve them. My reason for making such a statement was that, had I known at the time the CDDs were drafted that a Currency Conversion Claim would be available as a non-provable claims in the event there was a surplus, I believe that my own preference at that time would have been to carve them out.*"

68. Over 75% by number and over 75% by value of all CDDs do not contain express language preserving rights to Currency Conversion Claims: Lomas 11 at [64] **[2/4]**. None of the Client Money Supplemental Deeds contain express language preserving rights to Currency Conversion Claims: Lomas 10 at [64] **[2/2]**.

(8) ADMISSION OF CLAIMS WITHOUT CDDS

69. Until March 2014, updates provided to creditors by the Administrators in connection with interim dividend distributions stated that to be eligible to participate in interim dividends, creditors must execute a CDD or similar agreement (see, for example, the Creditor Update dated 24 March 2014 **[9/23]**; SDF (34/35) at [12] **[1/20]**; Lomas 10 at

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8 It is not known why the CCC Language has not been used in all CDDs executed since that date: Mr Copley refers to "specific reasons" at Copley [24] [**2/8]** without explaining what they are.

[81] **[2/2]**). Nevertheless, due, amongst other things, to the impaired progress in late 2013 of the CDD process and the Administrators' desire to continue to determine creditors' unsecured claims, LBIE has since December 2013 determined the claims of creditors who are not willing to sign CDDs by using Admittance Letters: Lomas 10 at [81] **[2/2]**. Such letters contain without prejudice language expressly preserving any rights that creditors may have to statutory interest payable under Rules 2.88(7)-(9) or Currency Conversion Claims: SAF (36A) [23]-[26] **[1/19]**; Lomas 10 at [82] **[2/2]**.

(9) THE SURPLUS ENTITLEMENT PROPOSAL

70. In March 2014, the Administrators disclosed to certain creditors that had entered into a Non-Disclosure Agreement the terms of a potential compromise. That proposal was then disclosed to the market generally on 28 March 2014 by posting it on the section of the PWC website dedicated to the administration: Lomas 9 at [23] **[2/1]**. The proposed CVA did not garner sufficient support to be viable at that time.

71. As observed in Garvey 3 at [28]-[29] **[2/3]**, the proposal envisaged that:

    (1) Statutory Interest would be paid *pari passu* without reference to the effect of the type of CDD applicable to a claim.

    (2) Currency Conversion Claims would be recognised and distributions made in respect of such claims *pari passu* without reference to the effect of the type of CDD applicable to a claim.

72. Mr Copley commented in a webcast to creditors on 6 May 2014 **[9/24]** that this proposal was based on the Administrators' legal analysis of the creditors' entitlements and, where there was legal uncertainty, on what the Administrators considered fair: SDF (36A) at [8] **[1/20]**; Garvey 3 at [30] **[2/3]**.

C. THE PRINCIPLES OF CONSTRUCTION

(1) THE BASIC PRINCIPLES

73. The fundamental principles of contractual construction are well known:

(1) "*The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*": *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 *per* Lord Clarke at [21] **[Auth/1B/50]**;

(2) "…*speaking generally commercially minded judges would regard the commercial purpose of the contract as more important than the niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties*": *Contract law: Fulfilling the reasonable expectations of honest men* 113 LQR 433, 311, *per* Lord Steyn **[Auth/2/2]**, as approved in *Rainy Sky SA v. Kookmin Bank* ibid. *per* Lord Clarke at [25] **[Auth/1B/50]**.

(2) BACKGROUND

74. There is no conceptual limit to what can be regarded as relevant background: *BCCI v. Ali* [2002] 1 AC 251 at [39] **[Auth/1A/27]**; *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 , 913**[Auth/1A/22]**. It may include:

(1) Evidence of the 'genesis' and objectively the 'aim' of the transaction: *Prenn v. Simmonds* [1971] 1 WLR 1381 at 1385H **[Auth/1A/13]**.

(2) Any statutory regime or context within which the contract is designed to operate: Lewison, The Interpretation of Contracts, 5th ed. pages 188-190 **[Auth/2/1]**; *Standard Life Assurance ltd v. Oak Dedicated Ltd* [2008] 2 All ER (Comm) 916 **[Auth/1B/37]**; *Phoenix Commercial Enterprises Pty Ltd v. City of Canada Bay Council* [2010] NSWCA 64 at [176] **[Auth/1B/45]**; *Amcor Ltd v. Construction, Forestry, Mining & Energy Union* (2005) 222 CLR 241 at [64] **[Auth/1B/32]**.

(3) RELEASE CLAUSES

75. The proper approach to the construction of a general release was addressed by the House of Lords in *BCCI v. Ali* [2002] 1 AC 251 **[Auth/1A/27]**.

76. Great care is required in order to place the agreement in its proper context and assess its purpose, precisely because the context in which and the purpose for which the general release was given may be apt to cut down the effect of the apparently all-embracing scope of the release: per Lord Nicholls at [23] and [24]. The background or context is "*very important*": per Lord Hoffmann at [39] (and [52] and [53]); Lord Clyde at [78]. The generality of the wording has no greater reach than its context indicates: per Lord Nicholls at [29], see also Lord Nicholls at [28]:

> *"However widely drawn the language, the circumstances in which the release was given may suggest, and frequently do suggest that the parties intended, or more precisely, the parties are reasonably to be taken to have intended, that the release should only apply to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language in the past, that would be outside the "contemplation" of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not "under consideration"* (emphasis added).

77. The relevant context includes the duties and functions of the officeholder. See, for example, *Re WW Duncan* [1905] 1 Ch 307 **[Auth/1A/6]** where a creditor had signed a receipt following payment of dividends "*in full and final discharge of my claim against this company*". Contributories contended that, as a result, the creditor had released any claim he had to interest in the event of a surplus. Buckley J rejected that contention, saying:

> "*I decline to attribute such an intention to any liquidator; it would be a most dishonest thing to do. It is the liquidator's duty to see that the estate in his hands is distributed according to the rights of the parties, not to induce somebody to give away by a slip a right as to which the liquidator knows there is a real question to be determined*."

78. Similarly the meaning of general words, even "whatsoever", may be limited by the context in which they appear:

> "…*Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words which precede them"*: *The Thames and Mersey Marine Insurance Co Ltd v. Hamilton Fraser & Co* (1887) 12 App.Cas. 484 per Lord Halsbury LC [**Auth/1A/5]**; see also *BOC Group Plc v. Centeon LLC* [1999] 1 All E.R. (Comm) 970 per Evans LJ [**Auth/1A/25]**.

79. A "*cautionary principle"* should inform the Court's approach to the construction of a general release: *BCCI v. Ali*, per Lord Bingham at [10] and [17], Lord Browne-Wilkinson at [21] **[Auth/1A/27]**.

80. In the absence of clear language, "*the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware*": *BCCI v. Ali* per Lord Bingham at [10] (and the cases cited at paragraphs [10] – [16] **[Auth/1A/27]**). The things that were or were not specifically in the contemplation of the parties at the time when the release was given may limit or impact on the scope of the release: *BCCI v. Ali*, per Lord Hofmann at [41] and [42].

81. In *Turner v. Turner* (1880) 14 Ch D 829 **[Auth/1A/3]** (cited by Lord Bingham in *BCCI v. Ali* at [14]) an executrix made certain payments to persons interested in the estate in consideration for a release of:

> *"all manner of actions, suits, cause and causes of action, and suits, debts, duties, sum and sums of money, accounts, reckonings, legacies, claims and demands whatsoever at law and in equity which they…then had, or could, should, or might at any time have, claim, challenge, or demand upon the said Maria Turner…either under the statutes for the distribution of the estates of intestates or otherwise howsoever, or for or by reason or on account of any matter or claim whatsoever".*

It was later discovered that property in which the testator was entitled to a share had, during his life, been sold at an undervalue. The executrix managed to set aside the sale

and a question arose as to whether the persons who gave the release were entitled to share in the money recovered. Malins V.C. held that they were, notwithstanding the broad terms of the release:

> "*It is to my mind impossible to read this deed without seeing that it is addressed to the state of things and to the amount of property of which the parties were aware, and that it has no application and could have not application to property of the existence of which they were unaware. It is an arrangement with regard to a state of things then known; but as to…the setting aside of the sale, it was impossible that it could apply to them. In a case of this kind it is the duty of the court to construe the instrument according to the knowledge of the parties at the time, and according to what they intended, and not to extend it to property which was not intended to be comprised within it….the words of release are in themselves abundantly sufficient, and if the deed is to be read literally and to be considered as including everything which they had known or might hereafter know, it is quite clear that this suit is barred by that release. But it has always been the rule of this Court to construe releases and documents of that kind with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time"* (at 834).

(4) THE IMPLICATION OF TERMS

82. A term will be implied in a contract if that is what the instrument, read as a whole against the relevant background, would reasonably be understood to mean:

(1) "*in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean*": *Attorney General v. Belize Telecom Ltd* [2009] 1 WLR 1988 at [21] **[Auth/1B/41]**.

(2) The basic test has been expressed in a number of ways (i.e. the proposed term must be "*reasonable and equitable*", necessary to give "*business efficacy*" to the contract, so obvious that "*it goes without saying"*, capable of clear expression and not contradict any express term of the contract: see e.g. *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 180 CLR 266, 282-283**[Auth/1A/16]**). However, these should not be regarded as a series of independent tests which must be surmounted, but as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means: *Attorney General v. Belize Telecom Ltd* ibid. at [27] **[Auth/1B/41]**.

(3) For example, it is frequently the case that an implied term is not "*necessary to give business efficacy to the contract"* in the sense that both parties can perform their express obligations, but that does not preclude the implication of a term where the consequences would otherwise contradict what a reasonable person would understand the contract to mean: *Attorney General v. Belize Telecom Ltd* ibid. at [23] **[Auth/1B/41]**.

D. THE CRA

(1) INTRODUCTION

83. As set out above, the genesis and primary purpose of the CRA **[3/1/315-493**] was to enable Trust Property to be returned to those entitled to it: SAF (34/35) at [43] **[1/18]**.

84. The Net Financial Claim is the amount ascertained and agreed to be due to the creditor under Financial Contracts[9]. Although phrased in Clause 4.4.2(ii) of the CRA as a "*new obligation of LBIE*", it is not treated as an expense or post-administration liability, but an ascertained and agreed claim reflecting the net sum arising under the Financial Contracts, calculated in accordance with the terms of those Financial Contracts and the overriding valuations provisions of the CRA.

85. As a by-product to the primary purpose of returning Trust Property, the Net Financial Claim is also treated as an unsecured claim by the beneficiary in any distributions from the LBIE estate (Lomas 10 at [19(b)] and [23] **[2/2]**; Browning 1 at [25] **[2/6]**; Pearson 7 at [30], [99.1] and [128] **[2/7]**). In this way, the CRA also gave LBIE a degree of certainty as to the amount of the unsecured claims arising from Financial Contracts.

86. CRA creditors are entitled to receive full satisfaction of the Net Financial Claim calculated pursuant to the CRA. The fact that the claim is admissible to proof does not affect this. Creditors are entitled to receive full satisfaction of their ascertained and agreed Net Financial Claim in the same manner as any creditor whose claim is admitted to proof. This includes the right to prove and participate in any dividends and the right to assert any non-provable claims arising in respect of its Net Financial Claim in the event of a surplus.

87. Given that the ascertained and agreed Net Financial Claim is denominated in USD, the CRA gives the creditor a right to be paid that sum in US Dollars and thus to a Currency Conversion Claim in the event of a surplus.

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9 Defined as *"any bilateral or multilateral contract entered into before the Administration Date (whether evidenced in writing or not) relating to one or more transactions or positions of a financial nature (and which is not a purely administrative or services contract), including contracts for the delivery and / or custody of Assets, entered into between a Signatory and the Company. For the avoidance of doubt, Master Agreements are Financial Contracts and each Master Agreement, together with the transactions entered into under it, shall be treated as a single Financial Contract".*

88. The CRA does not release the creditor's entitlement to contractual interest in the event that there is a surplus. Given that the purpose of the CRA is to return Trust Property and the calculation methodology produces a sum which is treated as due by LBIE to the creditor as at the Date of the Administration, there is no reason why it should do so. To the contrary, the CRA expressly provides for the preservation of a creditor's rights to interest by reference to Rule 2.88 of the Rules. Where a Financial Contract provides for interest to be payable, that Financial Contract continues to provide the relevant contractual rate for the purpose of the rate applicable to the debt apart from the administration under rule 2.88(9)[10].

89. A creditor's Net Financial Claim, and an entitlement that it may have to Statutory Interest or to a Currency Conversion Claim with respect to it, is unaffected by the releases in the CRA. Those releases are, in this regard, irrelevant. They do not affect the Net Financial Claim that was ascertained and agreed pursuant to the CRA or the rights of a creditor in respect of such a claim (whether the right to prove and participate in the payment of dividends or the right to further payments in the event of a surplus). The releases are intended to release LBIE from any other claims. For example, Clause 4.2.2 ("*Claims released by Signatories*") of the CRA makes clear that all claims for consequential loss or economic loss as a result of LBIE returning Trust Property via the methodologies in the CRA were released. The liability of the Administrators was also released in connection with the preparation and negotiation of the CRA and their acts, omissions or defaults pursuant to clause 9 ("*Release of Liability*") of the CRA. Whereas the potential liabilities referred to in these clauses could potentially have impacted upon the return of Trust Property pursuant to the CRA, the release of any entitlement to Statutory Interest or a Currency Conversion Claim was not necessary to achieve this purpose.

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10 Where the Net Financial Amount is the product of multiple contracts, some or all of which provide for a contractual rate of interest, the rate applicable to the debt apart from the administration is determined in accordance with the answer to Question 37, namely by ascertaining the amount of each component claim attributable to the single claim amount, ascertaining the "*rate applicable to the debt apart from the administration*" separately for each component claim and calculating the rate applicable to the debt apart from the administration as weighted average of all such rates.

(2) CONSTRUCTION OF THE CRA

The right to payment of the Net Financial Claim in US dollars

90. The Senior Creditor Group contends that the CRA **[3/1/315-493]** confers on creditors rights against LBIE denominated in US Dollars which are capable of giving rise to Currency Conversion Claims:

91. Under Clause 4.4.2 all CRA Signatories are entitled, among other things, to: (i) have their Net Contractual Position determined on the basis set out in the CRA; and (ii) assert their Net Financial Claim against LBIE as a new obligation of LBIE:

(1) "*Net Financial Claim*" is defined in Clause 25.1 as the Net Contractual Position.

(2) "*Net Contractual Position*" is defined in Clauses 24.2.1 and 24.2.2 as the aggregate of the "*Close-Out Amounts"* determined in respect of the Signatory's Financial Contracts. Clause 20.1 of the CRA provides that Close-Out Amounts are to be determined in accordance with any contractual valuation methodology, as supplemented by certain Overriding Valuation Provisions contained at Clause 20.4 of the CRA (see, further, paragraph [101] below).

(3) Pursuant to Clause 24.1, all Close-Out Amounts are denominated in US Dollars. This reflects the need for a common currency of account in which the entitlement to Trust Property, and liabilities owed by and to LBIE, were assessed. The selection of US Dollars as the common currency of account and as the currency in which the ascertained and agreed Net Financial Claim was to be denominated, was obvious for the reasons referred to at paragraphs [38] and [39] above. In the minority of cases in which a Close-Out Amount was denominated in a currency other than US dollars, it was therefore converted into US dollars, which conversion was effected using the spot rate as at the Date of Administration[11].

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11 *i.e.* at the "Relevant FX Conversion Time", as defined.

(4) The Net Financial Claim, denominated in US dollars, is expressed as constituting *"an amount due and owing by the Company to that Signatory, which shall constitute an ascertained unsecured claim of the Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors"* (Clause 25.1).

92. The fact that a creditor who entered into the CRA may, in certain cases, have subsequently also entered into a CRA CDD does not affect the position (as to which, see paragraphs [168] to [185] below).

93. Wentworth's argument that no Currency Conversion Claim arises (see Question 38, addressed at paragraphs 169-172 of its Position Paper **[1/7]**) is incorrect:

(1) Wentworth argues ([170]) that the foundation of any Currency Conversion Claim involves "*the reassert[ion]*" of the "*underlying contractual obligation*" (see Waterfall I Judgment at [90], [94] and [110]) and that this cannot extend to "*such rights as the creditors agree with the administrators as part of the process of establishing claims for the purpose of distribution within the administration*". A Currency Conversion Claim can, however, as a matter of logic, arise wherever a creditor has a right to be paid a particular amount in a foreign currency that has not been satisfied in full by prior payments in the insolvency waterfall. What is required is that a creditor has a right to be paid a sum in a foreign currency under the CRA, which it does, and that right has not been satisfied through the receipt of dividends or otherwise.

(2) The suggestion that the conversion into US Dollars was for "administrative convenience only" ([171]) (or the Administrators' argument that "*the NFC is a new claim which exists only for the purposes of receiving a dividend from the insolvent estate*" ([159.6] of their Position Paper **[1/9]**) ignores the terms of Clause 4.4.2 (which provides for the creditor to be able to assert the Net Financial Claim against LBIE as a new obligation of LBIE) and Clause 25.1 (whereby the Net Financial Claim becomes the amount due and owing by LBIE).

(3) The Senior Creditor Group's construction also accords with the commercial purpose of the CRA. It was necessary to convert claims into a common currency in order to establish a net position so that Trust Property could be returned to those entitled to it. The agreement struck between the creditors and the

Administrators quantified the claims existing as at the date of the administration (in whatever currency they may previously have existed) by reference to US Dollars. This would have been the effect of the Trust Property Scheme had it been implemented, and it is the effect of the CRA which implemented the terms of that scheme on a consensual basis.

The relevant contractual rate for the purpose of identifying the rate applicable to the debt apart from the administration under Rule 2.88(9)

94. The only issue between Wentworth and the Senior Creditor Group in respect of interest, so far as the CRA is concerned, is that Wentworth contends that the effect of the CRA is to limit a creditor's entitlement to Statutory Interest to interest at the Judgments Act rate of 8%.

95. This is incorrect. The right of a creditor to Statutory Interest, including interest at the rate applicable apart from the administration, is expressly reflected in and preserved by the CRA. The express references in the CRA to interest under Rule 2.88 include not merely the right to interest at the Judgments Act rate but also to interest at the rate applicable to the debt apart from the administration. Where a Financial Contract provides for interest to be payable that Financial Contract continues to provide the relevant contractual rate for the purpose of the rate applicable to the debt apart from the administration for the purposes of the references to interest under rule 2.88(9). The release contained in Clause 4.2 of the CRA (see further below) is irrelevant to the creditor's right to receive interest at that rate. The release provision is concerned with claims other than the claim ascertained and agreed by the CRA.

96. The CRA expressly preserves creditors' rights to Statutory Interest. This is made clear by two provisions of the CRA:

(1) Clause 20.4.7 of the Overriding Valuation Provisions provides that:

> *"in determining the Close-Out Amount in respect of a Financial Contract, no interest shall accrue on any unpaid Liability*[12] *of the Company from the Administration Date,*

12 *"Liabilities"* is defined as *"all liabilities, duties and obligations of every description, whether deriving from contract, common law, case law, legal provisions, statute or otherwise, whether present or future, actual or*

save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rules" [emphasis added].

Thus, when the Close-Out Amount is determined, interest continues to accrue on any unpaid Liability of the Company forming part of the Close-Out Amount to the extent that such interest would accrue under Rule 2.88.

(2) Clause 25.1 of the CRA defines "Net Financial Claim". It provides that:

"*For the avoidance of doubt, no interest shall accrue on any Net Financial Claim,* ***save to the extent provided in Rule 2.88 of the Insolvency Rules.***"

97. Both Clauses 20.4.7 and 25.1 therefore confirm:

(1) The continued entitlement of a CRA creditor to Statutory Interest on the Net Financial Claim in the administration; i.e. the CRA is not intended to deprive creditors of their right to Statutory Interest.

(2) That Statutory Interest is payable at the higher of the rate of 8% or the rate applicable apart from the administration. In particular, neither clause of the CRA limits Statutory Interest to interest at the rate of 8%.

98. The incorporation of Rule 2.88 in its entirety, and thus the reference to an entitlement to Statutory Interest at the rate applicable apart from the administration for the purpose of Rule 2.88(9), can logically only refer, if it is to have any meaning at all, to the rate payable pursuant to the underlying Financial Contract. Such an approach accords with the wording of both the CRA and Rule 2.88. At the point when the CRA was entered into, the rate applicable apart from the administration was the rate applicable pursuant to the Financial Contract.

99. If that is not the interpretation to be given to the relevant clauses, the reference in the CRA to Rule 2.88 in its entirety (and in particular the reference to Rule 2.88(9)) is

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contingent, ascertained or unascertained or disputed and whether owed or incurred severally or as principal or surety, and "Liability" means any one of them" .

rendered meaningless. Notably, Wentworth does not advance any alternative interpretation which gives meaning to the incorporation of Rule 2.88 as a whole.

100. The Senior Creditor Group's interpretation is consistent with other provisions of the CRA which, notwithstanding the releases contained in the CRA, refer to the underlying provisions of the Financial Contracts (including the provisions of the Financial Contracts relating to interest) in order to inform the content of the rights and obligations created by the CRA.

101. Thus, for example, so far as the definition and scope of the "*Net Contractual Position*" under the CRA is concerned:

(1) A CRA Signatory is entitled to have its "*Net Contractual Position*" determined in accordance with the terms of the CRA (Clause 4.4.2).

(2) The Net Contractual Position equates to the aggregate of the "*Close-Out Amounts*" determined in respect of its Financial Contracts (Clause 24.2).

(3) Each Close-Out Amount is determined by reference to the Contractual Valuation Provisions, as supplemented by the Overriding Valuation Provisions in Clause 20.4 (see Clause 21.2.1). The Contractual Valuation Provisions consist of "*any terms in such Financial Contract which provide for the calculation of an amount or amounts payable by one party to the other as a result of the termination of such Financial Contract*".

(4) Where a term of the Financial Contract provides for the payment of interest, such a term is one which "*provides for the calculation of an amount or amounts payable by one party to the other as a result of the termination of such Financial Contract*" within the meaning of Clause 21.2.1.

102. The continued relevance of the interest rate payable under the original Financial Contract, is also consistent with the fact that a signatory's obligation to *pay* interest in circumstances where the Close-Out Amount is owed to LBIE is limited by the rate applicable to the debt by reason of the original Financial Contract:

(1) Where a Net Financial Position represents an amount due and owing by a Signatory to LBIE, interest accrues at the *"Net Financial Interest Amount"* (Clause 25.2).

(2) The *"Net Financial Interest Amount"* is defined at Clause 25.3 as being equal to the "*Gross Uncollateralised Liability Interest*", subject to certain adjustments (Clause 25.3.1(i) – (ii)).

(3) The "*Gross Uncollateralised Liability Interest*" is defined as the amount of interest accruing on the amount due and owing by a Signatory to LBIE (i.e. the "*Gross Uncollateralised Liability*") at the prevailing "*Applicable Rate*" (Clause 25.3.2(i)).

(4) The "*Applicable Rate*" is defined at Clause 25.3.2 as "*a simple rate of interest equal to the lesser of (a) USD-LIBOR plus 1 per cent; and (b) the highest rate of interest applicable to any sum due from that Signatory to the Company, where the Signatory is not the defaulting party, as specified in any Financial Contract between that Signatory and the Company*" (emphasis added).

103. In light of the purpose of the CRA and statutory context in which it was agreed, the Senior Creditor Group's construction is the only construction which accords with the purpose of the CRA and with commercial common sense. In particular:

(1) The purpose of the CRA was to expedite the return of Trust Property. It was not necessary, in order for the CRA process to achieve its purpose, for the Administrators to require creditors to release their existing rights to post-administration interest payable at a particular rate under Financial Contracts.

(2) There was no proper reason for the Administrators, acting consistently with the statutory purpose of the administration, and their duties, to have required creditors to release a contingent right to Statutory Interest payable at a rate referable to the Financial Contract, when entering into the CRA.

(3) The construction advocated by Wentworth would result in the Administrators not treating creditors equally in relation to Statutory Interest, depending solely on

whether or not they had a trust claim[13] and, if they did, whether they agreed to enter into the CRA.

(4) There is no sensible commercial reason why creditors would have agreed to release their contingent right to Statutory Interest at the rate applicable apart from the administration, whilst retaining their right to interest at the Judgments Act Rate.

104. Further, or in the alternative, the right to receive Statutory Interest is a right which is consequential and parasitic on the creditor having a Net Financial Claim which is admitted for the purpose of payment of dividends (i.e. as an "Ascertained Claim"), and forms part of the bundle of rights arising on the coming into existence of the Net Financial Claim and Ascertained Claim (*cf* the argument made by the Joint Administrators at [145] of their Position Paper in respect of CDDs **[1/9]**). As such:

(1) The CRA should not be construed to thwart the right to receive Statutory Interest at a rate provided for in the Financial Contract or other rate applicable but for the administration.

(2) There is no difference in principle in this regard between the CRA and CDD analysis (for which, see below).

(3) It is un-commercial to construe the express references in the CRA to rights to Statutory Interest "*under Rule 2.88*" (Clause 20.4.7) and as "*provided in Rule 2.88*" (Clause 25.1) more narrowly than the express confirmation in later versions of the CDDs preserving a claim to Statutory Interest. Such references are to Rule 2.88, and not merely to the Judgments Act rate.

105. The position is unaffected by the releases contained in Clause 4.2 of the CRA. Although wide language is used[14], the releases are as a matter of construction irrelevant to the analysis:

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13 According to Wentworth a creditor would lose his claim to interest at the rate applicable to the debt apart from the administration, regardless of the size of his trust claim. According to Wentworth, any creditor with a trust claim whose net position was ascertained and agreed pursuant to the CRA, was intending to give up any claim to contractual interest that it would otherwise have had, even if its trust claim was de minimis compared to the amount of its net claim against LBIE.

(1) The right to claim Statutory Interest on a Net Financial Claim is expressly preserved by Clauses 20.4.7 and 25.1 of the CRA. The express preservation of the right to Statutory Interest pursuant to Rule 2.88 in its entirety preserves the right to interest at the rate payable pursuant to the original underlying Financial Contract for the purpose of claiming Statutory Interest, which right is therefore unaffected by the release in Clause 4.2.3 for this purpose.

(2) The right to claim Statutory Interest on a Net Financial Claim is a claim in respect of a statutory entitlement, not a claim "*in respect of any Financial Contract*" for the purpose of Clause 4.2.3 of the CRA.

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[14] Clause 4.2 states: "*each Signatory shall waive and release the following Claims against the Released Parties …*

4.2.1. all claims for or in respect of any payment for or on account of any Asset which is or was at any time the subject of an Asset Claim;

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

4.2.3 all Claims (apart from, for the avoidance of doubt, Modified Claims) in respect of any Financial Contract, …

E. THE CDDs

(1) INTRODUCTION

106. Nothing in the Insolvency Act or Rules requires creditors or the Administrators to enter into CDDs. The Administrators could have sought to admit creditors' claims to proof in the ordinary way. Instead, the Consensual Approach and use of CDDs provided an alternative method to the standard statutory proof of debt regime for determining unsecured creditors' claims for the purposes of proof[15] and enabling the early payment of dividends: SAF (34/35) at [53] and [63] **[1/18]**; Lomas 10 at [33] **[2/2]**.

107. As set out above, the CDDs were part of the 'Consensual Approach' to the admission of general unsecured claims developed by the Joint Administrators in 2010. The 'Consensual Approach' aimed to facilitate the payment of dividends by, amongst other things, giving the Administrators a degree of finality as to the claims LBIE would face from creditors. A CDD was an agreement a creditor entered into at the end of the 'Consensual Approach' process, precluding creditors from seeking to re-open or challenge the value of claims agreed and admitted to proof, so as to facilitate distributions: SAF (34/35) at [53], [63]–[65] **[1/18]**.

108. Creditors whose claims are agreed and admitted to proof through the CDD process have all their usual rights to Statutory Interest, Currency Conversion Claims or other non-provable claims, in respect of such claims. Claims agreed and admitted to proof through the CDD process, although intended to be final in amount, carry all the usual incidents and attributes of any claims which are agreed and admitted to proof. They continue to derive from, and to be referable to, the creditor's underlying contractual or other entitlements against LBIE (see, e.g., *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at [27] **[Auth/1B/31]**). In the event of a surplus, they attract Statutory Interest pursuant to Rules 2.88(7) and (9). They are also capable of giving rise to Currency Conversion Claims or other non-provable claims to the extent that the claim which forms the basis of the proof is not fully satisfied by payment through the proof process.

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15 References to unsecured creditors in the Administrators' evidence are to the unsecured claims of financial trading creditors: Lomas 10 at [11] **[2/2]**.

109. That this is the general effect of all of the CDDs is entirely consistent with the language used in the various forms of CDDs, as developed below.

110. It is also entirely unsurprising. One would expect that claims admitted to proof through the streamlined proof process concluded by the CDDs would rank for distributions and any further payments in the event of a surplus, in the same way as any claim admitted to proof in the ordinary way. Excluding such claims was not necessary to achieve the purpose of the 'Consensual Approach', including the CDDs, namely to create a streamlined process for quantifying and admitting claims to proof and to create a degree of finality as to the amount of creditors' claims so as to permit earlier distributions to be made.

111. This is particularly so, in light of the fact that the CDD process is designed to operate within the framework and context of the statutory regime and to be consistent with that regime.

(1) That regime imposes a general duty on the Administrators to ascertain and admit claims and distribute assets *pari passu* among those entitled to them, with only any surplus going to members. This requires creditors to be paid Statutory Interest and to have their claims satisfied in full, before any distributions are made to members.

(2) It also imposes a duty on the Administrators to protect the creditors' collective interests and treat them fairly and equally, save where the Administrators consider that unequal treatment is justified in the interests of the company's creditors as a whole: Sch. B1 paras 3(2) and 74 **[Auth/2/5]**; *Re Zegna Holdings Inc* [2010] BPIR 277 **[Auth/1B/47]**.

112. Admitting claims to proof through the CDD process on the basis that they are not entitled to Statutory Interest or payments in respect of non-provable claims in the event of a surplus, would be inconsistent with the purposes of the Administration and with the duties of the Administrators. Such a result is not necessary to achieve the purpose of facilitating earlier or higher distributions to creditors. There is no proper reason for the Administrators to have intended such a result, as it only benefits subordinated creditors and shareholders at the expense of other creditors.

113. The Administrators never indicated to creditors that the attributes of claims admitted to proof through the CDD process were different depending on the form of CDD required by the Administrators. The decision to use (for example) an Agreed Claim CDD or an Admitted Claim was simply a consequence of timing or whether the Administrators considered it possible that a creditor had a Client Money Claim.

114. On Wentworth's case, the parties are to be taken as having intended that, in consideration for a quicker proof process and an earlier distribution, creditors would agree to release any claims that they might have in the event of a surplus, although it was not necessary for them to do so and they received no benefit from doing so. Wentworth's case also results in arbitrary distinctions being drawn between creditors as a result of differences between the various forms of CDDs, which equally cannot have been intended, as the reason for those differences had nothing to do with whether creditors should or should not release their rights in the event of a surplus. That cannot be what the parties are to be taken as having intended.

115. The interpretation of the CDDs advanced by the Senior Creditor Group reflects the purpose of the documents and makes consistent commercial sense. That advanced by Wentworth does not.

(2) AGREED CLAIM CDDs

116. Agreed Claims CDDs were the first form of CDD and started to be used from 30 November 2010 onwards.

117. Agreed Claims CDDs accommodate the Administrators' uncertainty which existed in late 2010 regarding the extent of creditors' client money entitlements by implementing a two stage process for the admission of claims to proof: SAF (34/35) at [68] **[1/18]**. In particular (and as described further below), under Agreed Claim CDDs:

(1) Creditors' unsecured claims are quantified and agreed in the currency of underlying entitlement (SAF (34/35) at [54], [58] **[1/18]**) and usually expressed as an "Agreed Claim" in the currency of the underlying entitlement: (SAF (34/35) [72] **[1/18]**; Garvey 3 at [18] **[2/3]**).

(2) Agreed Claims are not immediately admitted for dividends. They are admitted for dividends (as an "Admitted Claim") (following conversion into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof) either: (i) upon determination by LBIE of the creditor's Client Money Claims; or (ii) upon the creditor electing, through an admittance document not containing further release language[16], to release or assign its Client Money Claims (SAF (34/35) at [70] **[1/18]**; Lomas 10 at [50] and [72] **[2/2]**).

118. In the absence of such a structure, the Administrators would have been unable to proceed with the claims agreement process until there was greater certainty regarding the extent of client money entitlements (SAF (34/35) at [68] **[1/18]**; Lomas 10 at [48] **[2/2]**). Agreed Claims CDDs are still used by LBIE in the event that a creditor prefers to execute that form of CDD (Lomas 10 at [51]).

119. Wentworth contends that creditors who entered into Agreed Claims CDDs have lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration, although it accepts that they have not lost the right to assert Currency Conversion Claims.

120. The Senior Creditor Group contends that such creditors have not lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration. In short, as developed further below, in relation to Agreed Claim CDDs:

(1) Agreed Claim CDDs agree the amount of a creditor's claims against LBIE and provide for such claims (or parts thereof) to be admitted to proof following the resolution of any Client Money Claims. Like other claims admitted to proof, a claim that has been agreed and admitted through an Agreed Claim CDD continues to derive from, and be referable to, the creditor's underlying contractual or other entitlements against LBIE.

(2) As such, claims agreed and admitted pursuant to Agreed Claim CDDs carry all the incidents and attributes of other claims agreed and admitted to proof including (in the event of a surplus) the right to Statutory Interest at the greater

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16 From June 2011 these were the "Client Money Supplemental Deeds" described in Lomas 10 at [52] and [73] **[2/2]**).

of the rate applicable to the debt apart from the administration and the Judgments Act Rate, and the right to assert Currency Conversion Claims and other non-provable claims to the extent that the claim has not been satisfied in full by payment through the proof process.

(3) Agreed Claim CDDs contain broad releases aimed at achieving finality as regards the amount of a creditor's claim eligible for admission to proof by releasing all claims which might otherwise be relied on by the creditor to supplement or vary the amount of its proof or to recover, otherwise than by proving, more than the entitlements conferred by the agreed and admitted claim. The releases do not release the agreed and admitted claim itself, or alter the incidents or attributes of such a claim.

(4) Like all other creditors whose claims have been agreed and admitted to proof, creditors who have entered into Agreed Claim CDDs are therefore entitled to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration. The rate applicable to the debt apart from the Administration includes the rate stipulated under the terms of the relevant Creditor Agreement.

(5) Like all other creditors whose claims have been agreed and admitted to proof, creditors who have entered into Agreed Claim CDDs and who, under the terms of the relevant Creditor Agreement are therefore also entitled to receive payment in a foreign currency, retain the right to assert a claim for any unsatisfied non-provable aspects of their Agreed Claim (including Currency Conversion Claims). This is accepted by Wentworth.

121. For the purposes of this analysis the Senior Creditor Group will refer to a version of an Agreed Claim CDD dated 1 February 2011, entered into between LBIE and a creditor whose underlying claim against LBIE arises under the terms of an ISDA Master Agreement (the "**Creditor Agreement**" – Clause 1.1) **[11/1A]**.

Agreed Claim CDDs agree the amount of a creditor's claims against LBIE and provide for such claims (or parts thereof) to be admitted to proof following the resolution of any Client Money Claims

122. The basic effect of Agreed Claim CDDs is to agree the maximum amount of a creditor's claims against LBIE (including any Client Money Claims) pursuant to the relevant Creditor Agreement(s) and to provide a mechanism for such claims (or parts thereof) to be admitted to proof depending on the resolution of any Client Money Claims.

123. To this end, Agreed Claim CDDs implement a two stage process for the agreement and admission of claims to proof.

124. Pursuant to the first stage, the amount of a creditor's claim against LBIE under the relevant Creditor Agreement(s) is quantified and agreed, ordinarily in the currency of the underlying entitlement (i.e. the "Agreed Claim" in the "Agreed Claim Amount").

125. In particular:

(1) In accordance with the ordinary proof process, creditors whose claims are agreed through Agreed Claim CDDs are required to submit proofs of debt, complying with the Insolvency Act and Rules, on LBIE's Claims Portal in the currency of the underlying obligation: SAF (34/35) at [22] **[1/18]**; SDF (34/35) at [5] [**1/20]**; Garvey 3 at [18] **[2/3]**.

(2) Pursuant to the "Consensual Approach", LBIE then makes an offer of the single amount at which the creditor's claim(s) is agreed (i.e. the "LBIE Determination") (Lomas 10 at [44]-[45] **[2/2]**), ordinarily in the currency in which the corresponding proof of debt was denominated (SAF (34/35) at [54], [58] **[1/18]**; Garvey 3 at [19]-[20] **[2/3]**).

(3) If that offer is accepted, LBIE and the creditor enter into an Agreed Claim CDD (Lomas 9 at [62] **[2/1]**), which ordinarily records the creditors "Agreed Claim Amount" in the currency of the underlying obligation: SAF (34/35) at [72] **[1/18]**.

(4) The "Agreed Claim Amount" reflects the extent of the creditor's agreed claim (including Client Money Claims) under and in connection with the relevant Creditor Agreement(s) (the "Agreed Claim"):

(a) Clause 2.1 provides (in material part):

> *"the Company and the Creditor irrevocably and unconditionally agree that, notwithstanding the terms of any contract (including the Creditor Agreement and Other Agreements) to which the Creditor and the Company are party, the Agreed Claim shall be limited to the Agreed Claim Amount*

(b) "*Agreed Claim*" is defined at Clause 1.1 as:

> "*the Creditor's Claim (or Claims as the case may be) against the Company under and in connection with the Creditor Agreement, including for the avoidance of doubt any Client Money Claim arising under or in connection with the Creditor Agreement, but excluding any Trust Asset Claims (if any)".*

126. Pursuant to the second stage, Agreed Claim CDDs provide a mechanism for the admission of all or part of the Agreed Claim Amount to proof, depending on the resolution of any Client Money Claims and (where applicable) conversion into Sterling pursuant to Rules 2.86(1) and (2) (i.e. the "Admitted Claim").

127. Clause 3.1 provides that the Agreed Claim shall not be accepted as an Admitted Claim except in accordance with Clauses 3.2 and 3.3. "Admitted Claim" is defined at Clause 1.1. as:

> *"A Claim of a creditor of the Company which qualifies for dividends pursuant to the Insolvency Rules and the Insolvency Act (or, if applicable, as amended or replaced pursuant to the terms of, inter alia, a scheme of arrangement or a company voluntary arrangement)".*

128. There are three ways in which the Agreed Claim Amount can become an Admitted Claim:

(1) Clause 3.2.1 applies where a creditor has assigned or waived all of its Client Money Claims. In those circumstances, the entirety of the Agreed Claim in the Agreed Claim Amount automatically becomes an Admitted Claim following conversion into Sterling pursuant to Rules 2.86(1) and (2).

(2) Similarly, Clause 3.2.2 applies where a creditor has assigned or waived part (but not all) of its Client Money Claims. In those circumstances, the Agreed Claim automatically becomes an Admitted Claim in an amount equal to the amount of the assigned or waived Client Money Claim, following conversion into Sterling pursuant to Rules 2.86(1) and (2).

(3) Clause 3.3 applies where a creditor has neither assigned nor waived the entirety of its Client Money Claims. In those circumstances, the creditor must wait for determination of all issues impacting upon the existence, validity and quantum of its Client Money Claims. Following the payment of such claims ("Client Money Payments") any part of the Agreed Claim Amount which remains unsatisfied automatically becomes an Admitted Claim following conversion into Sterling pursuant to Rules 2.86(1) and (2).

Claims admitted to proof through Agreed Claim CDDs carry all the incidents and attributes of other claims agreed and admitted to proof

129. As with any other claim admitted to proof, claims which are agreed and admitted through Agreed Claim CDDs continue to derive from, and are referable to, the relevant Creditor Agreement(s). Entry into an Agreed Claim CDD does not confer a new right to payment on the creditor, or change the source or basis of LBIE's contractual payment obligation towards the creditor.

130. There is nothing in the terms of the Agreed Claim CDD to suggest that creditors have different rights in relation to Statutory Interest, Currency Conversion Claims or other non-provable claims, in respect of claims agreed and admitted to proof through Agreed Claims CDDs or that those claims have different attributes or incidents from claims agreed and admitted to proof through the ordinary, unmodified, proof process. This is unsurprising since, as set out above, the basic function of CDDs is to provide a convenient means of agreeing and fixing the ordinary unsecured claims of creditors.

The releases do not alter the incidents or attributes of claims agreed and admitted for the purposes of proof

131. As explained in Lomas 9 at [61] **[2/1]**, one of the purposes of the CDD process is to enable LBIE and the Administrators to achieve a degree of finality as to the claims LBIE

would face from creditors and thereby facilitate the making of earlier distributions in respect of such claims: SAF (34/35) at [53], [63] **[1/18]**.

132. Agreed Claims CDDs achieve this by agreeing the amount of a creditor's claims against LBIE (i.e. including the value of Client Money Claims), which is then admitted to proof, and releasing all other claims.

133. To this end, the CDDs contain a broad release provision, releasing all claims other than the Agreed Claim which might otherwise be relied on by creditors to vary the amount of their proof or to recover, otherwise than by proving, more than the entitlements conferred by their Agreed Claim. Significantly, the one thing the release does not affect (and does not purport to affect) is the Agreed Claim in the Agreed Claim Amount (which, in due course, can be admitted to proof).

134. In this regard, Clause 2.1 provides:

> *"The Company and the Creditor irrevocably and unconditionally agree that, notwithstanding the terms of any contract (including the Creditor Agreement and the Other Agreements) to which the Creditor and the Company are party, the Agreed Claim shall be limited to the Agreed Claim Amount and shall constitute the Creditor's entire Claim against the Company and, save in respect thereof:*
>
> *2.1.1 the Creditor and (i) the Company and (ii) the Administrators, are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all Claims for interest, costs and orders for costs and any and all Trust Asset Claims and Client Money Claims (if any)), demands, actions, causes of action, liabilities, rights, and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreement the Other Agreements, or not, whether in existence now or coming into existence at some time in the future, and whether or not in the contemplation of the Creditor and / or the Company and / or the Administrators on the date hereof; and*
>
> *2.1.3 the Creditor will not take any steps to prove for, or to Claim for, any debt in the Administration (or other insolvency process) of the Company; or otherwise bring any Claim, action, demand or issue (or continue) any Proceedings against the Company and/or the Administrators (or any of them) in any jurisdiction in respect of any and all Claims and matters as are referred to in Clause 2.1.1. above."*

"Claim" is defined at Clause 1.1 as:

"*a claim in law or in equity or otherwise and of whatsoever nature:*

(i) including any and all claims, actions, liabilities, rights and obligations for breach of contract, tort, statute, restitutionary claims and breach of trust;

(ii) whether arising by reason of, amongst other things, insolvency or the termination, whether voluntary or for cause, of any contractual obligation or for any failure of a person to perform any contractual, legal or regulatory obligation or otherwise; and

(iii) for, amongst other things, the enforcement of any right to, or any liability in respect of a right to:

(a) seek or enforce judgment;

(b) exercise any remedy (for damages or otherwise), indemnity and contribution, whether for losses (including consequential loss, economic loss, loss of bargain, loss of value, or other losses computed by reference to value which may have been available had an obligation been duly performed in a timely manner, or otherwise), costs and expenses of any nature; or

(c) apply any set-off, netting, withholding, combination of accounts or retention or similar rights in respect of any claim or liability whatsoever,

and "to Claim" and "Claimed" shall be construed accordingly".

135. There is nothing in the Agreed Claim CDDs to suggest that the releases are intended to release creditors' rights in respect of the Agreed Claims which have been agreed and admitted to proof, including entitlements to Statutory Interest pursuant to Rules 2.88(7) and (9), Currency Conversion Claims or other non-provable rights in respect of such Agreed Claims.

136. On the contrary, Agreed Claims are expressly excluded from the scope of the language of the general release contained in Clause 2.1, which is preceded and introduced by the phrase: *the Agreed Claim shall be limited to the Agreed Claim Amount and shall constitute the Creditor's entire Claim against the Company and, save in respect thereof:*…" The release is simply not concerned with post-insolvency interest payable in respect of the Agreed Claim, or any non-provable element of the Agreed Claim that is not satisfied by the proof process.

137. This approach is consistent with the commercial purpose and function of Agreed Claim CDDs (as summarised in paragraphs [106]-[107] and [117]-[118] above). An alternative construction, which holds that Agreed Claims CDDs limit the incidents or attributes of claims agreed and admitted to proof through the CDD process, as compared to other

claims admitted to proof, is inconsistent with the definition of Agreed Claims and with the commercial purpose and function of Agreed Claim CDDs, and cannot reflect the intention of the parties.

138. Further, as well as dealing with admitting claims to proof, Agreed Claim CDDs were also intended to preserve the position of creditors with Client Money Claims. There is no possible justification for construing an Agreed Claim CDD in such a way as to mean that creditors seeking to preserve Client Money Clams gave up rights to interest (if provided for in the underlying agreements) or the right to receive payment in the currency of the underlying entitlement. In this context it was obviously essential that the Client Money Claim was agreed in its original currency and continued to attract interest as previously. Neither the Administrators nor a creditor with a Client Money Claim can sensibly be taken to have intended otherwise.

139. Alternatively, when the releases contained in the Agreed Claim CDD are read against the relevant background (in particular, the matters set out in section (1) of this part E above), it is implicit that they are not intended to limit the incidents or attributes of claims which are agreed and admitted to proof pursuant to the CDD process. Accordingly, in order to spell out what the agreement actually means it is necessary to construe the language such that the releases contained in the Agreed Claim CDD do not affect the non-provable incidents or attributes of claims agreed and admitted to proof through the CDD process.

Creditors who have entered into Agreed Claim CDDs are entitled to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9)

140. Wentworth agrees that creditors who have entered into Agreed Claim CDDs have not waived or otherwise lost their right to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) of the Insolvency Rules (see Wentworth's Position Paper at [163] **[1/7]**).

141. Wentworth's position, however, is that a creditor who has entered into an Agreed Claim CDD has no right to interest at the rate applicable to the debt apart from the administration, because it "*has no continuing contractual right to interest"* (Wentworth's Position Paper at [163(3)] **[1/7]**) on the basis that Clause 2.1.1 expressly releases *"all…Claims (including all Claims for interest…)"*. Wentworth's contention is wrong.

142. Like all other creditors whose claims have been agreed and admitted to proof, creditors who have entered into Agreed Claim CDDs are entitled to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration. That right to Statutory Interest has not been released. As a consequence, in the case of a creditor who has entered into an Agreed Claim CDD, the rate applicable to the debt apart from the Administration is the rate stipulated under the terms of the relevant Creditor Agreement. Entry into an Agreed Claim CDD does not alter the source or basis of LBIE's contractual payment obligation towards the creditor, which continues to derive from, and is referable to, the relevant Creditor Agreement (see paragraphs [122] to [129]).

143. This is the case notwithstanding the wide terms of the release in Clause 2.1, which is concerned with claims other than the claims which have been agreed and admitted to proof and with rights other than those in respect of such claims. That release:

(1) Does not (and does not purport to) operate in respect of the Agreed Claim, which is expressly preserved.

(2) Does not (and does not purport to) alter LBIE's obligations under Rules 2.88(7) and 2.88(9).

(3) Does not (and does not purport to) alter the ordinary incidents or attributes of claims which have been agreed for the purposes of proof including, in the event of a surplus, a right to claim Statutory Interest at the rate applicable to the debt apart from the Administration.

(4) Does not (and does not purport to) release, alter or vary the obligation to pay interest at the applicable rate under the terms of the relevant Creditor Agreement.

Creditors who have entered into Agreed Claim CDDs and who, under the terms of the relevant Creditor Agreement are entitled to receive payment in a foreign currency, retain the right to assert Currency Conversion Claims

144. As stated above, in order to accommodate any uncertainty regarding the extent of creditors' client money entitlements, Agreed Claim CDDs implemented a two stage

process for the agreement and admission of claims whereby the Agreed Claim is agreed and recorded in the currency of the underlying entitlement, before being admitted for the purposes of proof following conversion into Sterling pursuant to Rules 2.86(1) and (2).

145. In these circumstances, the Senior Creditor Group and Wentworth agree that creditors who are entitled to receive payment in a foreign currency under the terms of the relevant Creditor Agreement, retain the right to assert Currency Conversion Claims following entry into Agreed Claim CDDs.

146. The reasons for this are two-fold:

(1) Claims admitted to proof through the CDD process continue to derive from, and are referable to, the creditor's underlying contractual or other entitlements against LBIE and carry all the usual incidents and attributes of other claims agreed and admitted to proof.

(2) By recording creditors' Agreed Claim Amount in the currency of the underlying obligation, subject to conversion to Sterling pursuant to Rules 2.86(1) and (2), Agreed Claim CDDs preserve the creditor's entitlement to be paid in a foreign currency.

(3) ADMITTED CLAIM CDDs

147. Around April 2011, the Administrators introduced Admitted Claim CDDs: SAF (34/35) at [9] **[1/18]**. Admitted Claim CDDs were used where the Administrators considered that there was little or no possibility of the creditor having a Client Money Claim (SAF (34/35) at [74] **[1/18]**; Lomas 10 at [54] **[2/2]**).

148. In those circumstances, the combined two-stage process of agreeing and admitting claims implemented under Agreed Claim CDDs was not necessary, as there was no need for the CDDs to account for uncertainty as to a creditor's client money entitlements (Garvey 3 at [25] **[2/3]**). Instead, under an Admitted Claim CDD, the amount of a creditor's claim under the relevant Creditor Agreement is quantified and agreed in the currency of underlying entitlement and recorded as an Admitted Claim following

conversion into Sterling pursuant to Rules 2.86(1) and (2) (See: SAF (34/35) at [75] **[1/18]**; Garvey 3 at [18] – [20] **[2/3]**).

149. The purpose of the Admitted Claims CDD is otherwise the same as that of the Agreed Claims CDD, as reflected in their recitals[17], and there is no reason why the effect of an Admitted Claim CDD should be any different from the effect of an Agreed Claim CDD, so far as claims for Statutory Interest or Currency Conversion Claims are concerned. The Administrators did not suggest to creditors contemplating entering into a CDD that (i) whether they entered into an Agreed Claims CDD or an Admitted Claim CDD or (ii) the currency in which the claim was recorded, would affect the scope of their rights or that one form of CDD released rights that the other did not: see, for example, Browning 1 at [48] and [55] **[2/6]**.

150. Notwithstanding this, Wentworth contends that creditors who entered into Admitted Claim CDDs (unlike creditors who entered into Agreed Claim CDDs) in addition to having lost the right to claim Statutory Interest at the rate applicable to the debt apart from the administration, have also lost the right to assert Currency Conversion Claims.

151. This is incorrect. The effect of an Admitted Claim CDD is the same as the effect of an Agreed Claim CDD. In short, as developed further below, in relation to Admitted Claims CDDs:

(1) As with Agreed Claim CDDs, Admitted Claim CDDs agree the amount of a creditor's claims against LBIE and admit them to proof. Like other claims admitted to proof, where a claim has been agreed and admitted through an Admitted Claim CDD, it continues to derive from, and is referable to, the creditor's underlying contractual or other entitlements against LBIE.

(2) As with Agreed Claim CDDs, claims admitted pursuant to Admitted Claim CDDs carry all the incidents and attributes of other claims agreed and admitted to proof including (in the event of a surplus) the right to Statutory Interest at the greater of the rate applicable to the debt apart from the administration and the

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17 See, for example, Recital B to the Agreed and Admitted Claim CDDs, which describe the basic purpose of the agreements in materially identical terms as admitting claims for the purposes of making dividend distributions.

Judgments Act Rate and the right to assert Currency Conversion Claims and other non-provable claims to the extent that the claim has not been satisfied in full by payment through the proof process.

(3) The releases contained in Admitted Claim CDDs have the same scope and ambit as those contained in Agreed Claim CDDs. They do not release the agreed and admitted claim itself, or alter the incidents or attributes of claims agreed and admitted to proof.

(4) Unlike Agreed Claim CDDs, Admitted Claims CDDs record the Agreed Claim Amount in Sterling following conversion into Sterling pursuant to Rules 2.86(1) and (2): SAF (34/35) at [75] **[1/18]**. Such a record of the Agreed Claim Amount in an Admitted Claim CDD means, when read against the relevant background, the amount of the creditor's foreign currency claim arising from the relevant Creditor Agreement as converted into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof.

(5) Like all other creditors whose claims have been agreed and admitted to proof, creditors who have entered into Admitted Claim CDDs are entitled to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration. The rate applicable to the debt apart from the Administration is the rate stipulated under the terms of the relevant Creditor Agreement.

(6) Like all other creditors whose claims have been agreed and admitted to proof, creditors who have entered into Admitted Claim CDDs and who, under the terms of the relevant Creditor Agreement are entitled to receive payment in a foreign currency, retain the right to assert a claim for any unsatisfied non-provable aspect of the claim forming the basis of the Agreed Claim (including Currency Conversion Claims).

152. For the purposes of this analysis the Senior Creditor Group will refer to a version of an Admitted Claim CDD dated February 2012, entered into between LBIE and a creditor whose underlying claim against LBIE arises under the terms of an FBF Master

Agreement (the "**Creditor Agreement**" – Clause 1.1). This is the version of the Admitted Claim CDD annexed to Wentworth's Position Paper **[11/7]**.

Admitted Claim CDDs quantify and fix the amount of a creditor's claims against LBIE for the purposes of proof. Claims admitted to proof through Admitted Claim CDDs carry all the incidents and attributes of other claims agreed and admitted to proof

153. The basic effect of an Admitted Claim CDD is the same as an Agreed Claim CDD. They agree the amount of a creditor's claims against LBIE pursuant to the relevant Creditor Agreement(s) and admit such claims to proof (i.e. the "Admitted Claim Amount").

154. As with any other claim admitted to proof (and as with claims admitted through an Agreed Claim CDD), claims which are agreed and admitted through Admitted Claim CDDs continue to derive from, and are referable to, the relevant Creditor Agreement(s). Entry into an Admitted Claim CDD does not confer a new right to payment on the creditor, or change the source or underlying basis of LBIE's contractual payment obligation towards the creditor.

155. As with Agreed Claim CDDs, there is nothing in the terms of the Admitted Claim CDDs to suggest that claims agreed and admitted to proof through Admitted Claim CDDs have different attributes or incidents from claims agreed and admitted to proof through the ordinary, unmodified, proof process. This is unsurprising since, as set out above, the basic function of all such CDDs was to provide convenient means of agreeing the ordinary unsecured claims of creditors and admitting those claims for the purposes of proof.

The Agreed Claim Amount represents the foreign currency creditors' claim under the relevant Creditors Agreement as converted into Sterling pursuant to Rules 2.86(1) and (2)

156. The principal difference between Agreed Claim CDDs and Admitted Claim CDDs is that:

(1) Under Agreed Claim CDDs, the Agreed Claim Amount is not immediately accepted as an Admitted Claim and does not immediately qualify for dividends from LBIE's estate. Instead, under Agreed Claim CDDs, the Agreed Claim

Amount is only admitted as an Admitted Claim at a later date after the resolution of Client Money Claims in accordance with Clause 3. In those circumstances, the Agreed Claim Amount is not, and does not need to be, immediately converted into Sterling pursuant to Rules 2.86(1) and (2); whereas

(2) Under Admitted Claim CDDs the Agreed Claim Amount is immediately accepted as an Admitted Claim and immediately qualifies for dividends from LBIE's estate. In those circumstances, the Agreed Claim Amount is, and needs to be, immediately converted into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof.

157. The process by which the Agreed Claim Amount in an Admitted Claim CDDs is agreed and converted into Sterling is described in Garvey 3 at [18] to [21] **[2/3]**. In particular:

(1) As with Agreed Claim CDDs, creditors are required to submit proofs of debt, complying with the Insolvency Act and Rules, on LBIE's Claims Portal in the currency of the underlying obligation: SAF (34/35) at [22] **[1/18]**; SDF (34/35) at [5] [**1/20]**; Garvey 3 at [18] **[2/3]**.

(2) As with Agreed Claim CDDs, LBIE communicates its determination in respect of a creditor's proof of debt in the currency of the underlying entitlement under the Creditor Agreement: SAF (34/35) at [54], [58], [75] **[1/18]**.

(3) As with Agreed Claim CDDs, LBIE's determination is presented to creditors by the Administrators as a determination that was not intended to be a matter for negotiation (SAF (34/35) at [56] **[1/18]**; Lomas 10 at [45] **[2/2]**).

(4) Admitted Claims CDDs show the offer figure (that offer having been made and accepted in its foreign currency amount where applicable: SAF (34/35) at [54] and [58] **[1/18]** in Sterling after conversion pursuant to Rules 2.86 (1) and (2): SAF (34/35) at [75] **[1/18]**.

158. Accordingly, there is no material difference between the two processes, so far as claims to Statutory Interest or other non-provable claims are concerned:

(1) The process under both Agreed Claim CDDs and Admitted Claim CDDs requires a conversion into Sterling pursuant to Rules 2.86(1) and (2) in order for the Agreed Claim Amount to become an Admitted Claim; i.e. for the purposes of proof.

(2) In each case, the conversion takes place only after the Agreed Claim Amount has been agreed in the foreign currency and, in each case, immediately before the Agreed Claim Amount becomes an Admitted Claim.

(3) The only difference between them relates to the timing of the conversion and manner in which it is recorded.

(4) In the case of an Agreed Claim CDD, the conversion takes place immediately after the resolution of Client Money Claims in accordance with Clause 3, when the Agreed Claim Amount automatically becomes an Admitted Claim.

(5) In the case of Admitted Claim CDDs, the conversion takes place and is recorded immediately, as the Agreed Claim Amount immediately becomes an Admitted Claim.

159. In the circumstances, a reasonable person having all of the relevant background knowledge would understand the record of the Sterling-denominated Agreed Claim Amount as meaning the creditor's claim under the Creditor Agreement as converted into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof, and the agreement should be construed in that way.

The releases do not alter the incidents or attributes of claims agreed and admitted for the purposes of proof

160. Clauses 2.3 and 2.4 of the Admitted Claim CDD contain a release clause in materially the same terms as Clause 2.1 of the Agreed Claim CDD. The purpose of the release in an Admitted Claim CDD is identical to that in an Agreed Claim CDD. Namely, to release all claims (other than the "*Admitted Claim*", which is expressly preserved) that might otherwise be relied on by creditors to supplement or vary the amount of their proof, or to try and recover, otherwise than by proving, more than the entitlements conferred by their admitted claims.

161. As with the Agreed Claim CDD, and for the same reasons as set out in paragraphs [131] to [139] above, there is also nothing in Admitted Claim CDDs to suggest that the releases are intended to alter the incidents or attributes of claims which have been agreed and admitted for the purposes of proof, including entitlements to Statutory Interest pursuant to Rules 2.88(7) and (9), Currency Conversion Claims or other non-provable claims reflecting elements of the claim which have not been satisfied through the proof process.

Admitted Claim CDDs do not affect a creditor's rights to Statutory Interest

162. Like creditors who have entered into Agreed Claim CDDs, and for the same reasons as set out in paragraphs [140] to [143] above, creditors who have entered into Admitted Claim CDDs also retain the right to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration.

Creditors who have entered into Admitted Claim CDDs and who, under the terms of the relevant Creditor Agreement are entitled to receive payment in a foreign currency, retain the right to assert Currency Conversion Claims

163. Like creditors who have entered into Agreed Claim CDDs, creditors who, under the terms of the relevant Creditor Agreement are entitled to receive payment in a foreign currency, retain the right to assert a claim for any unsatisfied non-provable aspect of their rights under the relevant Creditor Agreement including Currency Conversion Claims following entry into an Admitted Claim CDD:

(1) Claims admitted to proof through the CDD process continue to derive from, and are referable to, the creditor's underlying contractual or other entitlements against LBIE and carry all the usual incidents and attributes of other claims agreed and admitted to proof. Where a creditor's underlying entitlement includes a right to be paid in a foreign currency, the right to assert a Currency Conversion Claim continues to exist in the same way as it would have existed had the Administrators adopted the ordinary process of proof.

(2) The record of the Agreed Claim Amount in Sterling is to be read as if it means, or includes words to the effect that it is referring to, the creditor's claim under the Creditor Agreement as converted into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof. By recording creditors' Agreed Claim Amount as converted into Sterling pursuant to Rules 2.86(1) and (2), Admitted Claim CDDs expressly, alternatively implicitly, preserve creditors' entitlements arising under the relevant Creditor Agreements to be paid in a foreign currency.

164. Wentworth contends, however, that entry into an Admitted Claim CDD, unlike entry into an Agreed Claim CDD, releases a creditor's entitlement to be paid in a foreign currency and precludes its right to assert Currency Conversion Claims in the event of a surplus. This is because, whilst most Agreed Claim CDDs expressly record the Agreed Claim Amount in the currency of creditors' underlying entitlement, pending conversion to Sterling pursuant to Rules 2.86(1) and (2), Admitted Claim CDDs do not.

165. Wentworth's contention is incorrect. It is irrelevant whether the CDD happened to record a creditor's claim in the currency of the underlying obligation, pending conversion into Sterling pursuant to Rules 2.86(1) and (2), or whether it happened to record a creditor's claim in Sterling following conversion pursuant to Rules 2.86(1) and (2).

166. Wentworth's position also elevates form over substance:

(1) The logic of Wentworth's position is that if an Admitted Claim CDD had recorded the Agreed Claim Amount in a foreign currency, but contained a further provision which immediately converted it to Sterling pursuant to Rules 2.86(1) and (2), creditors would retain the right to assert a Currency Conversion Claim.

(2) There is no distinction of substance between that situation and the present one in which an Admitted Claim CDD, instead of recording the Agreed Claim Amount in a foreign currency and immediately converting it to Sterling, records the Agreed Claim Amount in Sterling and states that such sum "*represent*[s] *the creditor's claim under the Creditor Agreement as converted into sterling in accordance with Rules 2.86(1) and (2)*".

(3) In neither case has a creditor released its underlying entitlement to be paid in a foreign currency. In both cases, a creditor retains the right to assert Currency Conversion Claims arising under the relevant Creditor Agreement and reflecting unsatisfied aspects of the rights provided for in such an agreement.

167. There is no sensible reason for the Administrators and the creditors to have intended that an Agreed Claims CDD would preserve a Currency Conversion Claim whilst an Admitted Claims CCD would release it, and nor was this ever suggested.

(4) CRA-CDDs

168. As set out above, creditors who entered into the CRA were entitled to payment of the Net Financial Claim denominated in US dollars, which claim was to be treated as an ascertained unsecured claim against LBIE.

169. The CRA provides a complete mechanism for the agreed quantification of claims arising under Financial Contracts, and therefore for the subsequent admission (subject to conversion pursuant to the terms of the Insolvency Rules) of such claims in the administration. It is not therefore necessary for CRA Signatories to enter into CDDs in order to have their claims under the CRA admitted as unsecured claims: SAF (34/35) at [63] **[1/18]**; Lomas 10 at [63] **[2/2]**.

170. Nevertheless, the Administrators adopted a policy of requesting CRA Signatories to enter into CDDs where they reached agreement with LBIE as to the amount of their claim, on the basis that the Administrators considered "*[a] CDD…be a more straightforward and less time-consuming way of documenting that claim instead of issuing the various notices required under the CRA*": SAF (34/35) at [79] **[1/18]**; Lomas 10 at [63][18] **[2/2]**. The Administrators did not suggest to creditors contemplating entering into a CRA CDD that doing so would affect the scope of the rights conferred by the CRA.

171. A number of versions of CDDs were developed by the Administrators for CRA Signatories: Lomas 10 at [64] **[2/2]**. They include:

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18 Under the CRA LBIE was required to provide a Net Contractual Position Statement. CRA-CDDs released LBIE from the requirement to do so.

(1) Agreed Claim CRA CDDs which, like other Agreed Claim CDDs, admit the creditor's claim for the purposes of proof following resolution of Client Money Claims and tend to express the Agreed Claim Amount in the original contractual currency (see e.g. **[11/16])**.

(2) Admitted Claim CRA CDDs which, like Admitted Claim CDDs, immediately admit the creditor's claim for the purposes of proof and tend to express the amount of a creditor's claim in Sterling, albeit (unlike Admitted Claim CDDs) that they expressly state that the Sterling denominated amount is the value of the creditor's claim "*converted to pounds sterling at the "official exchange rate" set out in Rule 2.86(2) of the Insolvency Rules…".*

(3) Other forms of CRA CDDs which are used where there is some factual or evidential uncertainty relevant to the quantification of a creditor's unsecured claims and which introduce certain agreed settlement assumptions for the purposes of agreeing and admitting all or part of the creditor's claims for the purposes of proof.

172. It is common ground that the CRA, by itself, does not release a Currency Conversion Claim: see Wentworth's Position paper at [159] **[1/7]**. It is also the case, for the reasons set out above, that the CRA does not interfere with, and instead preserves, creditors' entitlement to interest at the rate applicable apart from the administration, being the rate applicable pursuant to the underlying Financial Contract. Such rights are unaffected by subsequent entry into a CRA CDD, irrespective of the particular version used for the reasons set out below.

173. The suggestion (see Wentworth's Position Paper at [161] **[1/7]**) that the CRA combined with a CRA CDD does, however, release such Currency Conversion Claims does not reflect the purpose of the CRA CDDs, is inconsistent with the purpose of the administration and the Administrators' duties, and is commercially nonsensical. This cannot sensibly have been what the parties to the CRA intended by subsequently entering into a CRA CDD.

174. In short, as further developed below, as regards CRA CDDs:

(1) Claims admitted to proof through CRA CDDs, as with other CDDs, continue to derive from, and are referable to, the creditor's underlying entitlements against LBIE (i.e. in this case the rights conferred by the CRA) and carry all the usual incidents and attributes of other claims agreed and admitted to proof.

(2) The releases contained in CRA CDDs have the same scope and ambit as those contained in other CDDs. They do not release the agreed and admitted claim itself, or alter the incidents or attributes of claims agreed and admitted to proof.

(3) Like creditors who have entered into non-CRA CDDs, and for the same reasons, creditors who enter into CRA CDDs (in whatever version) retain the right to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration.

(4) Like creditors who have entered into non-CRA CDDs, and for the same reasons, creditors who have entered into the CRA (and are therefore entitled to receive payment in US dollars) retain the right to be paid in US dollars and to assert a Currency Conversion Claim in respect of that right.

175. For the purposes of this analysis the Senior Creditor Group will refer to two versions of the CRA CDDs:

(1) First, a version of the CRA CDD in which the creditor's unsecured claim is recorded in Sterling and which contains a release clause similar to the release clauses contained in Agreed and Admitted Claims CDDs (the "Standard CRA CDD") (at **[11/15]**).

(2) Second, the version of the CRA CDD exhibited to Wentworth's Position Paper **[11/21]**. This version was used in circumstances where, prior to the Administration Date, a creditor or LBIE had given certain instructions in relation to the purchase, sale, delivery or rehypothecation of securities or instructions for the return of rehypothecated securities and there was not sufficient information to determine whether or not such transactions failed or settled (the "Wentworth CRA CDD"). The Wentworth CRA CDD is no longer in use (in any form) as all

pending trade claims have been determined (see Appendix A to Lomas 10 at 7B **[2/2]**).

The Standard CRA CDD

176. As with other CDDs, the basic effect of the Standard CRA CDD is to agree the amount of a creditor's claims against LBIE and to admit such claims to proof.

177. To this end, the Standard CRA CDD agrees and admits the amount of a creditor's Net Financial Claim under the CRA which, in turn, represents the aggregate of the "*Close-Out Amounts"* determined in respect of the creditor's Financial Contracts within the meaning of the CRA:

(1) Clause 2 provides (in material part):

> *"The Company and the Creditor irrevocably and unconditionally agree that, notwithstanding the terms of any contract (including the CRA and / or the Creditor Agreements):*
>
> *2.1.1 the Creditor's aggregate Net Financial Claim shall be limited to, and in an amount equal to, the Net Financial Claim Amount and shall constitute the Creditor's entire Claim against the Company;*
>
> …
>
> *2.1.3 the Creditor's Net Financial Claim, in an amount equal to the Net Financial Claim Amount, shall constitute an Ascertained Claim and shall qualify for dividends form the estate of the Company available to its unsecured creditors pursuant to the Insolvency Rules and the Insolvency Act…"*

(2) "*Net Financial Claim"* is defined at Clause 25.1 of the CRA[19] as:

> *"A Net Contractual Position in respect of a Signatory expressed as a positive number…which shall constitute an ascertained unsecured claim of that Signatory in the winding-up of the Company or any distribution of the Company's assets to its unsecured creditors".*

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[19] Clause 1.2.1 of the Standard CRA-CDD provides that "*terms used but not defined in this Deed shall have the meanings given to them in the CRA"*

(3) "*Net Contractual Position*" is defined in Clauses 24.2.1 and 24.2.2 of the CRA as the aggregate of the "*Close-Out Amounts"* determined in respect of the creditor's Financial Contracts (as defined in the CRA).

(4) "*Ascertained Claim*" is defined in the CRA as "*an ascertained, unsecured claim in the winding-up of the Company or any distribution of the Company's assets generally to its unsecured creditors".*

(5) "*Net Financial Claim Amount"* is a sum of money expressed in Sterling followed by the words "*being the value of the Net Financial Claim converted to pounds sterling at the "official exchange rate" set out in Rule 2.86(2) of the Insolvency Rules which for the purpose of converting U.S. dollars to pounds sterling shall mean the following exchange rate $1.79379:£1".*

178. As with any other claim admitted to proof, claims which are agreed and admitted through the Standard CRA CDDs continue to derive from, and are referable to, the relevant underlying obligation being the Net Financial Claim, itself reflecting the creditor's underlying economic rights contained in the Financial Contracts (and subject to the overriding valuation provisions).

179. As with other CDDs, there is nothing in the terms of the Standard CRA CDD to suggest that claims agreed and admitted to proof through Standard CRA CDDs have different attributes or incidents from claims agreed and admitted to proof through the ordinary, unmodified, proof process or from claims admitted to proof through the process contained in the CRA. This is unsurprising since, as set out above, the basic function of all such CDDs is to provide convenient means of agreeing claims of creditors and admitting them to proof.

The releases do not alter the incidents or attributes of claims agreed and admitted for the purposes of proof

180. Clauses 2.1.4 and 2.1.5 of the Standard CRA CDD contain a release clause in materially the same terms as the Agreed and Admitted Claims CDDs. The purpose of the release in the Standard CRA CDD is identical to that in the other CDDs. There is nothing to suggest that the releases contained in the Standard CRA CDDs were intended to alter the incidents or attributes of the Net Financial Claim, including entitlements to Statutory

Interest pursuant to Rules 2.88(7) and (9), Currency Conversion Claims or other non-provable claims. Paragraphs [131]–[139] are repeated.

Standard CRA CDDs do not affect a creditor's rights to Statutory Interest

181. Like creditors who have entered into non-CRA CDDs, and for the same reasons, creditors who have entered into Standard CRA CDDs retain the right to claim Statutory Interest pursuant to Rules 2.88(7) and 2.88(9) at the greater of the Judgments Act Rate and the rate applicable to the debt apart from the Administration. Paragraphs [140]–[143] are repeated.

Creditors who have entered into the Standard CRA CDD retain the right to be paid in US dollars and to assert a Currency Conversion Claim in respect of that right

182. Like creditors who have entered into non-CRA CDDs, and for the same reasons, creditors who have entered into the CRA (and are therefore entitled to receive payment in US dollars and subsequently into a the Standard CRA CDD, retain the right to be paid in US dollars and to assert a Currency Conversion Claim in respect of that right. Paragraphs [144]-[146] above are repeated.

The Wentworth CRA CDD

183. The Wentworth CRA CDD **[11/21]** is a version of the CDD which was used in circumstances where, prior to the Administration Date, a creditor or LBIE had given certain instructions in relation to the purchase, sale, delivery or rehypothecation of securities or instructions for the return of rehypothecated securities ("Pending Transactions") and there was not sufficient information to determine whether or not such transactions failed or settled (see Recital C). The Wentworth CRA CDD resolves part of the provable debt while leaving the claim in respect of Pending Transactions to be resolved in due course.

184. Apart from the fact that only part of the provable claim is agreed, the purpose and intended effect of the Wentworth CRA CDD was otherwise no different from that of non-CRA CDDs or the Standard CRA CDD and the points made in respect of the Standard CRA CDD in paragraphs [178]–[182] above are repeated.

185. Further, in the case of the Wentworth CRA CDD:

(1) The release contained in Clauses 2.1.4 and 2.1.5 does not purport to effect a general release of claims but only to certain procedural rights under the CRA.

(2) Clause 2.4 expressly preserves rights to Statutory Interest by providing:

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

(3) In addition to recording the "Minimum Net Financial Claim" in Sterling, along with the words "*being the value of the Net Financial Claim converted to pounds sterling at the "official exchange rate" set out in Rule 2.86(2) of the Insolvency Rules which for the purpose of converting U.S. dollars to pounds sterling shall mean the following exchange rate $1.79379:£1*", the Wentworth CRA CDD also identifies the claims admitted as an "Ascertained Claim" in Appendix 1, all of which are shown in US dollars.

(4) Accordingly, the preservation of a creditor's rights to Statutory Interest and to be paid in a foreign currency is even clearer under the terms of the Wentworth CRA CDD.

(5) COMMERCIAL SENSE

186. Claims admitted to proof pursuant to the CDD process, regardless of the version of CDD used, agreed creditors' claims and admitted them to proof to enable the Administrators to make earlier distributions. They did not result in creditors releasing claims to Statutory Interest or Currency Conversion Claims in respect of their agreed and admitted claims.

187. The Senior Creditor Group's position accords with the purpose of the CDD process and the way in which that was presented by the Administrators, the effect of the statutory regime in which that process was to operate, the Administrators' duties, and commercial common sense.

188. By contrast, Wentworth's position is contrary to the purpose of the CDD process, the effect of the statutory regime and the Administrators' duties, and commercial common sense. It also gives rise to arbitrary distinctions which cannot sensibly have been intended by the parties:

(1) Nothing in the Insolvency Act or Rules requires creditors to enter into CDDs. The Administrators had a duty under Rule 2.77 to admit or reject claims tendered for proof in whole or in part and could have sought to admit creditors' claims to proof in the ordinary way (or by the Admittance Letters which were subsequently used). In that event, a creditor would have been entitled to Statutory Interest at the rate applicable apart from the administration and any non-provable claims in the event of a surplus.

(2) The Administrators decided to create the Consensual Approach (including the CDDs) in order to introduce a streamlined process for quantifying and admitting claims to proof and to create a degree of finality as to the amount of creditors' claims so that they could make earlier distributions: SAF (34/35) at [53], [62]–[65] **[1/18]**. Nothing in this purpose required or justified requiring creditors to release claims to post-administration interest or other non-provable claims in respect of any claim which had been agreed and admitted to proof.

(3) Requiring creditors to give up rights to Statutory Interest or Currency Conversion Claims was not necessary in order to achieve the purposes of the administration, as illustrated by the later amendments to CDDs clarifying that such rights were not released.

(4) There was no proper reason for the Administrators to require creditors entering into CDDs to give up rights to Statutory Interest or Currency Conversion Claims as a condition for having their claims agreed and admitted to proof, where to do so would resulted in a distribution that was inconsistent with the statutory scheme of distribution contained in the Insolvency Act and Rules and have benefitted subordinated creditors and shareholders at the expense of creditors.

(5) The Administrators never indicated that any creditor who entered into a CDD, rather than proving his claim in the ordinary way, would be giving up the right

that he would otherwise have had to Statutory Interest at the rate applicable to the debt apart from the administration or any Currency Conversion Claim.

(6) CDDs were presented to creditors as non-negotiable documents and creditors were informed that if they did not enter into CDDs they would have to enter into bilateral negotiations with the Administrators at an unspecified future date (SAF (34/35) at [56], [83.3] **[1/18]**; Lomas 10 at [45] **[2/2]**; SDF (34/35) at [12] [**1/20]**; Garvey 3 at [15] **[2/3]**; the FAQ issued by LBIE with respect to each dividend (e.g. [**9/26]**). The CDDs were in most cases so presented to creditors at times when the Administrators had not made any financial projection for the payment of dividends on provable claims, or were projecting a shortfall in respect of such claims. The effect of this was that, if creditors did not enter into a CDD, there was no reason for them to expect that they would receive compensation for the delay taken to admit claims. Until March 2014, updates provided to creditors by the Administrators in connection with interim dividend distributions stated that to be eligible to participate in interim dividends, creditors must execute a CDD or similar agreement (see, for example, the Creditor Update dated 24 March 2014 **[9/23]**): SDF (34/35) at [12] [**1/20]**; Lomas 10 at [81] **[2/2]**.

(7) If Wentworth is correct, the Administrators are to be taken as having intended that creditors will be treated differently, in relation to claims for Statutory Interest or Currency Conversion Claims, depending on whether they participated in the CDD process at all and, if so, what version of the CDD they happened to enter into, in circumstances where:

(a) All CDDs share a common purpose.

(b) Different versions of CDDs were in use by the Administrators at the same time.

(c) The Administrators did not indicate that, whether a creditor retained or released his rights to Statutory Interest or Currency Conversion Claims, would depend on which form of CDD was used.

(d) The decision to use (for example) an Agreed Claim CDD or an Admitted Claim in any particular case depended primarily on the irrelevant question of whether the Administrators considered that a creditor might have a Client Money Claim and whether, in light of that, the Administrators considered that a creditor's claim should be admitted through a two stage process (i.e. under an Agreed Claim CDD) or a single stage process (i.e. under an Admitted Claim CDD).

(e) The statutory regime contained in the Insolvency Act and Rules requires all non-Sterling denominated claims to be converted into Sterling pursuant to Rules 2.86(1) and (2) for the purposes of proof, whether such claims are admitted in the ordinary way of by means of a CDD.

(8) Wentworth's case cannot have reflected the intention of the Administrators who have a duty to protect creditor's collective interests and treat them fairly and equally. No proper commercial or other justification for such unequal and arbitrary treatment has been identified by Wentworth.

(9) The Administrators continued to enter into CDDs in a form which Wentworth contends had the effect of extinguishing rights to Statutory Interest, at a time when they realised there might be a surplus and that Statutory Interest may be payable. Similarly, the Administrators continued to enter into CDDs in a form which Wentworth contends had the effect of extinguishing Currency Conversion Claims after they became aware of the possible existence of such claims and that they may be payable. In such circumstances, they cannot properly be taken as having intended to extinguish such claims: See *Re WW Duncan* [1905] 1 Ch 307 **[Auth/1A/6]**.

(10) If, as is common ground, the CRA does not waive or release a Currency Conversion Claim, Wentworth's suggestion that the CRA combined with a CRA CDD does release such a claim is commercially nonsensical for the reasons set out above in relation to CDDs generally and because:

(a) A CRA signatory is not required to enter into a CDD to determine the amount of its unsecured claim (Lomas 10 at [63] **[2/2]**).

(b) Not all CRA CDDs expressed the agreed claim in Sterling. Where a claim is not expressed in Sterling, Wentworth agrees that the claim is agreed and admitted to proof without any Currency Conversion Claim being released.

(c) If Wentworth is correct, those creditors who happen to have signed Sterling CRA CDDs, have however, in contrast, lost their right to Currency Conversion Claim totalling, on the Administrators' estimate, about £280 million, which sum will instead now be distributed to the holders of subordinated debt and shareholders.

(d) The Administrators did not indicate that, whether a creditor retained or released his rights to Statutory Interest or Currency Conversion Claims, would depend on whether or not a CRA creditor also entered into a CRA CDD.

(e) Such consequences cannot be taken to have been intended by any creditor who chose to enter into a CRA CDD, in addition to the CRA, who would have had no sensible commercial reason for doing so.

(6) CONCLUSIONS ON QUESTIONS 34, 35 AND 38

189. For the reasons set out above, the CRA and CDDs properly construed in light of the regime contained in the Insolvency Act and Rules along with the duties and functions it imposes on the Administrators, together with the purposes for which the CRA and CDD processes were created, do not on their true construction have the effect of releasing creditors' rights in respect of claims which are agreed and admitted to proof, including claims to Statutory Interest, Currency Conversion Claims or other non-provable claims. That is to say, the processes initiated by the Administrators could not have had the effect of intentionally and unnecessarily depriving unsecured creditors of significantly valuable rights to which they are otherwise entitled. At no stage was it ever suggested that this would be the effect of the agreements, nor is it given their context and purposes.

190. Further, as set out above, the CRA confers on creditors' rights against LBIE denominated in US Dollars which are capable of giving rise to Currency Conversion Claims.

F. QUESTION 36A

(1) INTRODUCTION

191. If, contrary to the Senior Creditor Group's position in relation to Questions 34 and 35, the CRA or a CDD has the effect of releasing creditors' claims to Statutory Interest, Currency Conversion Claims or other non-provable rights in respect of claims agreed and admitted to proof, then such an effect was an inadvertent consequence of a process initiated by and (until 2014) required by the Administrators.

192. Enforcing any such release would be regarded by a reasonable member of the public, knowing all of the facts, as unfair, inappropriate and unbefitting of an officer of the court, would harm the interests of creditors and would confer a unfair benefit or enrichment on the estate and a windfall to the subordinated creditors and shareholders.

193. The rule in *ex parte James, Re Condon* (1874) LR 9 Ch App 609 **[Auth/1A/2]** applies and the Administrators should refrain from taking advantage of LBIE's strict or technical legal rights and should not enforce (and the Court should direct the Administrators not to enforce) such releases.[20]

194. Alternatively, for similar reasons, by enforcing the terms of the CRA or CDDs which have the effect of releasing non-provable rights in respect of claims agreed and admitted to proof, the Administrators would be acting in a way which unfairly harmed the interests of creditors who have entered into such CRA or CDDs within the meaning of paragraph 74 of Schedule B1 of the Insolvency Act 1986. On that basis, the Court should direct the Administrators not to enforce the releases.

195. The Senior Creditor Group does not contend that the Administrators or their advisors knowingly or wilfully acted in a manner which was unfair or inconsistent with the purpose of the administration, or their duties. It is notable, in this regard, that the Administrators do not take a positive position on Question 36A and have not sought to contend that it would be appropriate for them, as officers of the court, to enforce the

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[20] Save perhaps where a creditor actually subjectively understood that it was releasing claims to Statutory Interest, Currency Conversion Claims or other non-provable incidents or attributes of claims agreed and admitted to proof and consented to this.

releases. Instead, Wentworth has advanced a number of arguments which it says could appropriately be made by the Administrators in response the issues raised by Question 36A.

(2) THE RULE IN EX PARTE JAMES

196. The rule which takes its name from the decision of *Ex parte James, Re Condon* (1874) LR 9 Ch App 609 **[Auth/1A/2]** is a rule that has existed for many years, has been recognised at the highest level, and is important in the proper administration by the Court of its insolvency jurisdiction. The rule is applicable to the LBIE administration.

197. The rule was described in the following terms by Lord Neuberger in *Re the Nortel Companies* [2014] AC 209 at [122] **[Auth/1B/57]**:

> *"a principle has been developed and applied to the effect that "where it would be unfair" for a trustee in bankruptcy "to take full advantage of his legal rights as such, the court will order him not to do so", to quote Walton J in In re Clark (a bankrupt), Ex p The Trustee v Texaco Ltd [1975] 1 WLR 559 , 563. The same point was made by Slade LJ in In re TH Knitwear (Wholesale) Ltd [1988] Ch 275 , 287, quoting Salter J in In re Wigzell, Ex p Hart [1921] 2 KB 835 , 845: "where a bankrupt's estate is being administered … under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right", which "should be exercised wherever the enforcement of legal right would … be contrary to natural justice". The principle obviously applies to administrators and liquidators: see In re Lune Metal Products Ltd [2007] Bus LR 589 , para 34."*

198. The type of conduct that the officeholder is to be prevented from engaging in was described by Lawton LJ in the following terms in *Re Multi Guarantee Co Ltd* [1987] BCLC 257 at 270 **[Auth/1A/19]**:

> *"Various words have been used in the cases to indicate the kind of conduct to which the principle of Ex p James, Re Condon (1874) LR 9 Ch App 609 may apply, such as "a point of moral justice", "dishonest", "dishonourable", "unworthy", "unfair" and "shabby". Those words are not words of art at all. They are words of ordinary English usage and the concept behind them is, as I understand the cases, that an officer of the court, such as a trustee in bankruptcy or a liquidator, should not behave in a way which a reasonable member of the public, knowing all the facts, would regard as either dishonest, unfair or dishonourable."*

199. As described by Walton J *In re Clark* [1975] 1 WLR 559 at 563E-F **[Auth/1A/15]**, "*the Rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so"* (see also 564E-F, 567E).

200. Thus, in *ex parte James* itself **[Auth/1A/2]**, the trustee was prevented from relying on what was regarded as a technical rule as to voluntary payment (i.e as the law existed at that time, the inability to recovery payments made by mistake of law: see page 614). James LJ said that the trustee should not be allowed to set up a technical objection to doing what was right and that:

> *"finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people".*[21]

201. The application of the rule has particular force where it would be unfair for an officeholder, having initiated a transaction for the benefit of the general body of creditors, to insist that the transaction should be carried out strictly in accordance with the legal rights which the officeholder possesses under it: *In re Wigzell* [1921] 2 KB 835 at 866 per Younger LJ **[Auth/1A/9]**. Where a process has been initiated by the officeholder of the Court in the interests of the general body of creditors, such creditors are entitled to benefit from the transaction but similarly "*they shall take it as it honourably is no more and no less*", ibid at 869. They are bound by the same equity as the officeholder.

202. The rule is applied in circumstances where the consequence of taking full advantage of the legal rights by the officeholder will otherwise enrich the estate (see *Government of India v Taylor* [1955] AC 491 at 513A **[Auth/1A/11]**, *Re T&N Plc* [2004] Pens LR 351 at [18] **[Auth/1B/30]**). There does not, however, need to be a recognised and enforceable ground for a claim in unjust enrichment: the rule is applied because there may be no legal way of requiring reversal of the enrichment, but the Court considers it unfair for its officer to take advantage of the strict legal rights that might otherwise be available.

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21 As explained by Buckley LJ in *In re Tyler* [1907] 1 KB 865 at 873 **[Auth/1A/7]**, when James LJ speaks of money which in equity belongs to some one else, "*he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense and not in the sense of money which in a Court of Equity would belong to some one else.*"

203. The Court may direct the officeholder as to how to act, even if it is a course of conduct that is not lawfully required of the officeholder and could otherwise be complained of by creditors who would be prejudiced by the action: *Re Lune Metals* [2007] BCC 217 at [35] per Neuberger LJ **[Auth/1B/35]**. It is equally irrelevant that shareholders may, as a consequence, get less: *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 **[Auth/1A/14]**; *Collins & Aikman Europe SA* [2006] BCC 861 at [17] **[Auth/1B/33]**.

(3) SUMMARY OF RELEVANT FACTS FOR QUESTION 36A

The facts and matters relied upon by the Senior Creditor Group in connection with Question 36A include those described in Section B above (and the evidence to which reference is made), and any further matters identified in the Agreed Statement of Facts and the Senior Creditor Group's Statement of Disputed Facts.

(4) APPLICATION OF THE RULE IN EX PARTE JAMES

The relationship between the Administrators and Creditors

204. The Administrators are bound to act for the purposes of the Administration and under a duty to distribute LBIE's assets in accordance with the statutory scheme and amongst those persons entitled to them: see e.g. *Austin Securities v Northgate & English Stores Ltd* [1969] 1 WLR 529 **[Auth/1A/12]**. In determining whether to accept or reject proofs of debt, Administrators (by analogy with liquidators) act in a quasi-judicial capacity according to standards no less than the standards of a court or judge: *Menastar Finance Limited* [2003] BCC 404 at [44] **[Auth/1A/29]**; *Tanning Research Laboratories Inc v. O'Brien* (1990) 91 ALR 190 at 184 HCA **[Auth/1A/23]**.

205. The Administrators are highly experienced insolvency practitioners with access to extensive specialist legal advice and detailed information regarding LBIE's financial position: SDF (36A) at [1] [**1/20]**. Creditors of LBIE are entitled to proceed on the basis that the Administrators will at all times seek to comply with their duties and act in the best interests of the general body of unsecured creditors, and where necessary will obtain specialist legal advice to assist them in discharging their duties and act on such advice. All creditors are also ultimately reliant on the Administrators for information on the financial position of LBIE: SDF (36A) at [1.1] [**1/20]**. A number of different creditors,

with different sizes of claims and based in different jurisdictions, entered into the CRA and CDDs. There is no reason to assume that all had a similar level of experience in relation to insolvency proceedings, the same access to legal advice or that the irrecoverable costs of obtaining such advice would, in all cases, have been justified by reference to the size of their claims or to their individual circumstances.

206. The relationship between the Administrators and creditors is not akin to that of two commercial counterparties seeking to advance their own competing commercial interests in an arm's length situation where neither owes a duty to the other.

Enforcing the releases will cause harm to creditors

207. If the releases have the effect contended for by Wentworth, their enforcement will harm creditors. Such creditors will have given up valuable rights against LBIE which would otherwise have been satisfied in full by operation of the statutory regime.

The harm caused to creditors would be unfair

208. The consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable rights in respect of claims admitted to proof would be regarded by a reasonable member of the public, knowing all of the facts, as unfair, inappropriate and unbefitting of an officer of the court.

209. First, the Administrators had a duty to return Trust Property to, or deal with Trust Property in accordance with the wishes of, trust beneficiaries and a duty under the Insolvency Act to realise and distribute the assets in LBIE's estate first pari passu amongst creditors in respect of their provable claims, then in payment of Statutory Interest and non-provable claims, before distributing any surplus to subordinated creditors or shareholders. Requiring creditors to release rights to Statutory Interest, Currency Conversion Claims or other non-provable rights in respect of claims admitted to proof is inconsistent with, and not required in order for the Administrators to comply with, the requirements of the statutory regime.

210. Second, obtaining such releases was not necessary to achieve the purposes of the CRA or CDD processes, which were concerned respectively with returning Trust Property to

those entitled to it and making earlier distributions to creditors than would have occurred had the Administrators applied the normal process of proof provided for in the Insolvency Rules.

211. Third, the Administrators presented the CRA and CDD processes as a convenient means of returning Trust Property and agreeing provable claims in order to expedite the payment of dividends in respect of an apparently insolvent estate. Creditors were not informed by the Administrators that either process would, or could, result in them giving up valuable rights in the event of a surplus: SDF (36A) at [2] [**1/20]**; Lomas 10 at [69] **[2/2]**; Copley at [25] and [27] **[2/8]**). Nor did they have any reason to conclude that they would have this effect.

212. Fourth, it was never the Administrators' intention that creditors would release such rights:

(1) It was never their intention that creditors would waive their rights to Statutory Interest by virtue of the release clauses in the CDDs (SAF (36A) at [6] **[1/18]**; Lomas 10 at [69] **[2/2]**).

(2) Mr Copley (then the Administrator with primary responsibility for, *inter alia*, the agreement of creditors' claims, including under Project Canada, and the execution of CDDs on behalf of LBIE) did not intend to compromise Currency Conversion Claims (SAF (36A) at [18] **[1/18]**) and told creditors this (Copley at [32] [**2/8]**). Indeed, he ceased signing CDDs which did not preserve Currency Conversions Claims once it became clear that it was being suggested that such claims might be released by the Release Clause: Copley at [24]. Had he known about the existence of Currency Conversion Claims at the time the CDD process was introduced, he would have sought to have them carved out if it were necessary to do so in order to preserve such claims (SAF (36A) at [18.2] **[1/18]**; Copley at [28] **[2/8]**)[22].

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22 Mr Copley also mentioned to various creditors in October 2013 that, subject to obtaining legal advice, his preference would be to make a publicly-available statement on the section of the PwC website dedicated to the Administration to the effect that it was the Joint Administrators' view that CDDs did not have the effect of releasing Currency Conversion Claims and that it had not been the intention of the Joint Administrators that creditors waive their right to Currency Conversion Claims (SAF (36A) at [15] **[1/19])**; Copley at [25] and [27] **[2/8]**). This did not

(3) The administrators updated the standard CDD templates to preserve Statutory Interest and Currency Conversion Claims in express terms in 2012 and 2014 respectively (Lomas 10 at [70] and [78] **[2/2]**).

213. Fifth, the loss and harm caused by releases of claims to Statutory Interest and Currency Conversion Claims was inadvertent and, in the Case of Currency Conversion Claims, based on a misapprehension of the law. Had the true position been known, such claims would have been expressly preserved (as, in the case of CDDs, they subsequently were).

214. Sixth, the CRA and CDDs were presented to creditors as non-negotiable in circumstances where creditors were entitled to expect that the Administrators would at all times seek to act in the best interests of the unsecured creditors as a whole, in accordance with their duties and the purposes of the administration, and that such agreements would operate consistently in the manner in which they had been presented.

215. Seventh, the CRA was presented to creditors as non-negotiable at a time when no surplus in the LBIE estate was anticipated in the Administrators' progress reports. Until March 2014, updates provided to creditors by the Administrators in connection with interim dividend distributions stated that to be eligible to participate in interim dividends, creditors must execute a CDD or similar agreement.

216. Eighth, the CDDs were, in most cases provided to creditors as non-negotiable in circumstances where creditors were told that if they did not accept the offer made by the Administrators or the form of the CDD presented to them, they would be required to wait until the CDD process had been completed before their claims could be admitted through individual negotiations with the Administrators. As such, creditors were given an incentive to participate in the CDD process and accept the terms proposed by the Administrators by the prospect of further delaying receipt of interim distributions, and receiving no compensation in respect of the additional time taken to agree and admit their claims.

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ultimately occur because, following consultation with the Administrators' legal advisors and the other Administrators, it was decided that it was not appropriate to do so (because CDDs might have the effect of releasing Currency Conversion Claims) (Copley at [25] **[2/8]**).

217. Ninth, at least in some cases CDDs without language expressly preserving creditors' rights were entered into after the Administrators knew or ought to have known that there was a potential issue to be resolved regarding the scope of the releases, either because they realised that a surplus was possible (and thus that Statutory Interest may be payable) or because they had learnt that other non-provable claims, such as Currency Conversion Claims, might exist and might be payable.

218. Tenth, the consequences of enforcing any release of rights to Statutory Interest, Currency Conversion Claims or other non-provable rights in respect of claims admitted to proof would result in creditors participating in the same processes being treated differently depending solely on the form of document used by the Administrators from time to time, and whether and, if so, when creditors happened to agree to participate in the process, without any proper justification for such differential treatment having been identified or intended by the Administrators: SDF (36A) at [5]–[6] [**1/20]**; Garvey 3 at [22] **[2/3]**; Copley at [17] and [19] **[2/8]**. The bizarre and arbitrary differences in treatment in this regard are exemplified by paragraphs (8)(a) – (h) of the Senior Creditor Group's Supplemental Position Paper **[1/13]**. In particular, on Wentworth's case:

(1) Creditors who entered into the form of CDD predominantly in use until April 2011 lost the right to claim interest at the rate applicable to their underlying debt apart from the administration, but did not lose the right to assert Currency Conversion Claims where the CDD recorded their claim in the currency of their underlying entitlement.

(2) Creditors who entered into the form of CDD predominantly in use until September 2012 lost both the right to claim interest at the rate applicable to their underlying debt apart from the administration, and the right to assert Currency Conversion Claims.

(3) Creditors who entered into the form of CDD predominantly in use until February 2014 lost the right to assert Currency Conversion Claims but did not lose the right to claim interest at the rate applicable to their underlying debt apart from the administration.

(4) Creditors who entered into the form of CDD predominantly in use from February 2014 onwards did not lose the right to claim interest at the rate applicable to their underlying debt apart from the administration, or the right to assert Currency Conversion Claims.

(5) Creditors who entered into Admittance Letters have not given up any rights.

The position is all the more bizarre and arbitrary since different versions of the CDDs were in use by the Administrators at the same time. It is therefore possible, for example, that on one day in 2012 different creditors might simultaneously have been signing an Agreed Claim CDD with interest preservation language (releasing, on Wentworth's case, no claims to Statutory Interest and no Currency Conversion Claims) and an Admitted Claim CDD without such language (releasing, on Wentworth's case, claims to Statutory Interest at the rate applicable to the debt apart from the Administration and Currency Conversion Claims).

219. Eleventh, the Administrators benefitted from the releases in the CRA (which protected them from personal claims arising from the return of Trust Property pursuant to the terms of the CRA rather than in accordance with a beneficiary's pre-existing proprietary rights) and in the CDDs (which released them from any claims arising out of agreeing the amount of the provable debt). It would be unfair for the Administrators to take advantage of these benefits while enforcing releases detrimental to creditors that were not necessary to achieve the purposes of the CRA or CDDs.

The consequence of the unfair harm is to confer a windfall at the expense of certain creditors

220. If the releases in respect of non-provable rights in respect of claims agreed and admitted to proof are enforced the estate will benefit. The consequence will be that the estate does not have to pay claims that, but for the releases, would have had to have been met before any surplus could be returned to subordinated creditors or shareholders.

221. The unfair harm suffered by certain creditors therefore translates directly into an unjustified windfall to subordinated creditors and shareholders. Enforcement of the releases would confer an enrichment on subordinated creditors and shareholders which

is contrary to that stipulated for in the statutory regime and which they have no entitlement to expect under that regime.

222. The unfairness is compounded by the fact that the estate would receive a double windfall. Prior to its administration, LBIE's functional and reporting currency had been US dollars. After administration, a substantial amount of LBIE's assets remained denominated in US dollars. At all times after the date of Administration, the US dollars/Sterling exchange rate has been in favour of US dollars. The post-administration realisation of US dollar denominated assets by LBIE has thus generated a substantial foreign exchange gain for the estate. A notable example is the settlement between LBIE and LBI to resolve all issues between these two entities, which resulted in the LBIE estate receiving $2.2bn in cash (being the total of $0.50bn received directly from LBI and $1.70bn received by way of a sale of a claim against LBI) (see the Administrators' Tenth Progress Report, p. 5 **[8/3]**). The Administrators' Tenth Progress Report (p. 7) also confirmed that the Administration's vulnerability to volatility in the financial markets had been significantly reduced during the preceding 6 months, following the conversion of substantially all remaining house foreign currency balances into Sterling. In other words, all cash proceeds resulting from the LBI settlement were converted during the reporting period. In that period, the average US dollars/Sterling exchange rate was 1.53, thus a 17% appreciation of US dollars as against sterling since 15 September 2008. Accordingly, the Senior Creditor Group estimates that, compared to the US dollars/Sterling exchange rate as at 15 September 2008, the LBIE estate gained in the order of £200 million by converting the USD cash proceeds at the prevailing USD/Sterling exchange rate. That gain now forms part of the LBIE surplus assets. Therefore, if creditors with claims denominated in US dollars have lost the right to be paid in US dollars, LBIE and its subordinated creditors and shareholders will receive the benefit of an appreciation in value of LBIE's US dollar assets without having to account for the full amount of LBIE's US dollar liabilities.

Wentworth's Position

223. The Administrators do not take a positive position on Question 36A and have not sought to contend that it would be appropriate for them, as officers of the court, to enforce the releases. Instead, Wentworth has advanced a number of arguments which it

says could appropriately be made by the Administrators in response to the issues raised by Question 36A.

224. Wentworth's position, as it appears from its Supplemental Reply Position Paper **[1/14]**, is:

(1) that the Administrators could properly and successfully seek to argue that enforcing the releases would not be unfair in the requisite sense by reason of the fact that the CRA and CDDs were freely entered into by creditors, who were sophisticated counterparties with access to legal advice (see e.g. [3], [8]); and

(2) that the Administrators could properly and successfully seek to argue that the differential treatment of creditors participating in the same process that would arise if the releases were enforced would not be unfair in the requisite sense on the basis that different creditors happened to agree better rights than others (see e.g. [6]).

225. While arguments of this sort might have some relevance in the context of a dispute between two arm's length commercial counterparties seeking to advance their own commercial interests, they ignore the effect of the statutory regime and the duties of the Administrators (including their quasi-judicial role in admitting or rejecting claims), the nature of the relationship between the Administrators and creditors (as set out in paragraphs [204]-[206] above) and the fact that a higher standard of conduct is expected from officers of the court than is permitted from commercial counterparties.

226. Wentworth's position can be tested by asking what would have happened had the Administrators sought directions from the court before conducting the CRA and CDD processes. In those circumstances, it is inconceivable that they would have considered it appropriate to seek to include terms compromising claims to Statutory Interest and other non-provable rights in respect of claims agreed and admitted to proof in the event of a surplus (and Mr Copley says as much in his witness statement **[2/8]**) or that, if they did, the Court would have concluded that it was appropriate for them to do so.

227. On the contrary:

(1) The Administrators ultimately modified the terms of the CDDs in order to ensure that creditors' claims to Statutory Interest and Currency Conversion Claims were preserved; and

(2) The Administrators' 2014 Surplus Entitlement Proposal **[6/1/1-29]** envisaged Statutory Interest and Currency Conversion Claims being paid to creditors *pari passu* without reference to the type of CDD applicable to a claim, which treatment was said by the Administrators to be based on their legal analysis and, where there was uncertainty, on what the Administrators considered to be fair: SDF (36A) at [8] [**1/20]**; Garvey 3 at [27]-[30] **[2/3]**.

228. The effect of Wentworth's position, if it were correct, is that the CRA and CDDs will result in a distribution of LBIE's assets which is contrary to the statutory scheme and the Administrators' duties, as a consequence of processes which did not require such an outcome. The Administrators could not properly have intentionally set out to achieve that result and are in no different position merely because it was inadvertent. Such an outcome cannot be justified by reference to arguments along the lines of the "freedom of contract" and "caveat emptor" arguments advanced by Wentworth.

(6) PARAGRAPH 74: THE LAW

229. Paragraph 74 of Schedule B1 to the Insolvency Act **[Auth/2/5]** entitles the court to grant relief in circumstances where:

> "*(a) the administrator is acting or has acted in so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or*
>
> *(b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors."*

230. Paragraph 74 is concerned with the management of the administration. It is not concerned with, and does not require, misconduct on the part of the Administrators (*cf* paragraph 75): see *Re Coniston Hotel (Kent) LLP* [2013] 2 BCLC 405 at [37] **[Auth/1B/53]**.

231. It applies where:

(1) The actions of an administrator have caused some or all creditors to suffer harm to their interests or, in the case of a proposed action of an administrator, would cause such creditor or creditors to suffer harm: *Re Lehman Brothers International (Europe) Four Private Investment Funds v Lomas* [2009] B.C.C. 632 at [34] **[Auth/1B/39]**; and

(2) Such harm is "unfair"; harm alone is not enough.

232. As to the requirement of "unfairness":

(1) "Unfair" harm "*ordinarily mean[s] unequal or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration"*: *Re Coniston Hotel (Kent) LLP* [2013] 2 BCLC 405 at [36] **[Auth/1B/53]**.

(2) Unfairness does not necessarily require unjustifiable discrimination. For example, "*a lack of commercial justification for a decision causing harm to creditors as a whole may be unfair in the sense that the harm is not one which they should be expected to suffer"*: *Hockin v Marsden* [2014] 2 BCLC 531 at [16] **[Auth/1B/55]**.

233. Further, an application under paragraph 74 does not require the action or proposed action of the administrator to be so perverse or so unreasonable that no reasonable person would have done it: *Hockin v Marsden* ibid. at [16] **[Auth/1B/55]**. All that is required is that the action complained of is or will be causative of harm to some or all of the creditors' interests and that such harm is "unfair".

(7) APPLICATION OF PARAGRAPH 74

234. By enforcing the terms of the CRA or CDDs which have the effect of releasing non-provable rights in respect of claims agreed and admitted to proof, the Administrators would be acting in a way which would harm the interests of creditors who have entered into such CRA or CDDs in that they would be deprived of valuable rights against LBIE. Alternatively, by obtaining agreements which have that effect, the Administrators would have acted in a way which harmed the interests of creditors.

235. Such harm would be unfair by reason of the matters set out in paragraphs [208]-[219] above (in the context of the application of the rule in *Ex Parte James*) and, in particular, on the basis that:

(1) There was and is no proper justification for depriving CRA or CDD creditors of rights in respect of Statutory Interest or other non-provable rights in respect of claims admitted to proof in the event of a surplus, and the Administrators have rightly not sought to provide any such justification.

(2) The harm caused to creditors by any release of such claims is not one which they should be expected to suffer either:

(a) by reference to the statutory regime, pursuant to which creditors are entitled to receive payment in respect of Statutory Interest and other non-provable claims once provable claims have been paid in full; or

(b) by reference to the purposes for which the CRA and CDD processes were developed, neither of which processes required creditors to release rights in respect of Statutory Interest or other non-provable rights in respect of claims agreed and admitted to proof; or

(c) by reference to the interests of creditors as a whole.

(3) Creditors participating in the same processes would be treated differently depending on the form of CDD being used by the Administrators from time to time and whether and, if so, when, any particular creditor happened to agree to participate in the CDD process.

(8) CONCLUSIONS ON QUESTION 36A

236. In the circumstances, the Administrators as officers of the Court should be directed not to enforce any such releases given that they:

(1) Are not required to fulfil the purposes of the Administration or the proper performance of the Administrators' duties.

(2) Have an inadvertent effect which would be contrary to the intentions of the Administrators communicated to creditors by Mr Copley (the Administrator who signed the CDDs).

(3) Are contrary to what the Administrators considered to reflect the correct legal position or to be fair in their 2014 Surplus Entitlement Proposal.

(4) Result in an arbitrary differential treatment of creditors otherwise in the same position, which treatment is not justified by any commercial considerations identified by Wentworth or the Administrators.

(5) Result from documents not required by the insolvency regime and not necessary in order to achieve the purpose of the CRA or CDD processes.

(6) Result in an unjustified windfall to the subordinated creditors and shareholders at the expense of ordinary unsecured creditors.

G. QUESTION 9

237. Question 9 asks whether a creditor's accession into the CRA (and, in particular, the effect of Clauses 20.4.3, 24.1, 25.1, 25.2 and 62.4 of the CRA) would impact upon the answers to Questions 7 and 8. Questions 7 and 8 were determined in Part A of the proceedings and are concerned with the date from which Statutory Interest is payable on contingent and future debts.

238. For the reasons set out in the Senior Creditor Group's Skeleton Argument and Reply Skeleton Argument filed in connection with Part A, interest under Rules 2.88(7) and (9) is payable on all debts proved in the administration from the date of administration, regardless of whether such debts were present or future, certain or contingent as at the date of the administration.

239. A creditor's accession to the CRA does not affect the answers to Questions 7 to 8[23].

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23 If the Court finds against the Senior Creditor Group on Questions 7 and 8, the Senior Creditor Group reserves its position as to when the Net Financial Claim arises pursuant to the CRA and whether this is a present, future or contingent claim.

No.7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

WATERFALL II DIRECTIONS APPLICATION

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